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Source: Virginia Tax Review
Citation: 13 Va. Tax Rev. 731 (1994).
Title: The Summons Power and Tax Court Discovery: A Different Perspective

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THE SUMMONS POWER AND TAX COURT DISCOVERY: A DIFFERENT PERSPECTIVE

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TABLE OF CONTENTS

I. Introduction 732

II. Scope of the Summons Power 733
   A. A Summons Primer 733
   B. Challenges to the Summons Power 735
      1. Improper Purpose Claims 736
      2. Constitutional Challenges to the Summons Power 738

III. The Tax Court 742
   A. Structure and Purpose 743
   B. Discovery in the Tax Court 745
   C. Cases Focusing on the Tension Between Tax Court Discovery Rules and the Summons Power 750

IV. Resolution of Conflicts 752
   A. The Myth of the Level Playing Field 752
   B. Proper Purpose 755
   C. Jurisdiction 756
   D. Scope of Discoverable Material 760
   E. A Modest Proposal — Or, Why Go Looking for Trouble? 763
      1. Inconsistency in Case Management 763
      2. Lack of Legal Foundation 764
      3. Unworkability 765

V. Conclusion 766

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"The law can ask no better justification than the deepest instincts of man."\(^1\)

I. INTRODUCTION

The administrative summons reflects Congress' desire to grant the federal government, through the Internal Revenue Service (the "Service"), wide, almost unfettered power to gather information for the purpose of tax collection.\(^2\) This desire has been consistently affirmed in the face of Fourth Amendment challenges and has successfully overcome the privileges granted by the Fifth and Sixth Amendments.

Recent Tax Court cases, however, have limited the Service's use of the summons power in the Tax Court. Because the Tax Court is ostensibly designed to insure the rapid and efficient resolution of tax disputes, discovery in the Tax Court is streamlined. This goal is expressed in the Tax Court's self-promulgated discovery rules, which the court adopted under its inherent authority in an attempt to maintain the efficient and swift resolution of its cases.\(^3\) Recently, the Tax Court has held that the broad investigations encouraged by the administrative summons impede the streamlined nature of its discovery rules. Accordingly, the Tax Court's recent rulings affirm its own power to restrict the Service's use of the summons power in the context of Tax Court proceedings.

The conflict between the broad congressional mandate represented by the summons power and the desire to speed dispute resolution in the Tax Court through limited discovery is ironic, because the ultimate procedural objective of each is the same—ascertaining the correctness of a taxpayer's tax. Unfortunately, the resulting decisions have created an inherent conflict which impedes the fulfillment of the Tax Court's mission.

The small volume of comments the recent Tax Court cases have attracted has confronted neither the fundamental questions which the cases raise nor the issues which bear upon the Tax Court's inherent power. The most thoughtful piece on the subject, an article

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\(^1\) Oliver W. Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 477 (1897).
\(^2\) See I.R.C. § 7602; infra notes 7-16 and accompanying text.
by Brian P. Keifer, appeared in this journal and advocated a statutory limitation of the Service's employment of administrative summonses. This limitation included an outright prohibition on any use of a summons after a taxpayer's petition is filed.\(^4\) To somewhat lessen the impact of the limitation on the Service's ability to request information from the taxpayer, Keifer suggested loosening the restrictions on non-consensual depositions.\(^5\)

While beneficial to the taxpayer, Keifer's proposal takes a view inconsistent with both the strong congressional support and the consistent judicial approval that the summons power has received. Moreover, Keifer's main assumption, that the taxpayer is at a strategic disadvantage in tax court litigation and is therefore entitled to a level playing field, is misleading.

This article addresses the dilemma presented by the Tax Court's limitation of the summons power.\(^6\) Part II of this article examines the scope of the Service's summons power. Part III focuses on the Tax Court's discovery rules and how the summons power fits into these proceedings. (Those familiar with the summons power and Tax Court discovery rules may wish to skip this road-map for the uninitiated.) Part IV discusses the dilemma created by the Tax Court's restriction of the summons power and suggests a resolution to the problem. Unlike most, the author concludes that full use of information obtained pursuant to legitimate exercise of the summons power should be allowed in the Tax Court.

II. Scope of the Summons Power

A. A Summons Primer

The administrative summons is a powerful investigatory tool employed by the Service to determine potential tax violations. With section 7602 of the Internal Revenue Code (the "Code") Congress has given the Service extremely broad authority to examine the tax information of taxpayers who are under investigation.\(^7\)


\(^5\) Id. at 602.

\(^6\) This article does not evaluate the wisdom or appropriateness of the broad scope of the administrative summons granted by Congress and the judiciary. That task is left for another day.

\(^7\) See I.R.C. § 7602(a). Section 7602(a) provides:
However, the legislative history of the section gives little insight into the scope of power Congress intended.\textsuperscript{6}

Lacking congressional guidance, the Supreme Court has liberally interpreted the Code.\textsuperscript{9} The interpretation techniques employed by the Court in \textit{United States v. Euge} indicate the Court’s desire to avoid restricting the summons power.\textsuperscript{10} Further, because the 1982 amendments to section 7602 were intended to broaden its scope, the Court is unlikely to restrict its reading of the current statute.\textsuperscript{11}

Thus, a taxpayer challenge to the summons power faces a difficult standard. In the seminal case of \textit{United States v. Powell}, the Court set forth the broad power it saw as necessary to the efficient

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

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

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

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


\textsuperscript{9} Euge, 444 U.S. at 711. ("[I]f the summons authority claimed is necessary for the effective performance of congressionally imposed responsibilities to enforce the tax Code, that authority should be upheld absent express statutory prohibition or substantial countervailing policies.").

\textsuperscript{10} Id. In \textit{Euge}, the Court determined that production of handwriting exemplars was within the summons power. In his majority opinion, Justice Rehnquist used several tools to determine the scope of the summons power:

1) applying a construction to effect the section's purpose without "derogation of any constitutional rights or countervailing policies enunciated by Congress," id. at 710;

2) analogy to the scope of a testimonial summons at common law, id. at 712;

3) reference to Supreme Court precedents dating from 1911 which determined that Congress intended to grant a scope as broad as the common law testimonial summons power, id. at 714; and

4) reference to the broad powers granted to the Service throughout the Code, id. at 716 n.9.

\textsuperscript{11} See infra note 24 and accompanying text.
and sure collection of taxes.\textsuperscript{12} According to the \textit{Powell} mandate, the federal government was spared the obligation of establishing probable cause to issue a summons. Rather, in order to successfully challenge a summons, the Court in \textit{Powell} required that the taxpayer must show that enforcement of the summons would be an abuse of process.\textsuperscript{13}

In the same case, the Court laid out the principles constituting appropriate government use of the summons. The Court specifically provided that (1) an investigation must have a legitimate purpose, (2) the inquiry must be relevant to that purpose, (3) the information can not otherwise be already within the government’s possession, and (4) the administrative steps in the Code need to be followed.\textsuperscript{14} In addition, the Court stated that an investigatory summons can be issued on the basis of an agent’s good faith belief that a tax violation exists, and that the summons will be enforced as long as the Service makes a prima facie showing of good faith.\textsuperscript{15}

Therefore, to challenge the validity of a Service summons, the summoned party must rebut one of the elements of the \textit{Powell} test or show that enforcement of the summons would be an abuse of process, always an argument of last resort.\textsuperscript{16} As a result, the majority of challenges have attempted to show that the summons was either issued for an improper purpose or was in violation of constitutional protections.

\section*{B. Challenges to the Summons Power}

After the Service issues a summons, a taxpayer\textsuperscript{17} may appear before a hearing officer and make a good faith refusal to comply

\footnotesize{\textsuperscript{12} United States v. Powell, 379 U.S. 48, 53 (1964); Nancy L. Kenderdine, The Internal Revenue Service Summons to Produce Documents: Powers, Procedures, and Taxpayer Defenses, 64 Minn. L. Rev. 73, 76-77 (1979).}
\footnotesize{\textsuperscript{13} \textit{Powell}, 379 U.S. at 53. The Court rejected the argument that it was necessary for the Service to show probable cause, because doing so, “might seriously hamper the Commissioner in carrying out investigations he thinks warranted . . . and because the legislative history of § 7602(b) indicates that no severe restriction was intended.” Id.}
\footnotesize{\textsuperscript{14} Id. at 57-58; Kenderdine, supra note 12, at 77.}
\footnotesize{\textsuperscript{15} See \textit{Powell}, 379 U.S. at 58.}
\footnotesize{\textsuperscript{16} See id. at 57-58.}
\footnotesize{\textsuperscript{17} The term taxpayer is used to include both the summons recipient and an intervening taxpayer. A taxpayer may intervene when a third party recordkeeper has been served with a summons. I.R.C. § 7609(b).}
with the directives of a summons.\textsuperscript{18} Prior to the 1982 change to section 7602 of the Code, many taxpayers challenged "the legitimacy of the objective behind an IRS summons by alleging that the Service [was] using its compulsory process solely to obtain evidence for a criminal prosecution."\textsuperscript{19} If the taxpayer could prove that summons was issued solely for criminal investigation purposes, the Service would be unable to meet the legitimate purpose requirement of the good faith test.

1. Improper Purpose Claims

Two cases which attempted to clarify the limits of the improper purpose defense, \textit{Donaldson v. United States}\textsuperscript{20} and \textit{United States v. LaSalle National Bank},\textsuperscript{21} had the effect of widening the purpose for which a summons could be used.

In \textit{Donaldson}, the Court held that a summons was permissible in a situation where criminal prosecution was probable as long as the summons was "issued in good faith and prior to a recommendation for criminal prosecution."\textsuperscript{22} The \textit{LaSalle} Court took this line of reasoning one step further and ruled that the good faith of the Service as an institution was determinative rather than the agent's personal intent. 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.\textsuperscript{23}

Not surprisingly, it was extremely difficult for the taxpayer to prove that an institutional decision had been made to refer the investigation to the Justice Department. For example, an agent could state openly that his investigative intent was to gather information for criminal prosecution, but if the taxpayer failed to prove that the institution had made the decision to refer the case, the taxpayer could not block the enforcement of the summons. In effect,

\textsuperscript{18} See Michael I. Saltzman, IRS Practice and Procedure ¶ 13.04[1], at 13-38 (2d ed. 1991) (restating the procedure for objecting to a summons first established in Reisman v. Caplin, 375 U.S. 440 (1964)).
\textsuperscript{19} Laura S. Wertheimer, The Institutional Bad Faith Defense to the Enforcement of IRS Summons, 80 Colum. L. Rev. 621, 623 (1980).
\textsuperscript{20} 400 U.S. 517 (1971).
\textsuperscript{21} 437 U.S. 298 (1978).
\textsuperscript{22} \textit{Donaldson}, 400 U.S. at 536.
\textsuperscript{23} \textit{LaSalle}, 437 U.S. at 316.
Lasalle expanded the already broad reach of the summons to include criminal investigations by a Service agent.

Further, the Court adopted this broad application even though Congress had not included the express legislative authority for criminal investigations in the initial summons grant. However, in 1982 Congress broadened the reach of the summons power through specific legislation. This episode revealed the lock-step agreement between the Supreme Court and Congress to expand the scope of the summons power.

The 1982 addition of section 7602(b) to the Code confirmed the authority of the Service to issue a summons for the "purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws." Likewise, the addition of section 7602(c) created a "bright line" test for ascertaining improper purpose by allowing the use of a summons up to the time of referral to the Justice Department. Thus, a summons is now enforceable even if its sole use is to gather evidence for use in a criminal investigation, provided that no referral has yet been made to the Justice Department. The notes accompanying the Code changes claim that they do not in any way alter the other requirements under present law that the Secretary make the showings required under U.S. v. Powell. Further, the provision is in no way intended to broaden the Justice Department's right of criminal discovery or to infringe on the role of the grand jury as a principal tool of criminal prosecution.

It is difficult to imagine what form a successful taxpayer challenge for improper purpose would take when the Service is authorized to use a summons until the time of referral to the Justice Department. Since it has now been established that a legitimate

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28 See United States v. Powell, 379 U.S. 48, 60 (1964) (Douglas, J., dissenting) (speculating that a taxpayer challenge could be upheld if the purpose of the summons was to harass
purpose includes investigation into criminal offenses, the taxpayer has no real protection until the referral has been made. If the Service recommends criminal prosecution in a case, and the taxpayer then challenges the summons, the Service need only show that it issued the summons in good faith. As a last resort, the taxpayer can challenge the summons on constitutional grounds. However, the constitutional rights and privileges have been narrowly construed by the courts in the context of challenges to the summons power, and they therefore afford little protection to a challenging taxpayer.

2. Constitutional Challenges to the Summons Power

The Fourth\textsuperscript{29} and Fifth\textsuperscript{30} Amendments to the United States Constitution offer scant safeguards to the taxpayer who is under civil investigation. Since the codification of section 7602(b), the safeguards that were normally in place when criminal prosecutions stemming from tax law violations were imminent have been diluted. The requirement of probable cause, the expectation of a protected zone of privacy, and the protection against self-incrimination are just a few of the privileges that become impotent when either civil or criminal tax investigations are being conducted.

Under the Fourth Amendment, a citizen is normally protected from arbitrary investigation by the requirement that the government have probable cause to conduct a search. However, the Powell ruling nullified the requirement that the Service establish probable cause in tax fraud investigations.\textsuperscript{31} Instead the Court held that a lesser standard of good faith would suffice in Service investigations.\textsuperscript{32} A sufficient evidentiary proof of the light burden imposed by the good faith requirement is a signed affidavit stating

\begin{footnotesize}
\begin{enumerate}
\item 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.
\item[30] U.S. Const. amend V. The applicable clause of the Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." Id.
\item[31] 379 U.S. at 58.
\item[32] Id.
\end{enumerate}
\end{footnotesize}
that the Powell conditions have been met. Moreover, an objection that the summons is too indefinite or uncertain, and thus unreasonable under Fourth Amendment terms, at best gives the taxpayer only a little more time. Such a complaint can easily be overcome by a modification of the summons to more narrowly tailor the search request.

The Fourth Amendment is said to offer a zone of privacy in which such things as personal conversations and papers are protected from unwanted government intrusion. The expectation-of-privacy defense has been most often used in cases where the summoned documents have been previously entrusted by the taxpayer to an accountant or another third party. However, this defense has been consistently overruled by the courts on the theory that a person’s expectation of privacy is substantially diminished once documents have been turned over to third parties outside of a privileged relationship.

The accountant-client relationship, for example, provides no immunity to a summons.

In Fourth Amendment terms, there is no expectation of privacy where books and records, even those owned by the taxpayer, are delivered to an accountant to prepare the taxpayer’s return. Return preparation, by its nature, contemplates the making of a disclosure. There is no accountant-client privilege recognized at federal law upon which a taxpayer may rely in expecting confidentiality.

In contrast, attorney-client communications are more likely to be upheld because federal rules protect this relationship. However, an attorney-client privilege is only applicable when the attorney is

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33 See United States v. Kis, 658 F.2d 526, 536 (7th Cir. 1981) (finding that the government ordinarily proves good faith by affidavits of agents involved in investigation, and no more than that is necessary), cert. denied, 455 U.S. 1018 (1982).

34 See Katz v. United States, 389 U.S. 347, 351-52 (1967) (finding that what a person seeks to preserve as private, even in an area accessible to public, may be constitutionally protected (citing Rios v. United States, 364 U.S. 253 (1960); Ex parte Jackson, 96 U.S. 727, 733 (1877))).


acting in her capacity as a professional legal advisor and not when she is performing services typically performed by an accountant.\textsuperscript{37} Furthermore, even the core attorney-client privilege is not protected when the communications contain evidence that a future tax fraud violation is likely.\textsuperscript{38}

The combined effect of these decisions is the removal of Fourth Amendment privileges from a taxpayer under investigation by the Service. Because the Service does not have to validate its summonses with probable cause, a taxpayer must cooperate and produce information even though the Service has no evidence of any wrongdoing. In contrast, if probable cause were the standard, the Service would have to demonstrate that it had a legitimate reason to suspect tax fraud. Obviously, 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.

Many taxpayers also attempt to rely upon the Fifth Amendment’s protection against self-incrimination to shield their personal records. However, as with the Fourth Amendment, the Supreme Court has broadly interpreted the summons power of the Service and bypassed common constitutional protections. As applied to the Service’s tax investigations, the Supreme Court has taken the position that “the Fifth Amendment privilege is a personal privilege: it adheres basically to the person, not to information that may incriminate him.”\textsuperscript{39}

Thus, although a person can not be compelled to testify against himself, that person can be required to produce incriminating information having the same effect as personal testimony. Nonetheless, taxpayers often invoke this privilege when they believe that the summons, if enforced, will furnish the Service with records that contain incriminating evidence. Taxpayers invoking the privi-

\textsuperscript{37} See In re Edwin Shapiro, 381 F. Supp. 21, 22 (N.D. Ill. 1974) (holding the attorney-client privilege can not be invoked when a summons is issued to an attorney to produce a client’s tax records in the attorney’s possession).

\textsuperscript{38} See United States v. Zolin, 491 U.S. 554, 562 (1989) (allowing in camera review to determine whether allegedly privileged attorney-client communications fall within the crime-fraud exception).

\textsuperscript{39} Couch v. United States, 409 U.S. 322, 328 (1973) (holding taxpayer could not invoke Fifth Amendment privilege against compulsory self-incrimination to prevent production of business and tax records in possession of her accountant).
lege, however, are approaching a Supreme Court which has consistently narrowed the applicability of the Fifth Amendment privilege in tax cases. The Court has focused its analysis on both the incriminatory nature of the contents of records and the inherent incrimination in the act of producing those records, and has regularly limited the protection of the Fifth Amendment.

"The notion that the Fifth Amendment protects the privacy of papers originated in Boyd v. United States,40 but our decision in Fisher v. United States,41 sounded the death knell for Boyd."42 In Fisher, the summons was issued to the taxpayers' attorney who was in possession of the taxpayers' individual personal return records, which were created by an accountant.43 The Court held that the contents of business records are ordinarily not privileged because their creation is voluntary.44 Moreover, when the act of production is not required of the taxpayer personally, it:

> does not compel oral testimony; nor would it ordinarily compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought. Therefore, the Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the taxpayer, for the privilege protects a person only against being incriminated by his own compelled testimonial communications . . . .

> . . . .

> It is doubtful that implicitly admitting the existence and possession of the papers rises to the level of testimony within the protection of the Fifth Amendment.45

The Court expressly declined to reach the question of "[w]hether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession."46 However, the Fisher decision narrows the use of the Fifth Amendment privilege to cases in which the taxpayer can prove that production of infor-

40 116 U.S. 616, 630 (1886).
43 425 U.S. at 394.
44 Id. at 397.
45 Id. at 409-11.
46 Id. at 414.
mation is both testimonial and incriminating.

In *United States v. Doe*, the Court addressed the question left open in *Fisher*; whether the Fifth Amendment protected the contents of a sole proprietor's tax records in his personal possession.\(^47\) The Court held that enforcement of the summons was not compulsion to give self-incriminating testimony where preparation of the records had been voluntary, and as a result, the summons did not impinge on Fifth Amendment rights.\(^48\) Only if the production involved testimonial self-incrimination by compelling the taxpayer to admit the records either existed, were in his possession, or were authentic, could the privilege be invoked.\(^49\)

In summary, both Congress and the judiciary have allowed the Service extremely broad power to summon both people and information to determine a taxpayer's correct tax. Recent amendments to section 7602 have expanded the summons power to encompass criminal as well as civil investigations. In addition, developing jurisprudence has severely restricted a taxpayer's ability to rely on constitutional privileges for shelter. As a result, there are very few restraints preventing the Service from obtaining summoned information during an investigation, making the summons the Service's most powerful investigatory tool.

### III. The Tax Court

The United States Tax Court was established to provide taxpayers with a forum for informal and inexpensive adjudication of purported tax payment deficiencies. It has become the most widely used and important forum for the litigation of tax controversies.\(^50\)

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\(^48\) Id. at 610-12. In contrast to individuals and sole proprietors, custodians of corporate records cannot resist the production of documents on Fifth Amendment grounds. See *Braswell v. United States*, 457 U.S. 99, 102 (1988) (agreeing with *Bellis v. United States*, 417 U.S. 85, 88 (1974), and holding that custodians of artificial entities are not protected by the Fifth Amendment because corporate books and records are not personal to an individual).


\(^50\) See William F. Nelson & James J. Keightley, Managing the Tax Court Inventory, 7 Va. Tax Rev. 451, 453 (1988) ("Over 42,000 cases were filed in the Tax Court during 1987; a total of 1,100 tax refund cases were filed in all of the Federal District Courts and the Claims Court during the same period."); see also William H. Newton III, The United States Tax Court—Should Discovery Be Expanded?, 33 U. Miami L. Rev. 611, 612 (1979); Calvin Lau, Comment, Discovery in the Tax Court: A Preliminary Analysis, 21 UCLA L. Rev. 1399, 1340-41 (1974) (emphasizing the importance of the Tax Court to resolve tax controversies).
Moreover, out of the three courts provided by Congress for the litigation of tax disputes, the Tax Court is the only one which allows the taxpayer to litigate prior to paying the liability assessed by the Service.51 This vital difference has led to a dramatic increase in the Tax Court's docket52 and has compelled many changes since the inception of the original Board of Tax Appeals.53

A. Structure and Purpose

The Board of Tax Appeals, as the immediate predecessor of the present day Tax Court, was created pursuant to the Revenue Act of 1924 as an independent agency of the executive branch of government.54 The purpose of the Board was threefold: (1) to establish a pre-assessment forum for hearing tax controversies,55 (2) to create an adjudicating body which would be independent from the Internal Revenue Bureau's collection function,56 and (3) to initiate a

51 I.R.C. § 6213(a). The other two forums for hearing tax cases are the United States District Courts and the United States Court of Claims. However, litigating tax issues “in the Federal District Courts or the Claims Court is possible only after taxpayers make full payment of any tax deficiencies determined by the Internal Revenue Service.” Nelson & Keightley, supra note 50, at 452-53 (citing Flora v. United States, 357 U.S. 63 (1958) (construing the language and statutory framework of 28 U.S.C. § 1346(a)(1) to require payment of the full tax before suit can be brought in federal district court), reh'g granted, 360 U.S. 922 (1959), aff'd, 362 U.S. 145 (1960)).

52 See Newton III, supra note 50, at 812. Newton explains that pre-assessment litigation is a “pragmatic economic consideration [which] undoubtedly accounts in large part for the fact that the caseload in Tax Court is more than twice that of the combined total of tax cases in the other two available forums.” Id.


55 H.R. Rep. No. 179, 68th Cong., 1st Sess. 7-8 (1924), reprinted in J. S. Seidman, Seidman’s Legislative History of Federal Income Tax Laws, 1938-1961, at 759-60 (1938); Dubroff, supra note 54, at 28, 58. The Board of Tax Appeals in its second docketed and decided case recognized that an important aspect of its existence was allowing the taxpayer to adjudicate the controversy before paying the deficiency. Appeal of Everett Knitting Works, 1 B.T.A. 5, 6 (1924).

56 Report of the Tax Simplification Board, H.R. Doc. No. 103, 68th Cong., 1st Sess. 10 (1923). “The function of the Commissioner of Internal Revenue is to assess and collect taxes. This function is administrative and not judicial. The appeal given to the taxpayer from the action or proposed action of the commissioner should be to a judicial body independent of the commissioner.” Id. See also Dubroff, supra note 54, at 161; Appeal of J.M.
forum which would increase efficiency and streamline judicial procedure for the growing number of tax cases.\textsuperscript{57} As to the third function, the Revenue Act of 1924 expressly left to the Board's discretion the promulgation of rules governing both practice and procedure.\textsuperscript{58} Thus, the Board was able to formalize procedures which fulfilled its objective, namely, creating an accessible forum where the procedure was streamlined and issues were settled quickly and efficiently.

The Tax Court succeeded the Board of Tax Appeals pursuant to the Revenue Act of 1942.\textsuperscript{59} However, it was not until the Tax Reform Act of 1969 that Congress removed the Tax Court from the executive branch and granted it court status under Article I, Section 8 of the Constitution.\textsuperscript{60} The grant of court status prompted the Tax Court to seek rules which more closely paralleled the rules

\begin{quote}
Lyon, 1 B.T.A. 378, 379 (1925) (stating that the Board, although part of the executive branch, remained independent from the then Internal Revenue Bureau).

\textsuperscript{57} Dubroff, supra note 54, at 163. Dubroff explains, "[e]fforts to increase the efficiency with which tax disputes are adjudicated generally have been restricted to improvements of administrative procedures within the Bureau/Service and increased reliance on streamlined judicial procedures which encourage pre-trial settlements." Id. As such, "[o]ne of the primary goals of the Tax Court has been to maintain consistency of approach to assure comparable treatment of similarly situated taxpayers and to provide guidance to the Bar and the Internal Revenue Service." Meade Whitaker, Some Thoughts on Current Tax Practice, 7 Va. Tax Rev. 421, 421 (1988).

\textsuperscript{58} Revenue Act of 1924, ch. 234, \$ 900(h), 43 Stat. 337. Although the original Administration proposal contained language which specified that Board procedure should be informal, given the judicial character, the adversarial nature of the proceedings over which it would preside, and the clear legislative intent that a court-like procedure be employed, the Board had little choice but to adopt generally formal procedural rules. Within this framework, however, Congress had given broad discretion to the Board to specify the particulars of the rules it would follow.

Dubroff, supra note 54, at 217. There were several reasons for adopting formal procedure in tax controversies which included: providing a documentary basis for appeal, initiating uniform time limits for the various stages of pretrial procedure, structuring procedure to maximize and encourage pre-trial settlement, maintaining a reputation for equitable disposition of cases, and conforming Tax Court procedures to the established jurisdictional limitations. Id. at 217-18.

\textsuperscript{59} Revenue Act of 1942, ch. 619, \$ 504(a), 56 Stat. 957. The term "succeeded" is somewhat inapt in that the statute merely provided for a change of name from the Board of Tax Appeals to the Tax Court of the United States. Id.

\textsuperscript{60} Tax Reform Act of 1969, Pub. L. No. 91-172, \$ 951, 83 Stat. 730 (amending Internal Revenue Code of 1954, \$ 7441). The name was also changed to the United States Tax Court. See also Dubroff, supra note 54, at 204-15 (providing an historical analysis on this change of status).
\end{quote}
of other federal courts but which maintained the stipulation process which had proved extremely successful in producing early settlement of tax controversies.61

Under the Tax Reform Act of 1969, the jurisdictional requirements of the Tax Court remained the same. The two requirements for jurisdiction were: (1) that the Service issue the taxpayer a deficiency notice in income, gift, or estate tax for the year in dispute,62 and (2) that the taxpayer file a timely petition to the Tax Court.63 The taxpayer bears the burden of proof in the Tax Court.64 Although the taxpayer must prove that the deficiency assessment is invalid, she “need not prove the correct amount of tax.”65 Once the taxpayer has filed a petition and invoked the court’s jurisdiction, the Tax Court’s Rules of Practice and Procedure (the “Rules”) govern the case.66

B. Discovery in the Tax Court

The Rules adopted by the Tax Court in 1974 incorporated much of the court’s old pre-trial procedure into the new discovery rules.67

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61 See Tax Ct. R. 1(a). As one advocate for the adoption of the Rules explained:
In making a comparison of the proposed rules with the Federal Rules of Civil Procedure, the most striking thing is that the proposed rules continue the Tax Court's unique stipulation process which is not, as far as I know, contained in the rules of any other court. The stipulation rules are clearly spelled out there, and counsel on both sides are on notice that the stipulation process must be used.
63 See I.R.C. § 6213; Tax Ct. R. 13(c).
65 Saltzman, supra note 18, ¶ 1.05[2][b], at 1-35.
66 See Tax Ct. R. 20(a).
67 Section 7453 of the Code gives the Tax Court authority to enact Rules of Practice and Procedure which would govern the practice and procedure in all cases and proceedings in the United States Tax Court. See Rules of Practice and Procedure, 60 T.C. 1057, 1097-1103 (1973). The scope of discovery varies between the three tax forums and can substantially affect the outcome of a tax controversy. As one commentator explains:
Differences in the discovery rules applicable to cases in the Tax Court, district courts, or the Claims Court can affect the course of litigation of a tax case in a number of ways... Freewheeling discovery is most likely to occur in district courts, since the Federal Rules of Civil Procedure encourage discovery in order to facilitate settlement or trial... Discovery in the Claims Court may be limited (but not sig-
Adoption of discovery procedures into Tax Court proceedings was not without criticism, however, and was the subject of heated debate. The proponents of discovery eventually prevailed, primarily for the reason propounded by Judge Raum:

The principal objection to discovery appeared to be that it was susceptible of abuse, particularly in respect of oral depositions . . . . Yet discovery is a modern tool in the litigation process and the Committee was not prepared to abandon it. If the abuses could be eliminated, then it seemed to us that discovery could find a place in our practice and that a major revision of our rules would be incomplete without adopting some form of discovery. Accordingly, our Title VII reflects a cautious approach to the subject.  

The Tax Court envisioned the use of discovery only when it would expedite the disposition of the case but otherwise "the Court expect[ed] the parties to attempt to attain the objectives of discovery through informal consultation or communication before utilizing the discovery procedures provided in these Rules."  

Several amendments to the Rules, most applying to the use of depositions, have broadened the Tax Court discovery options. Whereas the original Rules did not allow for depositions except under limited conditions, the current Rules allow a party to obtain discovery by written interrogatories, by production of documents (significantly) by the requirement that a party obtain leave of the court before obtaining discovery. . . . In the Tax Court, the parties are expected "to attain the objectives of discovery through informal consultation or communication," and discovery is available through depositions only in limited situations. Consequently, a taxpayer who wishes to limit discovery should consider bringing his case in the Tax Court or possibly the Claims Court, rather than a district court.

Saltzman, supra note 18, ¶ 9.04[2][f], at 9-31 to -32.

68 Judge Arnold Raum, Panel Discussion at the ABA Section of Taxation Annual Meeting (Aug. 12, 1972), in Proposed Rules of the Tax Court, supra note 61, at 381.

69 Tax Ct. R. 70(a).

70 The official Tax Court notes following the addition of Rule 76 perhaps best describe the reason for increasing discovery options, explaining: The Court's experience of the past several years suggests, however, that the time has come to permit the deposition of expert witnesses under certain circumstances. It is expected that such depositions will not only enhance trial preparation and hence the presentation of evidence at trial, but will also increase the number of settlements in cases requiring the assistance of experts.


72 Tax Ct. R. 71(a).
ments or things, \textsuperscript{73} by depositions upon consent of the parties, \textsuperscript{74} by depositions without consent of the parties in certain cases, \textsuperscript{75} and by deposition of expert witnesses. \textsuperscript{76} Non-consensual depositions, however, are employed only as an "extraordinary method of discovery." \textsuperscript{77} Similar to discovery procedures, and used equally to assist in settlement of the case, are requests for admissions \textsuperscript{78} and stipulations for trial. \textsuperscript{79} The scope of discovery "may concern any matter not privileged and which is relevant to the subject matter involved in the pending case." \textsuperscript{80} The above discovery procedures "may be used in any sequence," and unless the court orders otherwise "the frequency of use of these methods or procedures is not limited." \textsuperscript{81} However, upon mo-

\textsuperscript{73} Tax Ct. R. 72. Rule 72 allows any party, without leave of court, to serve on any other party a request to inspect and copy any designated documents from which information can be obtained; id. Tax Ct. R. 73. Rule 73 provides for examination of transferees. Id.

\textsuperscript{74} Tax Ct. R. 74(a) (effective May 1, 1979). Rule 74(a) provides that upon consent of all parties to a case, and within the appropriate time limits, a deposition for discovery purposes may be taken either of a party or a non-party witness. Id.

\textsuperscript{75} Tax Ct. R. 75(a). Rule 75(a) provides that after a notice of trial has been issued or after assignment of the case, any party may, without leave of Court, take a deposition for discovery purposes of a nonparty witness in the circumstances described in paragraph (b) of the Rule. Id. Rule 75(b) states that the taking of a deposition of a non-party witness is an extraordinary method of discovery and may be used only when the discovery cannot be obtained through informal consultation or communication or by a deposition taken with the consent of the parties. Tax Ct. R. 75(b) (effective January 3, 1983).

\textsuperscript{76} Tax Ct. R. 76 (effective July 1, 1990). Rule 76 authorizes the deposition of an expert witness without the consent of all the parties to a case. Id. Rule 76(a) states that depositions of an expert witness with the consent of the parties shall be governed by Rule 74. Tax Ct. R. 76(a).

\textsuperscript{77} Tax Ct. R. 75(b); Tax Ct. R. 76(a)(2).

\textsuperscript{78} Tax Ct. R. 90.

\textsuperscript{79} Tax Ct. R. 91(a)(1). Rule 91(a)(1) provides: "The parties are required to stipulate, to the fullest extent to which complete or qualified agreement can or fairly should be reached, all matters not privileged which are relevant to the pending case, regardless of whether such matters involve fact or opinion or the application of law to fact." Id.; see also the Official Tax Ct. Note, 60 T.C. 1057, 1117 (1973) (stating that the stipulation process "has been a mainstay of practice in the Tax Court. The intention of this rule is to strengthen and clarify that process, and to continue its central function as an instrument for the more expeditious trial of cases as well as for purposes of settlement"); Whitaker, supra note 57, at 440 (noting that discovery strengthens the stipulation process since "the ability to develop relevant facts through pre-trial discovery, where it does not result in settlement of the case, has permitted a much broader and more effective stipulation").

\textsuperscript{80} Tax Ct. R. 70(b).

\textsuperscript{81} Tax Ct. R. 101. See also 10 Fed. Tax Serv. (MB) § P:35.20 (1990) which explains: Although many of the discovery procedures in the Tax court were derived from the Federal Rules of Civil Procedure, discovery in the Tax Court is not as broad as in the...
tion by a party and for good cause, the court may issue a protective order to shield a party from burdensome discovery requests.82 Moreover, enforcement actions and sanctions are available against parties who fail to cooperate with discovery requests.83

Any evidence gathered during a Tax Court proceeding must conform to the discovery rules. To insure compliance with the rules, the justice presiding over the proceeding has the duty to ensure that the evidence entered into the record has been properly received.84 In this manner the justice facilitates the function of the discovery rules; to allow each party the opportunity to gather evidence which helps to prove their side of a disputed tax controversy.

Ideally, once the Tax Court process begins, the Service investigatory stage would be over.85 In a tidy world the Service would complete the investigation before issuing a deficiency notice to the taxpayer, since the investigation is what presumably generated proof of the tax payment deficiency.86 Under this scenario, the tools available to the Service during the investigatory stage (the summons) should give way to the tools available during the evidentiary stage (the discovery rules).

However, frequently an investigation is not complete when the deficiency notice is issued. An investigation may continue past the issuance of a notice of deficiency for a variety of reasons. The Ser-

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federal district courts. The frequency of use of discovery procedures, however, is generally unlimited unless the court issues a protective order.

82 Tax Ct. R. 103(a).
83 Tax Ct. R. 104.
84 See Ash v. Commissioner, 96 T.C. 459, 473 (1991). The Tax Court’s control of evidence does not bar the enforcement of a summons. This was emphasized in Ash, where the Tax Court noted, “that while [we] must, of necessity, control the admission of all evidence in the pending proceeding, any proceedings regarding the enforceability of the administrative summons will be brought before the Federal District Court, not this Court.” Id. at 581 n.10 (citing generally Marvin J. Garbis, Federal Tax Litigation, Civil Practice and Procedure, Ch. 1 (1985)).
85 See Keifer, supra note 4, at 581. “Service audit authority extends throughout the initial examination appeals process, prior to the issuance of a statutory notice of deficiency (if the case remains unsettled).” Id. at 581 n.10 (citing generally Marvin J. Garbis, Federal Tax Litigation, Civil Practice and Procedure, Ch. 1 (1985)).
86 See Ash, 96 T.C. at 465 (1991) (citing Universal Co. v. Commissioner, 93 T.C. 589, 594 (1989)). In Ash the court reviews the Universal holding which explains the Tax Court’s view on the investigatory function of the Service. The Ash court states, “[f]irst, this Court has no desire to interfere in any way with respondent’s investigations into violations of the internal revenue laws. We noted that respondent has the obligation to initiate such investigations and to pursue them to completion.” Id.
vice may be conducting an investigation of the same taxpayer for other reasons, the investigation may be for another tax year, or the statute of limitations may have run for issuing a deficiency notice during the investigation, forcing the agent to issue a deficiency notice to preserve the action.\textsuperscript{87} Regardless of the reason, there has been a great deal of litigation over the issue of the Service seeking enforcement of a summons after the taxpayer has filed a petition for redetermination with the Tax Court.

As noted above, the taxpayer or Service may seek a protective order under Rule 103 when either party has grounds to believe that the other is attempting to abuse the Tax Court’s discovery procedures.\textsuperscript{88} In \textit{Branerton Corp. v. Commissioner}, the taxpayer sought to use written interrogatories before any informal exchange of information was undertaken.\textsuperscript{89} The Service sought a protective order under Rule 103(a)(2) on the grounds that the taxpayer had failed to seek informal discovery as expected under Rule 70. The court granted the Service’s motion and held that the taxpayer’s premature use of interrogatories failed to “comply with the letter and spirit of the discovery rules . . . constitut[ing] an abuse of the Court’s procedures.”\textsuperscript{90} The \textit{Branerton} court granted the protective order to assure that Tax Court litigation would continue to be

\textsuperscript{87} The taxpayer, however, will often seek a protective order from the Tax Court blocking the use of any information obtained in circumvention of the Court’s discovery rules.

\textsuperscript{88} Tax Ct. R. 103(a). Rule 103(a) provides:

Upon motion by a party or any other affected person, and for good cause shown, the Court may make any order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, including but not limited to one or more of the following:

(1) That the particular method or procedure not be used. (2) That the method or procedure be used only on specified terms and conditions, including a designation of the time and place.

(3) That a method or procedure be used other than the one selected by the party.

(4) That certain matters not be inquired into, or that the method be limited to certain matters or to any other extent.

(10) That documents or records be impounded by the Court to insure their availability for purpose of review by the parties prior to trial and use at the trial.

If a discovery request has been made, then the movant shall attach as an exhibit to a motion for a protective order under this Rule a copy of any discovery request in respect of which the motion is filed.

Id.

\textsuperscript{89} 61 T.C. 691, 691 (1974).

\textsuperscript{90} Id. at 692.
characterized by informal consultation prior to use of the newly adopted discovery devices, thereby preserving the stipulation process of pre-discovery Tax Court proceedings.

However, a conflict has arisen between the intent of Rule 103(a), to prohibit abuse of the Tax Court discovery rules, and the broad grant of authority given to the Service through its summons power. Recent cases have involved the Service’s attempts to use its administrative summons power to obtain taxpayer information while the taxpayer has a case pending in the Tax Court. As seen above, Congress has given the Service broad power to issue administrative summons under any set of circumstances.91

Still, it is feared that information obtained via the summons could be used against the taxpayer in a pending Tax Court case. Because the administrative summons encompasses a greater scope of material (both parties and information) than is provided for under the Rules, the taxpayer will generally seek a protective order to block use of the summoned information. These protective orders claim that the Service is attempting to circumvent the restrictive Tax Court discovery rules with the broad investigatory grant available in a summons.92

C. Cases Focusing on the Tension Between Tax Court Discovery Rules and the Summons Power

The clash between the Tax Court’s discovery rules and the Service’s administrative summons power was addressed in both Universal Manufacturing Co. v. Commissioner93 and Westreco, Inc. v.

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91 See supra part II.
92 On the other hand, if discovery were broadened, taxpayers may be put on a somewhat even par with the Service. For example, because discovery in the Tax Court is more limited than in the Court of Claims:

Taxpayers unable to pay the deficiency and in need of discovery may rightfully argue that [limited discovery] is unfair, especially since their opponent in the Tax Court, the Commissioner of the IRS, has the opportunity through the summons and investigative powers of the government to obtain disclosure of information by means unavailable to taxpayers.


93 93 T.C. 589 (1989) (notice of deficiency issued while criminal investigation still pending). In Universal, the Tax Court held that the Service can still issue summons subject to district court enforcement authority but Tax Court rules were preserved by issuing a protective order barring use of information gathered by summons in circumvention of the Tax Court’s discovery rules (i.e., third party non-consensual depositions). Id. at 594.
In these cases, the Tax Court granted the taxpayers' protective orders because the summonses were issued after the taxpayers had filed their petitions for hearing. The protective orders, "limited [the Service's] ability to use information in the cases before [the court] which had been previously obtained through the use of administrative summonses because the information developed pursuant to the summonses circumvented discovery rules and gave respondent a discovery advantage not enjoyed by the taxpayer."  

However, in Ash v. Commissioner, where the summons was issued prior to the taxpayer filing a petition with the Tax Court, the court "limited the application of Universal and Westreco, in an attempt to forge more manageable guidelines for the relation between administrative summonses and Tax Court discovery limitations."

The court in Ash therefore broadened the use of the summons power by narrowing the circumstances under which information obtained through the issuance of administrative summonses could be barred from the case. The Ash Court established the following guidelines for determining when and if it should exercise its power to enforce limited discovery:

Where litigation in this Court has commenced, and an administrative summons is issued with regard to the same taxpayer and taxable year, we will exercise our inherent power to enforce the limited

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*60 T.C.M. (CCH) 824 (1990) (issuing a protective order prohibiting a Service trial attorney from simultaneous participation in a Tax Court trial and an audit of subsequent years that involved identical issues with the Tax Court case). The Westreco court emphasized the restrictions placed on discovery in Tax Court proceedings and explained how use of the summons would circumvent Tax Court procedure. The court focused on the Tax Court rules which limit the use of depositions, restrict discovery on non-parties, emphasize informal consultation, and confine discovery to relevant subject matter in the pending case. Id. at 833-34. Further, the court foresaw that by exercising its summons power in different tax years, the Service could have access to a much wider range of information for use in the docketed case than would be allowed under Rule 70(b). Id. at 834.

*85 DiLeo v. Commissioner, 96 T.C. 858, 893 (1991); see also Keifer, supra note 4, at 581-82.

*96 T.C. 459 (1991) (upholding summons issued before petition was filed with Tax Court). Judge Wright, writing for the court, stated: "[U]ntil a petition is filed, we have no basis on which to impose the rules provided for in title VII of our Rules of Practice and Procedure, and any administrative summonses issued by respondent prior thereto do not pose a threat to the integrity of our Rules." Id. at 468.

* Keifer, supra note 4, at 580.
discovery contained in our Rules. We will do so unless [the Service] can show that the summons has been issued for a sufficient reason, independent of that litigation. Where litigation in this Court has commenced, and an administrative summons is issued not with regard both to the same taxpayer and taxable year (for instance where the summons concerns another taxpayer or a different taxable year), normally we will not exercise our inherent power. We will exercise that power, however, when [the taxpayer] can show lack of an independent and sufficient reason for the summons.**

The *Ash* decision thus allows post-petition information obtained via summons to be used in Tax Court proceedings if the Service shows that it had a sufficient and independent reason, not involving the pending Tax Court case, for issuing the summons. This decision limits *Universal* and *Westreco* by focusing on whether there was an independent reason for issuing a summons. In addition, *Ash* may extend both the length and cost of Tax Court litigation since the Service must be allotted time to prove its independent reasons for issuing the summons. Thus, the guidelines set forth in *Ash* allow for greater use of a summons even when a Tax Court proceeding has commenced.

IV. RESOLUTION OF CONFLICTS

Several tensions result from the *Ash* limitation of post-petition summoned information. These tensions arise between the taxpayers’ demands for procedural fairness and the Service’s mandate to investigate tax information, between the original proper-purpose limitation on the summons power and the new *Ash* factors, and between the jurisdiction of the district court and the Tax Court. These tensions are examined below, and then a solution is posed for resolving the problems created by *Ash*.

A. *The Myth of the Level Playing Field*

Advocates of limiting the administrative summons power invoke the issue of fairness and advance the proposition that Tax Court

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** *Ash*, 96 T.C. at 471.**
litigation should be played on a level playing field. To be sure, the level playing field theory has surface appeal. Gut level notions of fair play suggest that combatants in a fair fight ought to be similarly armed. In fact, the contrary suggestion that one side ought to have a decided advantage over the other seems positively un-American.

As an example of possible changes in accord with the level playing field theory, one approach advocates amendment of section 7602 of the Code to prohibit use of a post-petition summons with respect to the same party and tax year, and/or allowing the taxpayer greater access to non-consensual depositions by revising and expanding Rule 75. Otherwise, according to this approach, the Service’s continued use of the summons could provide it with information in Tax Court proceedings that is unavailable to the taxpayer through the court’s narrower discovery options.

However, as appealing as the level playing argument is, it should play no role in the argument over the limits of the summons power. Rather, the focus of analysis should be on whether the Tax Court may legitimately interfere with the broad power Congress granted to the Service in the administrative summons, as interpreted by the United States Supreme Court.

This article does not suggest that a playing field in which the Service has unfettered use of the summons power is level. Indeed, the courts recognize that the summons is an extremely powerful tool to shift the odds away from the taxpayers. Further,

99 See Keifer, supra note 4, at 601; Ronald A. Stein, The IRS Summons as a Tax Court Discovery Tool: Another Perspective, 69 Taxes 501, 503 (1991); Universal, 93 T.C. at 595; Westreco, 60 T.C.M. (CCH) at 834.

100 See Keifer, supra note 4, at 600-03.

101 Id. at 588. One commentator goes so far as to suggest that the level playing field is of constitutional dimension. Stein, supra note 99, at 503 (stating that “keeping the playing field level is a constitutional imperative”).

102 This view is reflected in Judge Chabot’s rejection of the level playing field theory in Ash. 96 T.C. at 473-76 (Chabot, J., concurring). Judge Chabot notes that the Tax Court is, “obligated to take the administrative summons as a fact of life; we should do so not because we agree with the Congress’ policy but, rather, because the Congress has exercised its constitutional authority and we must follow it. . . .” Id. at 476.

103 See PAA Management, Ltd. v. United States, 962 F.2d 212, 219 (7th Cir. 1992) (finding that the summons is not a discovery tool, rather, “it is strictly inquisitorial” (quoting Bolich v. Rubel, 67 F.2d 894, 895 (2d Cir. 1933))); see also United States v. Arthur Young & Co., 465 U.S. 805, 816 (1984) (stating “[t]he purpose of § 7602] is not to accuse, but to inquire” (quoting United States v. Bisceglia, 420 U.S. 141, 146 (1975))).
any one of the cases upholding the use of the summons power in the face of express constitutional proscriptions against unreasonable search and seizure or against self-incrimination, inferentially, if not expressly, acknowledges and validates the intrusive and searching nature of the summons. A review of such a searching summons power may be the subject of legitimate debate, the level playing field argument has held little sway in the constitutional jurisprudence affirming the summons power.

Beyond the rejection by the courts, even the most cursory examination of the level playing field theory reveals that it rests on shaky grounds. Its primary flaw is that it ignores that in tax litigation, the taxpayer has, or at least had, access to all the information regarding her tax liability. If the summons is to expedite the collection and determination of the tax, the government must, of necessity, have a vehicle by which it can ascertain relevant information to which it has had, in contrast to the taxpayer, no prior access.

The idea that a taxpayer is entitled to a correlative right overlooks this salutary purpose. It also overlooks the fact that the government normally would have no information on a taxpayer not already held by or available to her. Moreover, an illogical loophole would be created for taxpayers to forestall investigation, if under Tax Court procedure the sweeping summons power could be circumscribed by the simple expedient of filing a Tax Court petition, while in District Court the taxpayer would still be subjected

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104 See supra text accompanying notes 35-49.
105 A review of the United States Supreme Court decisions cited throughout this article reveals no reference to the level playing theory argument. However, neither the level playing field argument nor its counterpart—fairness—has, in the Court's view, risen to constitutional proportion. To the contrary, the Court has affirmed and yielded to congressional intent to grant the summons and the Service a broad scope of power. See, e.g., United States v. Euege, 444 U.S. 707, 716 (1980).
106 The principle that a taxpayer has the burden of proof in tax cases is another example of seeming unfairness that is accepted as necessary for the government to sustain itself by facilitating the collection of revenue. See Martinez, supra note 64.
107 The author concedes the limitation of this idea in the area of multiparty cases in which one taxpayer might seek information from the government relevant to his case but which was originally held by or available from another taxpayer in the case. Similarly, a taxpayer might seek to discover the identity of those who have been summoned as third party record keepers. See Stein, supra note 99, at 505 n.38. In the former case, I.R.C. § 6103 might well protect the privacy of other taxpayers with respect to return information. In the latter case, I.R.C. § 7609 already provides for the requisite notice.
to the full range of the summons power.\textsuperscript{108} No case has seriously advanced such a disparate treatment of taxpayers, and to the extent the Tax Court has moved in this direction, it courts erosion of its inherent authority. In sum, the level playing field theory does not pass muster, due both to its rejection by the courts and to its failure to take account of the taxpayer's prior possession of the summoned information.

\textbf{B. Proper Purpose}

A taxpayer generally seeks a protective order to block use of information in the Tax Court proceeding and also to put a damper on a continuing Service investigation. However, a taxpayer faces several roadblocks to effectively limiting an ongoing investigation. As discussed above, the Service can continue an investigation of the taxpayer even after a Tax Court proceeding has begun.\textsuperscript{109} In other words, the Service does not fail to meet the proper purpose prong required by \textit{Powell} merely by issuing a deficiency notice. If the Service meets all the requirements of the \textit{Powell} test, the Service is entitled to full enforcement of the summons.\textsuperscript{110}

Furthermore, proper purpose is determined as of the date the taxpayer's petition was issued, not at the date of the Service's petition for enforcement of the summons.\textsuperscript{111} This effectively curtails a taxpayer's argument that continued investigation is no longer necessary once the case is pending trial before the Tax Court, because if a taxpayer's liability is still subject to redetermination pursuant to section 6212(c) of the Code, the government's legitimate interest is retained.\textsuperscript{112} Moreover, this legitimate interest insures that a

\textsuperscript{108} See PAA Management, Ltd. v. United States, 962 F.2d 212, 218 (7th Cir. 1992); United States v. Gimbel, 782 F.2d 89, 93 (7th Cir. 1986).

\textsuperscript{109} See supra text accompanying notes 87, 93.

\textsuperscript{110} See United States v. Abrahams, 905 F.2d 1276, 1285 (9th Cir. 1990) (vacating district court order which limited attorney's production of files to twenty taxpayer client returns instead of all returns requested by the Service).

\textsuperscript{111} \textit{Gimbel}, 782 F.2d at 92.

\textsuperscript{112} Id. at 93.
summons will still be enforceable even if the Service agent had an improper purpose for issuing the summons.\textsuperscript{113}

C. Jurisdiction

The jurisdictional question centers on the ability of both the federal district court and the Tax Court to affect the use of an administrative summons. The federal district court enforces and oversees abuse proceedings.\textsuperscript{114} The Tax Court has the authority to issue a protective order blocking the use of summoned information in its proceedings.\textsuperscript{115} In response, the Service has many times attacked the Tax Court’s use of a protective order on the grounds that the court lacks the requisite authority to limit use of the summons.\textsuperscript{116}

The Tax Court, however, has indicated in several of its holdings that the issuance of a protective order does not infringe on the district courts’ authority to enforce a summons.\textsuperscript{117} Rather, the Tax Court asserts that it is ruling solely on the procedure by which evidence is obtained which is admissible in its forum.\textsuperscript{118} The Tax


\textsuperscript{114} I.R.C. § 7604(a). Section 7604(a) provides:

If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

\textsuperscript{115} Id. The district court may also:

restrict a summons in order to protect the taxpayer’s rights that the IRS will not use information obtained through the summonses for improper purposes. United States v. Author Services, Inc., 804 F.2d 1520, 1525 (9th Cir. 1986); United States v. Zolin, 491 U.S. 564, 561 (1989) (affirming the court of appeals’ restriction on dissemination of information obtained through IRS summons). The court is not limited to either enforcing the summons or denying enforcement. Author Services, 804 F.2d at 1525.

\textsuperscript{116} See supra note 93, 97 and accompanying text.

\textsuperscript{117} See, e.g., Ash, 96 T.C. at 459.

\textsuperscript{118} See, e.g., id. at 472.

\textsuperscript{119} “Once in our court, follow our rules,” is the message the Tax Court is delivering to the Service. . . . The philosophy of the Tax Court has traditionally been that the Service should use the examination level and not the Tax Court for discovery.” Kathleen Matthews, Tax Court Stops IRS from Enforcing Administrative Summons in District Court, 90 Tax
Court argues that it has the authority to issue a protective order blocking the use of information gained in response to a summons, when the same information would be unavailable through its discovery process without express permission of the court.\textsuperscript{119}

The controversy regarding whether the Tax Court has the jurisdictional authority to issue protective orders which somehow limit a Service summons first arose in \textit{Universal}, and has since been revisited in both \textit{Westreco} and \textit{Ash}.\textsuperscript{120} The central issue in these cases was whether the Tax Court had the authority to issue a protective order blocking use of summoned information, and, if so, from what source the authority was derived. Each of the opinions upheld the authority of the Tax Court to issue the protective order, finding two sources for that power. The first is the inherent authority of courts to regulate their own processes; the second is derived from the Tax Court’s statutory authority to prescribe rules of practice and procedure.\textsuperscript{121}

The \textit{Ash} holding reveals the Tax Court’s analysis regarding its inherent authority to issue protective orders. The \textit{Ash} court set a bright line test based on the timing of the summons. In a pre-petition scenario, the Tax Court will not issue a protective order to block information obtained via a summons because the taxpayer would already be under an obligation to the Service to supply information under section 7602 of the Code.\textsuperscript{122} In a post-petition summons scenario, however, the Tax Court concluded that it had the inherent authority to enforce a protective order.\textsuperscript{123}

The \textit{Ash} court’s reliance on and interpretation of Rule 103A presents a problem to the second prong of the court’s authority analysis, its statutory authority to prescribe rules of practice and procedure. The court’s authority is derived from Rule 103,\textsuperscript{124} and

\begin{footnotesize}
\begin{itemize}
  \item[\textsuperscript{119}] But see United States v. Gimbel, 782 F.2d 89, 93 (7th Cir. 1986) ("[T]he mere fact that the Government might be able to obtain some or all of the documents through the Tax Court procedures does not by itself compel the conclusion that the Government's attempt to enforce the summons is being made in bad faith." (footnote omitted)).
  \item[\textsuperscript{120}] See supra part III.C.
  \item[\textsuperscript{121}] See \textit{Ash}, 96 T.C. at 470-71; \textit{Westreco}, 60 T.C.M. (CCH) at 834; \textit{Universal}, 93 T.C. at 585.
  \item[\textsuperscript{122}] See 96 T.C. at 468.
  \item[\textsuperscript{123}] Id. at 470-71.
  \item[\textsuperscript{124}] The Tax Court stated that Rule 103 "authorizes this Court to restrict the use of discovery procedures or information obtained through discovery when required to protect a
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because 103 only addresses information gained through the discovery process, there is still a question as to how Rule 103 could restrict information gained through means outside of the Tax Court's discovery process.

The Tax Court addresses this issue by looking to cases interpreting Federal Rule of Civil Procedure 26(c), from which Rule 103 is derived. Using this analogy, the court unfortunately finds that these cases tend to limit the issuance of a protective order.125

The Tax Court sidesteps this discrepancy by then claiming it has the inherent authority to protect the integrity of the forum.126 But this argument does not address why the Tax Court’s authority should be any different than in the Rule 26(c) cases.127 Indeed, the Rule 26(c) cases limited the courts’ authority to issue protective orders based on considerations less compelling than the arguments for limitation of protective orders narrowing the administrative summons power.128

In sum, the jurisdiction issue is pivotal in the context of protec-

party or other person against 'annoyance, embarrassment, oppression, or undue burden or expense.'” Id. at 469.

125 Id. at 469-70.

126 Id. at 470-71.

127 See W. Curtis Elliott, Jr., Can IRS Trial Attorney Be Barred from Other Years of the Taxpayer?, 74 J. Tax’n 294, 298 (1991). Elliott states that the Westreco court enforced the protective order not on evidentiary grounds, but rather:

upon its inherent authority to enforce its rules by excluding evidence obtained in violation of a protective order, which order would not be overridden by the Federal Rules of Evidence. In making its assertion, the Tax Court cited no authority for this proposition. The Tax Court has previously questioned its own imposition of supervisory powers to justify exclusions of evidence obtained by the IRS under doubtful circumstances where there is no violation of a constitutional right as in Dixon, 90 T.C. 237 (1988).

Id.

128 Cases cited by the Ash majority include:

Kirschner v. Uniden Corp. of America, 842 F.2d 1074 (9th Cir. 1988) (power to control discovery under Rule 26(c) does not extend to the issuance of a protective order preventing a party from using material obtained in a separate action, and requiring the party to return the material to the other party, even though the parties to such other action are identical); Whittaker Corp. v. Execuair Corp., 736 F.2d 1341 (9th Cir. 1984) (Rule 26(c) does not give the District Court power to exclude evidence discovered in a separate antitrust action, even when such discovery occurs after the District Court’s own discovery cutoff date); Bridge C.A.T. Scan Associates v. Technicare Corp., 710 F.2d 940 (2d Cir. 1983) (where information alleged to contain trade secrets was compiled prior to commencement of lawsuit, Rule 26(c) did not give the court any authority to prohibit its disclosure).

Ash, 96 T.C. at 469.
tive order enforcement. The Tax Court has asserted its authority to regulate the admission of evidence in its proceedings under the theory of implied or inherent power. However, the Tax Court’s desire to maintain control over every facet of its proceedings thwarts its core congressional mandate to determine the correct tax. As a result, the Tax Court’s position both undermines its own effectiveness and also interferes with the broad power granted to the Service under section 7602 of the Code. Because the Service has a strong conflicting desire to obtain all relevant information, in the future the Service may initiate change either through Congress or through a ruling by the United States Supreme Court which limits the Tax Court’s power to issue protective orders.

Ironically, the Tax Court’s issuance of a protective order may not prohibit the Service from seeking summons enforcement. The Seventh Circuit has firmly rejected the proposition that filing a petition with the Tax Court deprives the district court or court of appeals of their jurisdiction. 129 Moreover, the district court does not abuse its discretion by enforcing a summons once the petition has been filed. 130 The bottom line is that if a taxpayer’s liability is still in question and subject to redetermination under section 6212(c) of the Code, the Service may legitimately use a summons to request documents that are relevant to that determination. 131

The unanswered question is whether the Tax Court must then accept into its proceedings information that is gathered by administrative summons after the petition for redetermination has been filed. Although the Tax Court cannot block enforcement of the summons, the Seventh Circuit has apparently been unwilling to in-

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129 See United States v. Gimbel, 782 F.2d 89, 93 (7th Cir. 1986). Gimbel did not, however, involve a Tax Court protective order.

130 See id.

131 Id. In the early case of Bolich v. Rubel, 67 F.2d 894 (2d Cir. 1933), the Second Circuit upheld the Commissioner’s power to gather information while a case was pending before the Board of Tax Appeals on the theory that the summons power “[p]roperly . . . is not a power to procure or perpetuate evidence at all; it is strictly inquisitorial, justifiable because all the facts are in the taxpayer’s hands.” 67 F.2d at 895. The Second Circuit thus seemed to distinguish a good summons from a bad summons on the basis of the purpose of the summons. If the summons is being used to possibly increase the tax assessment it is valid, whereas if it is being used to produce evidence in support of the Service’s case against the taxpayer it is invalid. See id. at 894-95.
fringe upon the jurisdiction of the Tax Court and has not required that the summoned information be admitted in the Tax Court proceedings.\textsuperscript{132}

Defining the jurisdiction of the Tax Court, the \textit{Ash} opinion stated that the purpose of Tax Court discovery is "to ascertain facts which have a direct bearing on the issues before the Court."\textsuperscript{133} However, the only issue before the court is the determination of the correct amount of tax owed by the taxpayer. Thus, the stated purpose of the court would not suffer from admitting the summoned information to the tax determination proceeding. To the contrary, resolution of the issue would be aided by the inclusion of summoned information since the information gained would presumably facilitate determination of the correct tax.

Further, the worries that late arriving summons information will cause increased delays in Tax Court proceedings are not warranted. Because the district court oversees summons enforcement, the Tax Court would not be burdened with additional administrative hassles stemming from the admission of summoned information, though the district court might bear an increased burden. For the same reason, the duration of Tax Court proceedings need not be affected by summons use. As a result, the Tax Court need not have any major involvement with the summons process, and can thereby focus its inquiry solely to the issue of the correct amount of tax. With these points in mind, it follows that if the Service gains access to pertinent material within the time frame of the Tax Court litigation, it should be admissible.

\textbf{D. Scope of Discoverable Material}

The scope of information allowed into Tax Court proceedings is terribly relevant to both the Tax Court and the Service. For the most part, the taxpayer has legitimate concerns about making sure that discovery rules are enforced. The Service, of course, does not wish any limitation of its investigatory capacity (especially in large, complex tax cases where it is most likely to have continuing inves-
tigations even after deficiency notices have been issued).

There is no question that the administrative summons authorizes the Service to obtain a much broader scope of information than is normally allowed in the Tax Court.\textsuperscript{134} Currently, however, the Service's authority to issue summonses during the audit process may not be used to circumvent the Tax Court discovery rules.\textsuperscript{135}

One argument put forward in support of this limitation is that if the information obtained from a summons were useable during a Tax Court proceeding, the Service would then attempt to rely on summonses more than on the discovery process. Because a summons encompasses such things as non-consensual depositions, which the Tax Court rules do not allow, absent extraordinary circumstances, this would not only serve to circumvent the discovery rules and to make them particularly spineless, but it could possibly promote slack investigative efforts on the part of the Service.

Under \textit{Ash}, timing is a crucial element when it comes to granting protective orders that seek to block the use of information obtained via a summons. If a taxpayer has previously filed a petition with the court, the Tax Court is willing to bar the use of information gathered under a summons that appears to be directed at information or parties that the court's discovery rules would not encompass.\textsuperscript{136} If, however, the summons was issued prior to the taxpayer filing a petition, the court is more willing to allow use of that information.\textsuperscript{137} Pointing out the disparity, Keifer suggests:

\begin{quote}
It is unclear why a potential pre-petition abuse of an administrative summons should receive complete absolution while post-petition summonses are subject to greater challenge. The problem becomes one of mere timing; the \textit{Ash} Court may be elevating form over substance. Instead, a fairer course may have been to allow challenge of pre-petition summonses, with the burden of proof resting on petitioner.\textsuperscript{138}
\end{quote}

However, the pre-petition argument does not make sense if the

\textsuperscript{134} See supra part II.
\textsuperscript{135} See \textit{Ash}, 96 T.C. at 470-71.
\textsuperscript{136} See id.
\textsuperscript{137} See id. at 468.
\textsuperscript{138} Keifer, supra note 4, at 597.
Tax Court's predominant focus is either to determine the correct amount of the taxpayer's deficiency or to determine the taxpayer's overpayment of tax to the government.\textsuperscript{139} If the essential function of the Tax Court is to determine the amount of the taxpayer's obligation to the government, any information that helps the court to make this determination is relevant and should be allowed into evidence.\textsuperscript{140} Because a summons serves the purpose of eliciting information, its use should not be barred simply because the taxpayer has filed a redetermination notice with the Tax Court.

Logically then, to present the Tax Court with the most complete picture possible, "all the relevant facts should be put into the record."\textsuperscript{141} According to Judge Whitaker, the necessary factual inquiry should include a responsibility for the Tax Court judge to take an active role in the adjudication process.\textsuperscript{142} The judge could "direct the parties to brief the issue, call or interrogate witnesses as necessary, and require the inclusion of documents in the record even against the objection of the parties."\textsuperscript{143} The increased participation by the judge should also include supervision of administrative summonses, which could then be issued safely at any point in the petition process. As explained above, the Service's summons is used to gather taxpayer information which the government does not possess, and therefore judicially-supervised use of summonses after filing of the petition makes sense.

Even if a pre-petition and post-petition distinction were logical, the Tax Court has lost the former clarity and ease of applying the Universal and Westreco bright-line timing standard by muddying the picture with the Ash analysis of the Service's motivations. In addition to administrative problems, this outcome conflicts with the Supreme Court's determinations that summoned information is neither constitutionally protected nor outside the broad powers granted by Congress.\textsuperscript{144} As noted above, Congress affirmed the

\textsuperscript{139} The Tax Court was given jurisdiction to determine the correct tax owed by the taxpayer. See I.R.C. § 6214(a).

\textsuperscript{140} The evidence should be admitted provided the information has been obtained within the Powell parameters and prior to criminal referral. See supra text accompanying notes 20-28.

\textsuperscript{141} Whitaker, supra note 57, at 437.

\textsuperscript{142} Id. at 441-43.

\textsuperscript{143} Id. at 442.

\textsuperscript{144} See discussion supra parts II.A., II.B.2.
broad summons power when it stated that the summons can be exercised within the Powell framework until and unless criminal referral is issued. This leads to the conclusion that when the summons power has been exercised properly, the Service's motivation should play no role in a Tax Court proceeding. The procedural barriers established by the Tax Court therefore result in a handicap to the Service not desired or intended by the congressional mandate.

E. A Modest Proposal — Or, Why Go Looking for Trouble?

The Tax Court has an enviable record for achieving its mission efficiently. However, by overstepping its authority in regulating administrative summonses, the Tax Court invites outside interference into its affairs. To prevent this and to maintain the reputation of the court, the author advocates a retreat by the Tax Court from Ash back to a solid legal footing. The Tax Court should withdraw from the business of adjudicating the admissibility of relevant evidence obtained by an administrative summons and should return to the business of determining the correct tax using all the relevant information.

1. Inconsistency in Case Management

One goal of the Tax Court is to maintain a consistent approach in Tax Court adjudication. This goal can be achieved only if the Tax Court judges are themselves consistent in both results and procedure. As to results, the opinions by the Tax Court judges have assured comparable treatment of similarly situated taxpayers and have provided guidance to the Bar and the Service. However, when it comes to procedures of case management, the styles adopted by the Tax Court judges are distinct.

Tax Court judges are increasingly involved in case management, and not surprisingly, they have adopted various styles which are not subject to internal review (unlike their opinions). The judges' involvement has evolved due to several related factors.

\[^{145}\text{See supra text accompanying note 27.}\]
\[^{146}\text{Whitaker, supra note 57, at 421.}\]
\[^{147}\text{Id.}\]
First, cases are now assigned to specific judges five months prior to the date of trial, allowing the assigned judge ample time to influence the pre-trial procedure.\textsuperscript{148} Second, it is now standard practice for a judge to draft a Standing Pre-Trial Order which “sets forth the parties’ responsibilities and notifies them of possible sanctions in the event they fail to comply with its terms.”\textsuperscript{149} Third, the judge has the power, and therefore a concurrent duty, to enforce the rules of the Tax Court, which includes the application of the \textit{Ash} standard to administrative summonses.\textsuperscript{150}

Unfortunately, the differing styles of case management adopted by various Tax Court judges can lead to different applications of the \textit{Ash} standard with regard to administrative summonses. This uncertainty and inconsistency in the Tax Courts could be eliminated simply by abandoning the \textit{Ash} standard and allowing the issue of administrative summonses to reside in the district court, except in instances of obvious abuse.

This decreased involvement with the adjudication of summonses would have the effect of more efficient case disposal due primarily to a narrowing of issues and to an increase in early stipulations leading to settlement.\textsuperscript{151} Additionally, any abuse of the summons power could be resolved using the Tax Court as an informal forum for resolution, insuring that the Tax Court judges would retain the final decision on a summons, but shifting the forum of the time-consuming controversy to the district courts.\textsuperscript{152}

\section*{2. Lack of Legal Foundation}

The Tax Court oversteps its authority and misinterprets its role when it uses the \textit{Ash} standard to exclude information appropriately obtained by post-petition administrative summonses. Congress gave the Service broad authority to use the administrative summonses in section 7602 of the Code.\textsuperscript{153} The United States Su-

\begin{itemize}
  \item \textsuperscript{148} Id. at 422.
  \item \textsuperscript{149} Id. at 423.
  \item \textsuperscript{150} Id. at 430-32. For example, a judge may dismiss a case upon a party's failure to respond to the Standing Pre-Trial Order. Id. at 431.
  \item \textsuperscript{151} Id. at 434.
  \item \textsuperscript{152} The district courts, of course, retain the power to enforce the summons. See I.R.C. § 7402(b); see also supra notes 129-31.
  \item \textsuperscript{153} See supra part II.A.
\end{itemize}
preme Court has repeatedly validated this broad scope,\textsuperscript{154} and the authority to limit employment of administrative summonses rests with the district courts.\textsuperscript{155}

As a last resort, the Tax Court acknowledged that its ability to render relevant evidence inadmissible could only spring from the court's inherent authority to regulate its own proceedings.\textsuperscript{156} In doing so, the Tax Court has mistakenly chosen to elevate the nebulous concept of its own inherent authority above the concrete definition of its role and mission provided by Congress and the Supreme Court.\textsuperscript{157} In sum, by adopting the Ash holding, the Tax Court disregards explicit law, and relies instead on a theory which hampers the achievement of the court's mission.

3. Unworkability

If the Tax Court were to abandon the Ash holding, cries of unworkability in response to shifts in procedural rule interpretation are to be expected. In his evaluation of amendments to the Federal Rules of Civil Procedure, Professor Richard Marcus writes that "lawyers seeking to determine whether changes will make them winners or losers have a remarkable facility to find a dark lining for any silver cloud, and probably a malign hidden agenda as well."\textsuperscript{158} This observation is especially relevant in weighing negative reaction to any change in Tax Court procedure favoring an increase in the scope of the summons power, since the Bar is uniformly aligned in opposition to Uncle Sam.

The possible negative reaction to a change from Ash and to the commentary that the Tax Court is not authorized to interfere with the Service's administrative summons power recalls the bar's response to the change which was caused by Golson \textit{v. Commissioner}.\textsuperscript{159} In Golson, the court parted from the then common practice and held that, where appropriate, the Tax Court would apply

\textsuperscript{154} See supra part II.
\textsuperscript{155} See supra part IV.C.
\textsuperscript{156} See supra text accompanying notes 123-26.
\textsuperscript{157} See supra text accompanying notes 128-29.
\textsuperscript{159} 54 T.C. 742 (1970).
the common law of "the Court of Appeals to which appeal lies."\footnote{Id. at 757.} Confusion and unworkability were predicted by practitioners suddenly forced to anticipate the vagaries of each circuit's peculiar holdings.\footnote{See Deborah A. Geier, The Emasculated Role of Judicial Precedent in the Tax Court and Internal Revenue Service, 39 Okla. L. Rev. 427 (1986) (relying partly on the potential for Golsen related problems to advocate the creation of a national court of tax appeals which would infuse respect for judicial precedent and stare decisis).} Two decades of experience, however, show that these fears were unfounded. Similarly, a move towards the appropriate recognition of the summons power will improve rather than impair achievement of the Tax Court's objectives without destroying the core process.

The Tax Court can preserve the benefits of its current Rules by avoiding interference with the administrative summons process and by simply leaving execution and enforcement of the administrative summonses to the district courts. This course would allow the Service to meet its mandate, would add no burden to the Tax Court, and would enhance the court's ability to determine the correct tax based on all relevant data.

\section*{V. Conclusion}

Congress and the United States Supreme Court have announced with clarity that, within the \textit{Powell} framework, the Service has broad authority to exercise its summons power. Part II of this article reviewed the development of the administrative summons power. Part III chronicled the incremental process by which the Tax Court chose to elevate its perceived procedural requirements above the summons power, culminating in the doctrine adopted in \textit{Ash}. Part IV evaluated the \textit{Ash} doctrine, concluding with the author's position that the Tax Court has no grounds to regulate the information obtained by the Service via the summons.

The Tax Court, or Congress, if the Tax Court is unwilling to change, faces a distinct choice between seemingly unattractive alternatives. Evaluation of the \textit{Ash} doctrine leads to the conclusion that the Tax Court's position is untenable. Whether or not the Tax Court has the authority to exclude summoned information, the nature of a tax controversy suggests a broad scope of fact finding. There are no grounds of Tax Court judicial economy upon which
to limit a summons, as the Tax Court plays no part in summons enforcement and can force the Service to abide by the court’s timetable.

It could be argued, as the Tax Court moves toward a procedural position more closely resembling that of the federal district courts than that of the Board of Tax Appeals, that the court should abandon the procedures adopted when it hoped to maintain its prior informality. The issue of restricting administrative summonses would be moot once the Tax Court adopted the district courts’ broader, though more cumbersome, discovery rules.

However, such a drastic change is unwarranted. The process of enforcement of a summons should remain with the district courts, leaving the Tax Court to consider only the case presented within its own timetable. By focusing on the facts presented, including information obtained by the Service through valid summonses, the court will realize the most accurate decisions and honor the spirit of section 7602 of the Code and the decisions shaping that section’s parameters. Only in the most abusive situations, almost as a matter of case management, should the Tax Court seek to limit the effect of a summons.

There is no sufficient reason in the face of contradictory authority for the Tax Court to maintain a doctrine whose main beneficiary is a party potentially shielded from paying the proper assessment. Congress and the United States Supreme Court have seen fit to grant the Service extremely broad powers under section 7602 of the Code as necessary to insure efficient compliance. Because the Tax Court’s anomalous treatment of the administrative summons power can not be legally or procedurally justified, the Tax Court has invited a United States Supreme Court or congressional reversal. In the end, the Tax Court’s anomalous treatment of the administrative summons cannot be justified and detracts from the court’s goals and achievements.