The Summons Power and the Limits of Theory: A Reply to Professor Hyman

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Professor David Hyman’s recent article, When Rules Collide: Procedural Intersection and the Rule of Law, which appeared in the last issue of the Tulane Law Review, explains the problems associated with what he terms “procedural intersections.” Professor Hyman finds that a “procedural intersection” occurs when parties are engaged in separate adjudicative proceedings in different fora, regarding the same issue, and each forum offers competing procedural rules. Dean Martinez’s criticism of Professor Hyman’s theory is not centered on the grand vision Professor Hyman takes, but rather on the narrow grounds that would appear to preclude the use of the administrative summons power in the Tax Court. The criticism is in three parts. The first is that Professor Hyman’s theory understates the extent of the sovereign’s power to tax. The second is that Professor Hyman’s theory emphasizes the “level playing field” in the tax context to an unjustified extent. The third is that Professor Hyman’s theoretical construct simply does not apply in the Tax Court.

“Tax law . . . is not normally characterized by case-specific exceptions reflecting individualized equities.”

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I. INTRODUCTION

Some years ago, I wrote an article published in the Virginia Tax Review which outlined my view criticizing the U.S. Tax Court’s

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exclusion of evidence obtained through the government’s exercise of the administrative summons power. While I adhere to my original position in support of the use of the summons power to aid government discovery, I have reflected on my earlier position, and like most authors, my views have evolved. Professor David Hyman’s piece, When Rules Collide: Procedural Intersection and the Rule of Law, which appeared in the last issue of the Tulane Law Review affords me a second chance to restate my earlier thesis and to comment on his theory of procedural intersection.

As a preliminary matter, Professor Hyman’s theory seeks to explain the problems associated with what he terms “procedural intersection” in various contexts. Professor Hyman finds that a “procedural intersection” occurs when parties are engaged in separate adjudicative proceedings in different forums, regarding the same issue, and each forum offers competing procedural rules. The rule in one forum provides a more restrictive procedural method, whereas the second forum offers a less restrictive procedural method. Because I believe it is a good practice not to mix criticism and agreement, I have focused on my criticism of Professor Hyman’s work notwithstanding my agreement with much of it.

My view of Professor Hyman’s theory is not centered on the grand vision he takes, but rather on the narrow application of his vision to preclude the use of the administrative summons power in the Tax Court. My criticism is in three parts. The first is that Professor Hyman’s theory understates the extent of the sovereign’s power to tax. The second is that Professor Hyman’s theory emphasizes the “level playing field” in the tax context to an unjustified extent. The third is that his theoretical construct simply does not apply in the Tax Court, as he suggests.

While I advance criticism of Professor Hyman’s piece, I also believe that his work is a useful inquiry not confined to the narrow orthodoxy we tax scholars tend to adopt. A cursory review of the literature reveals a dearth of scholarly discussion which even attempts to address tax collection in Professor Hyman’s meta-theoretical style.

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2. See Leo P. Martinez, The Summons Power and Tax Court Discovery: A Different Perspective, 13 VA. TAX REV. 731 (1994) (criticizing the U.S. Tax Court’s exclusion of evidence obtained through the government’s exercise of the administrative summons power).


4. See id. at 1394.
Notwithstanding my views on its applicability in the tax context, my critique of Professor Hyman’s piece is exceedingly narrow and my enchantment with his theory in other than the tax context endures. My hope is that notwithstanding my disagreement with David Hyman, his article provokes dialogue in the netherworld of tax collection.

II. PROFESSOR DAVID HYMAN’S THESIS

As stated above, Professor Hyman defines the term “procedural intersection” as the dilemma faced when the same dispute can be adjudicated in different forums with different procedural rules. Along with several other examples, Hyman uses grand jury proceedings to exemplify a procedural intersection. The investigative power of the grand jury is highly regulated and very broad. There have been attempts to misuse the grand jury’s investigative power to investigate civil matters, or to perform fishing expeditions to obtain information which otherwise would be difficult to acquire. The Supreme Court has consistently denied that the grand jury power can be manipulated to circumvent other investigatory restrictions. Professor Hyman applauds the Court’s enforcement of the more restrictive procedures as a protection against circumvention. He notes that, although there are limitations and restrictions to the general rule, courts have “consistently” ensured that “a party’s conduct is controlled by the more restrictive rule when there is any indication of circumvention of that rule, particularly when there is no constitutional or statutory right to that result.”

Professor Hyman then discusses the summons power given to the Internal Revenue Service (IRS) by Congress, and its intersection with the more restrictive procedural rules created by the Tax Court. He uses this intersection to demonstrate an area where the courts have chosen to enforce the rule less restrictive of government, and offers criticism of this choice.

In the Tax Court context, Professor Hyman writes that enforcing the more restrictive discovery mechanism keeps the IRS counsel from enhancing the government’s position through the use of the summons

5. See id.
6. See id. at 1395.
7. See id.
8. See id. at 1397.
9. Id. at 1404.
10. See id. at 1405.
11. See id. at 1405-09.
power.\textsuperscript{12} He believes that this will maintain the structural integrity of the system.\textsuperscript{13} According to Professor Hyman, discovery is a two-way street, and because in the Tax Court the taxpayer is allowed to conduct only limited discovery, the IRS should be held to the same standard.\textsuperscript{14}

Professor Hyman also finds that the more restrictive rule does not interfere with the IRS’s use of the summons power.\textsuperscript{15} He argues that the IRS can issue any summons it chooses; however, it should not be able to use any information achieved through the summons in a docketed Tax Court case.\textsuperscript{16} Professor Hyman concludes that, as a general rule, the “paradox” created by every procedural intersection should be resolved by choosing the more restrictive rule whenever there is circumvention of the narrower rule or undue risk of the same.\textsuperscript{17}

III. A TAX COURT DISCOVERY PRIMER

Professor Hyman argues that the use of the broad summons power by the IRS in a docketed Tax Court proceeding circumvents the rules of the Tax Court.\textsuperscript{18} Because of the limited discovery in the Tax Court, and the sweeping summons power maintained by the IRS, He urges that “[t]he stage [is] . . . set for an epic procedural intersection.”\textsuperscript{19} Hyman criticizes the District Court’s “systematic” enforcement of the less restrictive rule, and notes that “even the Tax Court’s enthusiasm for the more restrictive rule is questionable.”\textsuperscript{20} Professor Hyman believes that the current approach of both the district court and the Tax Court is incorrect.\textsuperscript{21}

For the uninitiated, a brief description of the tax context in which Professor Hyman applies his procedural intersection theory is apt. The United States Tax Court was established to provide taxpayers with a forum for informal and inexpensive adjudication of purported tax payment deficiencies.\textsuperscript{22} It has become the most widely used and

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\item \textit{See id.} at 1426.
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\item \textit{See id.} at 1453.
\item \textit{See id.} at 1401.
\item \textit{Id.} at 1408.
\item \textit{Id.} at 1424.
\item \textit{See id.} As I have indicated in other works, I am in partial agreement with Professor Hyman in that I believe the Tax Court approach is incorrect.
\item \textit{See} Revenue Act of 1924, ch. 234, § 900, 43 Stat. 337 (1924); \textit{see also} Flora v. United States, 362 U.S. 145, 158-63 (1960); H.R. REP. NO. 68-179, at 7-8 (1924), \textit{reprinted in} J.S. Seidman, Seidman’s Legislative History of Federal Income Tax Laws 1938-
important forum for the litigation of 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 IRS. This vital difference has led to a dramatic increase in the Tax Court’s docket and has compelled many changes since the inception of the original Board of Tax Appeals.

Because the Tax Court is ostensibly designed to insure the rapid and efficient resolution of tax disputes, discovery in the Tax Court is streamlined. The administrative goal is expressed in the Tax Court’s self-promulgated discovery rules adopted under its inherent authority. As Professor Hyman notes, the scope of discovery varies between the three tax courts and can substantially affect the outcome of a tax case.

1861, at 759-60 (1938); F. GERALD BURNETT & GERALD A. KAFKA, LITIGATION OF FEDERAL TAX CONTROVERSIES § 1.02, at 1-3 n.11 (1994); HAROLD DUBROFF, THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS 47 (1979).

23. “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.” William F. Nelson & James J. Keightley, Managing the Tax Court Inventory, 7 VA. TAX REV. 451, 453 (1988); see also INTERNAL REVENUE SERVICE, ANNUAL REPORT 1988, at 38-39; 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. 1339, 1340-41 (1974).

24. See I.R.C. § 6213(a) (1994). The other two forums for hearing tax cases are the United States district courts and the United States Claims Court. 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 23, at 452-53 (citing Flora v. United States, 357 U.S. 63, 69-76 (1958), reh’g granted, 360 U.S. 922, aff’d, 362 U.S. 145 (1960)).

25. 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.” Newton, supra note 23, at 612.

26. See, e.g., F. Brook Voght, Amended Tax Court Rules Reflect New Jurisdiction and Goal of Increased Efficiency, 73 J. TAX’N 404 (1990). A primary reason for any amendment to the Tax Court’s Rules of Practice and Procedure (Rules) is the need to implement “new procedural features that [are] considered necessary to judicial economy, procedural flexibility, and more effective case development.” Id.

27. 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.” U.S.T.C. R. PRAC. & PRO. 70(a), in 60 T.C. 1057, 1097 (1973).

28. I.R.C. § 7453 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 id. at 1097-1103.
controversy. 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. As a result, the decisions have created an inherent conflict which ultimately impedes the fulfillment of the Tax Court’s mission. It is thus easy to understand why Professor Hyman believes that procedural intersections of epic proportions loom in this arena.

Because the administrative summons encompasses a greater scope of material (both parties and information) than is provided under the Tax Court Rules, a taxpayer will generally seek a protective order to block use of the summoned information on the grounds that the IRS is abusing the Tax Court’s discovery process by circumventing the court’s more restrictive discovery rules.

29. See Hyman, supra note 3, at 1408; see also Michael I. Saltzman, IRS Practice and Procedure § 9.04[2][f], at 9-31 to 9-32 (2d ed. 1991). Saltzman 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 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.

Id. (footnotes omitted).

30. Several amendments to the Rules, mostly applying to the use of depositions, have broadened discovery options. 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.

Official Tax Court Notes, Rule 75, 93 T.C. 910, 910-11 (1989); see also Martinez, supra note 2, at 745-50.

31. The taxpayer or IRS 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. 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:
The clash between the Tax Court's discovery rules and the IRS's administrative summons power was addressed in both *Universal Manufacturing Co. v. Commissioner*\(^{32}\) and *Westreco, Inc. v. Commissioner*.\(^{33}\) 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 respondent's [the Service's] ability to use information in the cases before us [the court] which had been previously obtained through the use of administrative summonses because the information developed pursuant to the summonses circumvented our discovery

(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 or 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.

On the other hand, if discovery were broadened, taxpayers may be put on a somewhat even par with the IRS. Newton argues, for example, that because discovery in the Tax Court is more limited than 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 Internal Revenue Service ("IRS"), has the opportunity through the summons and investigative powers of the government to obtain disclosure of information by means unavailable to taxpayers.


32. 93 T.C. 589, 589-91 (1989) (issuing notice of deficiency while criminal investigation still pending). In *Universal*, the Tax Court held that the IRS 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 Tax Court's discovery rules (i.e., third-party nonconsensual depositions). *See id.* at 595.

33. 60 T.C.M. (CCH) 824, 830-33 (1990) (prohibiting an IRS trial attorney from simultaneous participation in Tax Court trial and audit of subsequent years that involved identical issues of 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 nonparties, emphasize informal consultation, and confine discovery to relevant subject matter in the pending case. *See id.* at 833-34. Further, the court foresaw that, by exercising its summons power on different tax years, the IRS could have access to a much wider range of information for use in the docketed case than would be allowed under Rule 70(b). *See id.* at 834.
rules and gave respondent a discovery advantage not enjoyed by the taxpayer."34

However, in *Ash v. Commissioner,*35 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."36 The limitation adopted in *Ash* narrowed the circumstances under which information obtained through the issuance of administrative summonses could be barred from the case.37


[As part of its audit authority, the Service can issue administrative summonses pursuant to section 7602 to a taxpayer or any other person deemed proper to produce records or give testimony. These summonses are under the enforcement jurisdiction of the Federal District Courts. The breadth of an administrative summons is significantly greater than Tax Court discovery, including allowing non-consensual depositions to be taken.]


Thus, if the Service introduces into a Tax Court proceeding information derived from a non-consensual deposition via administrative summons, an obvious tension between Tax Court discovery limitations and Service administrative summonses authority ensues. If the Tax Court allows admission of information derived via administrative summonses, the Service effectively has been allowed to circumvent the Tax Court's discovery limitations, *i.e.*, the general prohibition of non-consensual depositions. This could lead the Service to use information obtained via summons rather than engaging in informal consultation and stipulation of agreed upon facts. Therefore, it is reasonable for the taxpayer to move for a protective order to prevent Service use of information derived from otherwise prohibited depositions in the Tax Court proceeding.

*Id.* at 581-82.

35. 96 T.C. 459 (1991) (upholding summons issued before petition filed with Tax Court). Judge Wright, writing for the court, stated that, "until 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.


37. 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 discovery contained in our Rules. We will do so unless respondent 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
The *Ash* decision thus allows postpetition information obtained via summons to be used in Tax Court proceedings if the IRS shows that it had a sufficient and independent reason (not involving the pending Tax Court case) for issuing the summons. *Ash* effectively adopts an intermediate resolution which limits *Universal* and *Westreco* by focusing the issue 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 because the IRS must be allotted time to prove its independent reasons. In any case, the *Ash* court’s attempt to set guidelines concerning protective orders allows for greater use of the summons even though a Tax Court proceeding has commenced.

This is the current state of the procedural intersection between the broad summons power given to the IRS and the limited discovery rules provided by the Tax Court. In its cases regarding the use of the summons power, the Tax Court has neglected to focus on the realities of the litigation it has been charged to hear. In the same manner, Professor Hyman’s concern with the procedural intersection occurring in the tax context is based upon the proposition that Tax Court litigation is the same as other civil suits. In fact, Tax Court cases present different legal scenarios because of the government’s sovereign power of taxation, the fact that the “playing field” is not level, and the reality that the taxpayer is in possession of the information necessary to determine the correct tax. These factors support the notion that in this context, the procedural rule least restrictive of the government’s exercise of the summons power should apply.

IV. CRITICISM OF PROFESSOR HYMAN’S THESIS

A. The Power to Tax

Professor Hyman indicates that in most other contexts, the more restrictive rules have been chosen because of “sound policy and economic reasons.” He argues that choosing the less restrictive rule “distorts the overall integrity of [a] procedural system without providing any offsetting benefit.” His argument rests on the assumption that those who drafted the procedural rules already considered the viability of the less restrictive rule, and rejected its

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inherent power. We will exercise that power, however, when petitioner can show lack of an independent and sufficient reason for the summons.

*Ash*, 96 T.C. at 471.


39. *Id.*
use. Because of this assumption, Professor Hyman argues that the existence of a less restrictive rule in a second forum should not provide an avenue to circumvent the intent behind the creation of the more restrictive rule.

In the Tax Court context, Professor Hyman's theory breaks down. I argue that for sound policy and economic reasons, the choice of the less restrictive rule (i.e., liberal use of the summons for government discovery) has been made effectively. The main reason for use of the less restrictive rule is that the power to tax is not offset by any correlative right of the taxpayer.

The power of the state to decide and to proscribe the exactings its citizens must pay is among the most fundamental and wide-reaching powers of government. The powerful and fundamental nature of the power to tax has been widely acknowledged by the Supreme Court throughout its history. It is a seemingly unlimited power, befitting the description of the government as a "taxing machine." Cicero aptly stated that "[t]axes are the sinews of the state."

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40. See id.
41. See id. at 1428-29. In this context it is less restrictive with respect to government exercise of the summons power.
42. See CAROLYN WEBBER & AARON WILDAVSKY, A HISTORY OF TAXATION AND EXPENDITURE IN THE WESTERN WORLD 38-147 (1986) (outlining ancient systems of taxation); Richard Epstein, Taxation in a Lockean World, 4 J. SOC. PHIL. & POL'Y 49 (1986) ("One constant refrain of political and constitutional history treats taxation as an inherent and indispensable power of the sovereign."); Leo P. Martinez, Taxes, Morals and Legitimacy, 1994 BYU L. REV. 521, 541 n.73 (noting that the power to tax is an inherent and omnipresent aspect of government).
43. See, e.g., Barclays Bank PLC v. Franchise Tax Bd. of Cal., 512 U.S. 298, 329-31 (1994) (holding that rights of taxpayer/citizens must yield to "tax uniformity" and "state autonomy" despite the fact that some taxpayers would be subject to "multiple international taxation"); Nordlinger v. Hahn, 505 U.S. 1, 17-18 (1992) (stating that, even though tax unfairly burdened some taxpayers, judicial intervention is not warranted where tax furthers a legitimate state interest); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585 (1983) (finding differential taxation power to be a "powerful weapon against the taxpayer selected"); Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 663 (1874) ("The power to tax is . . . the most pervading of all the powers of government . . ."); Nichols v. United States, 74 U.S. (10 Wall.) 122, 129 (1868) ("The prompt collection of the revenue, and its faithful application, is one of the most vital duties of government."); Society for Savings v. Coite, 73 U.S. (6 Wall.) 594, 606 (1867) (finding taxation power "resides in [the] government as a part of itself" and is "never presumed to be relinquished"); Providence Bank v. Billings & Pittman, 29 U.S. (4 Pet.) 514, 563 (1830) (stating that the power to tax "operates on all the persons and property belonging to the body politic" and "has its foundation in society itself"); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819) ("[T]he power to tax involves the power to destroy.").
44. 2 THOMAS CARLYLE, SIGNS OF THE TIMES, IN CRITICAL AND MISCELLANEOUS ESSAYS 56 (1904); see also People v. Adirondack Ry. Co., 54 N.E. 689, 692 (N.Y. 1899), aff'd, 176 U.S. 335 (1900):
Although there are some limitations to the government's power to tax, the power has been consistently upheld as a necessary element of our society. Even when the Supreme Court has placed limitations on the government's taxing power, it has provided exceptions to the limitations. For example, a tax is not valid merely as a deterrent to an activity, yet if it does result in the deterrence of an activity, it will still

The power of taxation [and other powers] underlie the constitution and rest upon necessity, because there can be no effective government without them. They are not conferred by the constitution, but exist because the state exists. They are . . . rights inherent in the state as sovereign. . . . The state cannot surrender them . . . . They are as enduring and indestructible as the state itself.

Id.


Cicero believed nothing was more noble than the law of the State. Laws were “originally made for the security of the people, the preservation of the state, for the peace and happiness of human life” and taxes helped to achieve that level of security. See HUNTINGTON CAIRNS, LEGAL PHILOSOPHY FROM PLATO TO HEGEL 142 (1949). Holmes and Brandeis expressed a similar thought: “Taxes are what we pay for civilized society.” Compania de Tobacos v. Collector, 275 U.S. 87, 100 (1927) (Holmes, Brandeis, J.J., dissenting). The United States Supreme Court in 1934 also declared that “taxes are the life-blood of government.” Bull v. United States, 295 U.S. 247, 259 (1935).

46. Notwithstanding a consistent theme of unbridled government power to tax, the power is subject to some limitations. A basic theme is that taxes are for the public or common good. A tax must be levied for a public purpose and not merely to benefit private enterprise or to “build up private fortunes.” Loan Ass’n, 87 U.S. at 664 (striking a tax that was levied to create a city fund for the purpose of donating money to a private manufacturer to encourage the establishment of its business in Topeka). The Court recognized that, of all the “powers conferred upon government[,] that of taxation is the most liable to abuse.” Id. at 663. The use of the power to tax by Topeka in this instance was “robbery” because, although the city claimed to support the public good with the tax by encouraging the growth of business, the benefit vested too remotely. See id.

The government’s power to tax is further limited by fairness or equity. See Martinez, supra note 42, at 549 n.103. Taxes must be levied in a nondiscriminatory manner so that the same tax burden will rest evenly among those in similar circumstances. See Harper v. Virginia Dep’t. of Taxation, 509 U.S. 86, 94-101 (1993) (holding that the Court’s interpretation of federal law and its retroactive application of the rule must be applied by the state, and the state’s selective application of the new rule violates the principle of treating similarly situated parties in a like manner), vacated, Lewy v. Virginia Dep’t of Taxation, 509 U.S. 916 (1993).

Finally, the power to tax can be circumscribed if it serves a deterrent purpose seeking to completely bar an activity, if it is used exclusively to punish, or if it is harsh and oppressive. As will be developed, even in the face of these articulated limitations, the Supreme Court is still hesitant to declare a tax unconstitutional unless it is a gross manipulation of the power to tax.
be upheld if another purpose for the tax can be articulated.\textsuperscript{47} Out of deference for the taxing authority, the Supreme Court will often search for means to label the tax a “revenue generation” operation, thereby making deterrence merely a side effect of the tax.\textsuperscript{48} Even a tax with a particularly steep rate, or an “obvious deterrent purpose” does not necessarily evince an inappropriate use of the power to tax.\textsuperscript{49} If the Court can determine that the main purpose of the tax is revenue generation, the high rate and the deterrence will likely be disregarded.

According to Professor Hyman, procedural intersections create an inevitable risk of circumvention of the more restrictive rule through the use of the second, less restrictive, forum.\textsuperscript{50} He believes that the risk of circumvention requires a consistent application of the procedural rules of the more restrictive forum as a matter of policy, economics, and philosophy.\textsuperscript{51} I don’t disagree with the proposition generally, but in the Tax Court context it does not account for the government’s inherent authority to levy and collect taxes. It is obvious from the extreme reluctance of the Supreme Court to second-guess the taxing authorities that taxes play a vital role in the existence and functioning of the government. For the sake of preserving this vital power to tax and the government’s financial well-being, the Court appears to be willing to defer to sovereign taxation powers and to sacrifice taxpayer concepts of fairness or fair play, as well as to allow the government to shift its tax burdens and benefits in ways clearly discriminatory and unfair. The theme of deference to legislative power is a constant, and carries through the Court’s opinions regarding the government’s exercise of the administrative summons power as well. The government’s one-sided power in all other areas in the tax context changes the significance of the procedural intersection present at the Tax Court level.


\textsuperscript{48} According to dissenting Chief Justice Rehnquist, “[t]axes are customarily enacted to raise revenue to support the costs of government” but also “[m]ay be enacted to deter or even suppress the taxed activity.” Kurth Ranch, 511 U.S. at 786-88 (Rehnquist, C.J., dissenting).

\textsuperscript{49} Id. at 1946; see also Sonzinsky v. United States, 300 U.S. 506, 513 (1937) (finding that every tax in some way regulates an activity and “[t]o some extent . . . interposes an economic impediment to the activity taxed as compared with others not taxed”).

\textsuperscript{50} See Hyman, supra note 3, at 1392-93.

\textsuperscript{51} See id. at 1394.
B. The Myth of the Level Playing Field

Professor Hyman’s position is that the arguments in favor of the less restrictive rule are actually based upon “a series of fundamental misconceptions and incorrect assumptions.”52 To protect the integrity of the forum and to create a level playing field for both parties, he believes the more restrictive Tax Court rules should prevail.53 This idea is simply the flip side of his observation that, although there are limitations and restrictions to the general rule, courts have “consistently” ensured that “a party’s conduct is controlled by the more restrictive rule when there is any indication of circumvention of that rule, particularly when there is no constitutional or statutory right to that result.”54

As in the preceding discussion, it is the sovereign who is exercising a legitimate function of government, so that we must examine whether the taxpayer retains any significant rights which might justify the “level playing field” approach underlying Professor Hyman’s theory.55 If I am correct in my belief that the sovereign’s power to tax is nearly unlimited, then the argument favoring any rule that is more restrictive of the summons power would lose force.

The idea of a level playing field is a myth because of the taxing power. If the sovereign is omnipotent and the taxing scheme is subject to minimal scrutiny, the means of taxation and the mechanism by which the tax is levied and enforced must also be sacrosanct. This is easily demonstrated in three different but related aspects of tax collection. An examination of the presumption of correctness of IRS positions, the Supreme Court’s summons-power jurisprudence, and the burden of proof in tax cases reveals (perhaps sadly, to this taxpayer) that taxpayers are accorded few rights.

A presumption of correctness arises in connection with the IRS’s determination of deficiency, and the presumption remains until the taxpayer produces competent and relevant evidence to support his or her position.56 When the taxpayer comes forward with such evidence,

52. Id. at 1430. In this context, the less restrictive rule would allow the taxpayer discovery rights commensurate with the government’s discovery options.
53. See id. at 1426-36.
54. Id. at 1404.
55. See id. at 1432-35.
56. See Welch v. Helvering, 290 U.S. 111, 115 (1933); Niles Bement Pond Co. v. United States, 281 U.S. 357, 361 (1930); Cohen v. Commissioner, 266 F.2d 5, 11 (9th Cir. 1959); A. & A. Tool & Supply Co. v. Commissioner, 182 F.2d 300, 305 (10th Cir. 1950); Dairy Home Co. v. United States, 180 F. Supp. 92, 95 (D. Minn. 1960).
the presumption vanishes and the case must be decided upon the
evidence presented. See Barnes v. Commission, 408 F.2d 65, 69 (7th Cir. 1969); Compton v. United
States, 334 F.2d 212, 216 (4th Cir. 1964); A. & A. Tool, 182 F.2d at 304.
Government policy and the need for revenue are the reasons why
the determination is presumed correct. This presumption facilitates
revenue collection. The courts have consistently held that the right of
the United States to collect its internal revenue by summary
administrative proceedings has long been settled because property
rights must yield provisionally to governmental need.

Similarly, it is not surprising that the administrative summons is a
powerful investigatory tool employed by the IRS to determine
potential tax violations. With § 7602 of the Internal Revenue Code
(Code), Congress has given the IRS extremely broad authority to reach
tax information pertinent to taxpayers. The administrative summons

57. See Barnes v. Commission, 408 F.2d 65, 69 (7th Cir. 1969); Compton v. United
States, 334 F.2d 212, 216 (4th Cir. 1964); A. & A. Tool, 182 F.2d at 304.
58. See United States v. Rexach, 482 F.2d 10, 16 (1st Cir. 1973); 9 WIGMORE ON
59. As Judge Hand held: "[A] plaintiff, seeking an affirmative judgment measured
in dollars, must prove how much is due. His claim is for money paid and he must show that
every dollar he recovers is unjustly withheld." Taylor v. Commissioner, 70 F.2d 619, 621
(2d Cir.), aff'd sub nom. Helvering v. Taylor, 293 U.S. 507 (1934); see also Phillips v.
Commissioner, 283 U.S. 589, 595 (1931); Bull v. United States, 295 U.S. 247, 259-60
(1930) ("[T]axes are the life-blood of government, and their prompt and certain availability
an imperious need . . . . Thus the usual procedure for the recovery of debts is reversed in the
field of taxation. Payment precedes defense, and the burden of proof, normally on the
claimant, is shifted to the taxpayer."); Champ Spring Co. v. United States, 47 F.2d 1, 3 (8th
Cir. 1931) ("The issue in this case is: To whom does the money in equity, justice, and good
conscience belong? If the plaintiff fails to show that it has a superior right to that of the
defendant, it cannot recover."); Church of Scientology v. Commissioner, 83 T.C. 381, 468
(1984) ("[T]he Government’s burdens in collecting the revenue must be few and light.").
60. I.R.C. § 7602(a) provides:
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
reflects Congress's desire to allow the federal government, through the IRS, wide, almost unfettered, power to gather information for the purpose of tax collection.

Although the legislative history of § 7602 does not provide much insight into the scope of power Congress intended, the Supreme Court has interpreted the Code in a manner consistent with a broad power to tax. Thus, a taxpayer challenge to the summons power faces a difficult test.

In United States v. Powell, the Court set forth the broad power it saw as necessary to the efficient and sure collection of taxes. According to the Powell mandate, the federal government was spared the obligation of establishing probable cause and the taxpayer had to show that enforcement of the summons would be an abuse of process. Furthermore, an investigatory summons could be issued on the basis of an agent’s good faith belief in a tax violation, and the

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

I.R.C. § 7602(a) (1994).


62. "[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." Euge, 444 U.S. at 711. The interpretation techniques employed by the Court in Euge indicate the Court’s desire to avoid restricting the summons power. In 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”; (2) analogy to the scope of a testimonial summons at common law; (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; and (4) reference to the broad powers granted to the IRS throughout the Code. See id. at 711-14, 716, n.9.


64. See Powell, 379 U.S. at 54. The Court rejected the argument that it was necessary for the IRS to show probable cause, because to do so, “might seriously hamper the Commissioner in carrying out investigations he thinks warranted ... and because the legislative history of § 7603(b) indicates that no severe restriction was intended.” Id.

The Court laid out the principles that would guide it in the determination of the appropriate government use of the summons. The Court specifically provided: (1) that an investigation must have a legitimate purpose, (2) that the inquiry be relevant to the purpose, (3) that the information not be otherwise already within the government’s possession, and (4) that the administrative steps in the Code be followed. See id. at 57-58; Kenderdine, supra note 63, at 76-77.
summons would be enforced as long as the IRS made a prima facie showing of good faith.\textsuperscript{65} The dilution of the probable cause requirement, 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.\textsuperscript{66} In short, the taxpayer is left with little

\begin{quote}
65. \textit{See Powell, 379 U.S. at 58.} To challenge the validity of the IRS summons, the summoned party must rebut one of the elements of the \textit{Powell} test. \textit{See id.}

66. \textit{See United States v. Zolin, 491 U.S. 554, 565-75 (1989)} (holding in-camera review may be used to determine whether allegedly privileged attorney-client communications fall within the crime-fraud exception); \textit{United States v. Arthur Young & Co., 465 U.S. 805, 813-14 (1984)} (holding summons for accountant’s work papers enforceable; policy considerations weigh in favor of full disclosure of all relevant tax liability); \textit{United States v. Miller, 425 U.S. 435, 445-46 (1976)} (finding taxpayer has no legitimate expectation of privacy in bank records); \textit{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); \textit{Powell, 379 U.S. at 58} (nullifying the requirement that the IRS establish probable cause in tax-fraud investigations); \textit{In re Shapiro, 381 F. Supp. 21, 22 (N.D. Ill. 1974)} (finding attorney-client privilege not properly invoked when summons is issued to attorney to produce client’s tax records which are in attorney’s possession); \textbf{SALTZMAN, supra} note 29, ¶ 13.09[3], at 13-79.

In Fifth Amendment privilege 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. “The notion that the Fifth Amendment protects the privacy of papers originated in \textit{Boyd v. United States}, 116 U.S. 616, 630 (1886), but our decision in \textit{Fisher v. United States}, 425 U.S. 391 (1976), sounded the death knell for \textit{Boyd}.” \textit{United States v. Doe, 465 U.S. 605, 618 (1984)} (O’Connor, J., concurring). In \textit{Fisher}, the summons was issued to the taxpayers’ attorney who was in possession of the taxpayers’ individual personal return records created by an accountant. \textit{Fisher, 425 U.S. at 394}. The Court held that the contents of business records are ordinarily not privileged because their creation is voluntary. 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. . . .

\begin{quote}
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.
\textit{Id.} at 409-11.

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.” \textit{Id.} at 414. However, the \textit{Fisher} decision narrows the use of the Fifth Amendment privilege to cases in which the taxpayer can prove both that production of information is testimonial and incriminating.
\end{quote}
protection against the summons and with little policy to support more protection.

In the same way, the reasons underlying the placement of the burden of proof on taxpayers support the idea that the playing field is anything but level. Many cases suggest the taxpayer should bear the burden of proof simply because the taxpayer is the plaintiff. However, in the vast number of cases, nonpayment of tax is a result of the taxpayer’s deliberate or negligent failure to meet the statutory obligation to pay. The objective evidence in such cases generally is within the taxpayer’s possession. Certainly, with the exception of filed returns and information provided by the taxpayer, the IRS is in a poor position from which to establish an affirmative case. It follows that the common-law allocation of the burden of proof in such situations is on the party in possession of the evidence. Indeed, the Tax Court has

In *United States v. Doe*, 465 U.S. 605 (1984), the question left open in *Fisher* was addressed—namely, whether the Fifth Amendment protected the contents of a sole proprietor’s tax records in his personal possession. The Court held that enforcement of the summons was not compulsion to self-incriminating testimony where preparation of the records had been voluntary, and, as a result, the summons did not impinge on Fifth Amendment rights. *See id.* at 611-12. In contrast to individuals and sole proprietors, custodians of corporate records cannot resist the production of documents on Fifth Amendment grounds. In *Braswell v. United States*, 487 U.S. 99, 102, 105 (1988), the Court upheld *Bellis v. United States*, 417 U.S. 85, 88 (1974), ruling that artificial entities are not protected by the Fifth Amendment because corporate books and records are not personal to an individual. However, if the production involved testimonial self-incrimination by compelling the taxpayer to admit the records existed, were in his possession, or were authentic, the privilege could be invoked. *See Doe*, 465 U.S. at 614.


“Since the action for refund of taxes is in the nature of a common law action for money had and received and is governed by equitable principles, the burden of proof is upon the taxpayer to prove not only that the determination of the tax was wrong, but to produce evidence from which another and proper determination could be made.”

David v. Phinney, 350 F.2d 371, 376 (5th Cir. 1965) (quoting 10 MERTENS LAW OF FEDERAL INCOME TAXATION § 58.035, at 98-99 (1965)).


The adoption of the taxpayer burden of proof rules in the Tax Court also have a common-law derivation. In 1925, during hearings before the House of Representatives, one of the original appointees of the Board of Tax Appeals, James S. Ivens, explained the board's
suggested that Rule 142 (allocating the burden of proof to taxpayers) is based in part on the taxpayer’s unique access to knowledge relevant in his given case.\textsuperscript{70}

Professor Hyman is not alone in advocating a limitation of the administrative summons power. Like most, he invokes the issue of fairness and advances the proposition that Tax Court litigation should be played on a level playing field.\textsuperscript{71} To be sure, the level playing field theory has surface appeal. Notions of fair play suggest that combatants in a fair fight ought to be similarly armed. The problem is that this fight is anything but fair; it is weighted heavily in favor of the sovereign.

These ideas have prompted some to advocate an amendment of § 7602 to prohibit use of a postpetition summons with respect to the same party and tax year, and/or allowing greater access to nonconsensual depositions by revising and expanding Rule 75.\textsuperscript{72} Otherwise, according to this approach, the IRS’s continued use of the rationale adopting a rule imposing the burden of proof on taxpayers. First, Ivins stated that the Board of Tax Appeals was following the practice of all courts since the beginning of civilization that the moving party, i.e., the plaintiff or the initiator of an action, must take the burden of going forward. \textit{See Revenue Revision 1925: Hearings before the House Comm. on Ways and Means}, 69th Cong. 907, 908-09 (1925). Second, Ivins stated that if the Board didn’t have such a rule the Commissioner couldn’t sustain its burden of proof because it is the taxpayer who is in possession of the relevant evidence. \textit{See id.}

Interestingly, the hearings considered the Internal Revenue Service’s use of the power of subpoena to obtain relevant evidence to satisfy its burden of proof if the taxpayer were relieved of the burden. Ivins’s response is telling, in that he stated that use of the subpoena power would not work because “there are quite a number of taxpayers who do not keep any comprehensible books. They keep nothing but a check book and in that check book there may be reflected deposits in the bank which amount to two or three times the taxpayer’s income.” \textit{Id.} at 908.

70. \textit{See} Church of Scientology v. Commissioner, 83 T.C. 381, 468 (1984); S & H Inc. v. Commissioner, 78 T.C. 234, 242 (1982); Goodmon v. Commissioner, 761 F.2d 1522, 1524 (11th Cir. 1985); Rager v. Commissioner, 775 F.2d 1081, 1083 (9th Cir. 1985); Hawkins v. Commissioner, 713 F.2d 347, 353 (8th Cir. 1983).

The Second Circuit held in \textit{Golbert v. Renegotiation Board}, 254 F.2d 416, 417 (2d Cir. 1958), that unless the rule was arbitrary or capricious, the court had to abide by it. According to the \textit{Golbert} court, “[t]he Congressional history of the Tax Court remedy is in full accord with the view that Congress intended the Tax Court to provide for rules governing the burden of proof. . . . The determination that the burden is upon the petitioner is not contrary to Congressional intent.” \textit{Id.}


72. \textit{See generally} Keifer, \textit{ supra} note 34, at 600-03 (recommending that an amendment to § 7602 should be implemented to prohibit service of an administrative summary after the filing of a petition with the court).
summons could provide it with information in Tax Court proceedings that is unavailable to the IRS through the court's narrower discovery options.\textsuperscript{73} Although supported by some, this amendment has not been adopted, and therefore, the IRS by statute retains its broad summons power.

As appealing as the level playing field argument is, it is irrelevant to, and should play no role in, the argument over the limits of the summons power. It shifts the focus of the analysis to what is fair, rather than to whether the Tax Court may legitimately interfere with the broad power granted by Congress as shaped by the United States Supreme Court. This Article does not suggest that a playing field in which the IRS has unfettered use of the summons power is level.\textsuperscript{74} Indeed, the courts recognize that the summons is a powerful tool verging on the inquisitorial.\textsuperscript{75} 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, validates the intrusive and searching nature of the summons.\textsuperscript{76} While the wisdom 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.\textsuperscript{77}

Beyond the foregoing, the most cursory examination of the level playing field theory reveals that it rests on shaky ground. Its primary flaw is that it ignores the fact that in tax litigation it is the taxpayer

\textsuperscript{73} See id. One commentator goes so far as to suggest that the level playing field is of constitutional dimension. Stein, supra note 71, at 503 (stating that “[k]eeping the playing field level is a constitutional imperative”).

\textsuperscript{74} This view is reflected in Judge Chabot’s rejection of the level playing field theory in Ash. See Ash v. Commissioner, 96 T.C. 459, 473-74 (1991) (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’s policy but, rather, because the Congress has exercised its constitutional authority and we must follow it.” Id. at 476.


\textsuperscript{76} See infra note 86.

\textsuperscript{77} A review of the United States Supreme Court decisions cited throughout this Article indicates 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 IRS a broad scope of power. See, e.g., United States v. Eule, 444 U.S. 707, 716-19 (1980).
who 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 obtain relevant information. 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 or available to her.

Moreover, it is illogical that 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 subjects herself to the full arsenal of the summons power. For all of these reasons, the level playing field theory is unsupportable.

C. The Limits of Theory

The litigation of any tax dispute, whether in the federal district court, the Claims Court, or the Tax Court, has as its ultimate goal the collection of revenue for the sovereign. All are civil proceedings which, as Professor Hyman observes, have unique discovery tailored to each forum. My view is that because all proceed to the same goal, the discovery allowed in each should be similar. The Tax Court should not enforce a more restrictive discovery mechanism than the other courts. There should also remain a careful distinction in the discovery treatment of civil tax proceedings and criminal tax proceedings. In the latter arena, Professor Hyman's approach should be applied. It is this realm that provides a good example of explicit recognition of the notion of a procedural intersection.

78. 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 Leo P. Martinez, Tax Collection and Populist Rhetoric: Shifting the Burden of Proof in Tax Cases, 39 Hastings L.J. 239, 241-43 (1988).

79. As I noted in my earlier piece, I concede 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. See Martinez, supra note 2, at 754 n.107. Similarly, a taxpayer might seek to discover the identity of those who have been summonsed as third-party record keepers. See Stein, supra note 71, at 505 n.38.

80. See PAA Management, Ltd., 962 F.2d at 218; United States v. Gimbel, 782 F.2d 89, 93 (7th Cir. 1986).

81. Because the greatest disparity occurs between the Tax Court and the district court, I will only address that aspect of Professor Hyman's procedural intersection.
To understand my distinction between criminal and civil tax proceedings, an explanation of how the discovery operates in the criminal tax context is warranted. Prior to 1982, it was common tax-litigation practice for taxpayers to challenge "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." If the taxpayer could prove that the investigation was being conducted solely for criminal purposes, the IRS would be unable to meet the legitimate-purpose requirement of the good faith test. As it turns out, the cases which attempted to clarify the limits of the improper-purpose defense widened, in effect, the purpose for which a summons could be used.

In 1982, § 7602(b) was added to the Internal Revenue Code, explicitly confirming the authority of the IRS 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 § 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, under current law, a summons is 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. In fact, it is difficult to imagine what form a successful taxpayer challenge would take when

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82. Laura S. Wertheimer, Comment, The Institutional Bad Faith Defenses to the Enforcement of IRS Summons, 80 Colum. L. Rev. 621, 623 (1980); see also Saltzman, supra note 29, ¶ 13.04[1], at 13-38 (restating the procedure for objecting to summons first established in Reisman v. Caplin, 375 U.S. 440 (1964)).

83. See United States v. LaSalle Nat'l Bank, 437 U.S. 298, 316 (1978) (finding good faith of the IRS as an institution is determinative rather than the agent's personal intent); Donaldson v. United States, 400 U.S. 517, 536 (1971) (holding summons permissible where criminal prosecution is probable if "issued in good faith and prior to recommendation for criminal prosecution").

84. I.R.C. § 7602(b) (1994).

85. See I.R.C. § 7602(c).


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." Senate Finance Committee Report on the Tax Equity and Fiscal Responsibility Act of 1982, 16 Tax Notes 222, 248 (1982).
the IRS is authorized to use a summons until the time of referral to the Justice Department.\textsuperscript{87}

Professor Hyman's procedural intersection theory lends itself well to the civil/criminal distinction in tax collection. Clearly, at the point when a taxpayer comes within the zone of constitutional protection, that is, after the case is referred to the Justice Department, the restriction of government discovery seems appropriate. The congressional response, as set forth above, has been to sharply define the line demarcating permissible and impermissible government use of the summons power. The government's right to use the summons in criminal proceedings is theoretically curtailed in line with Professor Hyman's thesis.

Although I agree with Professor Hyman that the more restrictive rule should consistently apply in criminal proceedings, actual practice and experience have departed from Professor Hyman's ideal. Since it has now been established that a legitimate purpose can include investigation into criminal offenses, the taxpayer has no real protection until the referral has been made. When a challenge is made by the taxpayer, the IRS need only show it issued the summons in good faith. The taxpayer can challenge the summons on constitutional grounds; however, these constitutional rights and privileges have been narrowly construed by the courts in the context of challenges to the summons power, and an attack is usually unsuccessful.\textsuperscript{88}

The refusal to apply the more restrictive procedural rule in the criminal tax forum is indicative of how the procedural intersection occurring in the civil tax forum should be handled. In Ash v. Commissioner, the Tax Court stated that the purpose of its own procedures is "to ascertain facts which have a direct bearing on the issues before the Court."\textsuperscript{89} The only issue before the court, however, is determination of the correct amount of tax owed by the taxpayer. Thus, the stated purpose of the court does not suffer from admitting the summoned information to the tax determination proceeding. To the contrary, resolution of the issue is enhanced by the inclusion of summoned information, because it would presumably facilitate determination of the correct tax.

\textsuperscript{87} See United States v. Powell, 379 U.S. 48, 57-59 (1964). In Powell the Court speculated that a taxpayer challenge could be upheld if the purpose of the summons was to harass or otherwise pressure the taxpayer to settle a collateral dispute. See id. at 58-60.

\textsuperscript{88} Since the codification of $7602(b), safeguards that were normally in place when criminal prosecutions were imminent have been diluted. See supra note 66.

\textsuperscript{89} 96 T.C. 459, 463 (1991).
As mentioned earlier, Professor Hyman concludes that, as a general rule, the “paradox” created by every procedural intersection should be resolved by choosing the more restrictive rule when there is circumvention of that rule or undue risk of the same.\footnote{See Hyman, supra note 3, at 1453.} Although in most scenarios I would concur with him, in the tax context such generalizations cannot be maintained, if for no other reason than that all civil tax forums exist to collect tax. Given the reticence of the courts to accede to the demands of the more restrictive rule in the procedural intersection present in the criminal tax proceeding—in a context that seems ripe for application of Professor Hyman’s theory—it is unlikely that such a theory can hold sway when the point of contention is merely discovery options in different civil contexts.

V. CONCLUSION

Professor Hyman’s theory is elegant but incorrectly applied in the tax context. While the Supreme Court must uphold the power to tax because of the vital role taxes play in the existence and functioning of the government, this deference to the taxation power creates a structural problem for the Tax Court which has the goal of informal resolution of disputes. As a seemingly paradoxical result, the very institution that is designed to facilitate tax collection is hampered by a discovery tool that seems to threaten this salutary purpose.

While I am in general agreement with the principles articulated by Professor Hyman, I disagree with his application of the principles in the tax arena. In the tax context, the sovereign is not attempting to circumvent the procedural rules set up by the Tax Court, rather it is the taxpayer trying to circumvent the sovereign’s authority by asserting the inadmissibility of evidence obtained pursuant to the validly exercised summons power.

The problem of judging in the Tax Court is not simply one of mere application of a “systematic and coherent account of law and its relation to morality and society.”\footnote{Stanley Fish, Dennis Martinez and the Uses of Theory, 96 Yale L.J. 1773, 1785 (1987).} Tax Court judges must judge in a context that recognizes they are in a continuing, seamless enterprise.\footnote{See id. at 1787 (citing RONALD DWORKIN, How Law is Like Literature, in A Matter of Principle 146, 159 (1985)).} To make the system “coherent,” the Tax Court must recognize the
power that the sovereign wields in the taxing realm, and ultimately Professor Hyman’s theory must yield as well.

The Supreme Court’s view of tax collection is pragmatic. It seeks to protect the government’s power to tax by setting extremely high thresholds for striking a tax as unconstitutional and by narrowly construing any claims that the sovereign has abandoned its powers of taxation. Accordingly, matters of process and collection share this single-minded imperative of self-preservation. To say otherwise erodes the precedent clearly articulated for decades by the Supreme Court. It is for these reasons that Professor Hyman’s theory is inapplicable in the Tax Court context. It is also for these reasons that I am unable to agree with his call for consistent application of the more restrictive procedural rule in the tax arena. Consistency does not override the need for logical application.