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# THE ENFORCEMENT OF IRS SUMMONSES AND SECTION 7609

MADLINE TUSA<sup>†</sup>

## INTRODUCTION

When Thomas More wrote of his version of Utopia, he envisioned a world in which “all laws are promulgated for this end, that every man may know his duty; and therefore the plainest and most obvious sense of the words is that which ought be put upon them.”<sup>1</sup> Of course, More’s world did not have the Internal Revenue Service (“IRS”) or the Internal Revenue Code (the “Code”). The taxpayer interest in avoiding burdensome intrusion and the IRS interest in obtaining necessary information has made a plain interpretation of the tax code infeasible. This struggle, however, is nothing new.<sup>2</sup> History has revealed that the dominance of each interest has shifted based on societal need: In times of trouble, the need for revenue takes over; in calmer times, taxpayer interests are given more weight.<sup>3</sup> Which interest has prominence at any given time “affects legislative, regulatory, and judicial actions; it implicates not just substantive rules of tax liability and tax rates but also styles of statutory interpretation and the rules and devices of tax

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<sup>1</sup> SIR THOMAS MORE, *UTOPIA* 83 (The Columbian Publishing Co. 1891) (1516).

<sup>2</sup> Steve R. Johnson, *Reforming Federal Tax Litigation: An Agenda*, 41 FLA. ST. U. L. REV. 205, 205–206 (2013) (comparing the struggle to balance the “facilitation of revenue collection and fairness to taxpayers” to an old tale in which a red dragon and a white dragon fight perpetually for dominance beneath the earth’s surface, causing the ground to rumble and making any construction thereon impossible). The IRS is not the only administrative agency struggling to balance individual and agency interests. See *SEC v. Jerry T. O’Brien, Inc.*, 467 U.S. 735, 736 (1984) (recognizing the Securities and Exchange Commission’s (“SEC”) interest in preventing targets of SEC investigations from destroying documents, intimidating witnesses, and hiding evidence).

<sup>3</sup> Johnson, *supra* note 2, at 206.

procedure.”<sup>4</sup> The United States Supreme Court’s decision in *United States v. Powell* is an example of an attempt to balance these interests.<sup>5</sup>

The IRS, part of the United States Department of the Treasury, is interested in ensuring that citizens meet their tax obligations.<sup>6</sup> In fact, the IRS is among “the world’s most efficient tax administrators.”<sup>7</sup> The IRS is so efficient partly because of its broad statutory authority.<sup>8</sup> Part of that power includes the ability to use summonses to determine taxpayer liability.<sup>9</sup> The summonses, however, are not self-enforcing.<sup>10</sup> Thus, if a party ignores or refuses to comply with a summons, the IRS must bring a proceeding to have it enforced.<sup>11</sup> At such a proceeding, a taxpayer may contest the summons on several grounds, but to do so successfully requires satisfying an extremely high burden.<sup>12</sup>

One of the ways a taxpayer may contest a summons enforcement is to claim that the IRS did not follow proper “administrative steps” when it issued late notice of a summons, violating Section 7609(a) of the Code.<sup>13</sup> Section 7609(a) requires notice to taxpayers when summonses are served on third parties for purposes of an IRS investigation of the taxpayer.<sup>14</sup> However, taxpayers have largely been unsuccessful in using Section 7609 violations to quash summonses.<sup>15</sup> Whether or not this notice requirement is a mandatory step that, if not followed, would be grounds for quashing a summons has split the circuits. The United States Court of Appeals for the Second, Eleventh, and Sixth Circuits have ruled that failure to comply with the notice requirement is not grounds for quashing a summons as long as the “totality of the circumstances” indicates a good faith effort on

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<sup>4</sup> *Id.*

<sup>5</sup> 379 U.S. 48, 57–58 (1964) (creating four factors the government must meet to enforce an administrative summons).

<sup>6</sup> *The Agency, its Mission and Statutory Authority*, IRS.GOV, <https://www.irs.gov/uac/The-Agency-its-Mission-and-Statutory-Authority> (last visited June 5, 2017).

<sup>7</sup> *Id.* In 2015, “the IRS collected almost \$3.3 trillion in revenue,” spending only 35 cents for every \$100 collected. *Id.*

<sup>8</sup> See 26 U.S.C. § 7602(a)(2) (2012).

<sup>9</sup> See *id.* § 7602(a)(3).

<sup>10</sup> *Id.* § 7604(b) (2012).

<sup>11</sup> *Id.*

<sup>12</sup> See *United States v. Powell*, 379 U.S. 48, 57–58 (1964).

<sup>13</sup> See *id.* (requiring administrative agencies to follow all proper “administrative steps” in the enforcement of summonses).

<sup>14</sup> 26 U.S.C. § 7609(a) (2012).

<sup>15</sup> See, e.g., *Adamowicz v. United States*, 531 F.3d 151, 161 (2d Cir. 2008).

behalf of the IRS and a lack of taxpayer prejudice.<sup>16</sup> In contrast, the United States Court of Appeals for the Tenth Circuit ruled that the language of the statute makes notice of a third-party summons a mandatory requirement, and therefore failure to strictly comply with the statute will be grounds to quash a summons.<sup>17</sup>

The circuit courts adopting the totality of the circumstances approach based their conclusions on a balancing of competing interests.<sup>18</sup> On one hand, forcing the IRS to reissue summonses because of improper notice would use up valuable IRS resources only to end up in the same place.<sup>19</sup> Further, in a system relying on individuals self-reporting, the IRS's ability to obtain information is a "crucial backstop."<sup>20</sup> The *Powell* decision works to reinforce that backstop by "reduc[ing] informational asymmetry between the parties, so that administrative and judicial determinations on the merits can be made on something approaching a level playing field."<sup>21</sup>

On the other hand, the Code takes taxpayer interests into consideration. First, constraining the IRS's ability to get information "would 'enable 'dishonest persons to escape taxation, thus shifting heavier burdens to honest taxpayers.'"<sup>22</sup> Second, if a taxpayer believes a third-party summons was improperly issued, she has a right to initiate a proceeding to quash the summons.<sup>23</sup> Once that proceeding has begun, the statutory period of twenty-three days before examination is paused until either the court makes a determination or the taxpayer consents.<sup>24</sup> Taxpayers must strictly comply with the

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<sup>16</sup> See *id.*; *Azis v. U.S. I.R.S.*, 522 F. App'x 770, 777 (11th Cir. 2013); *Cook v. United States*, 104 F.3d 886, 889 (6th Cir. 1997).

<sup>17</sup> See *Jewell v. United States*, 749 F.3d 1295, 1300–01 (10th Cir. 2014).

<sup>18</sup> *Adamowicz*, 531 F.3d at 161; *Azis*, 522 F. App'x at 777; *Cook*, 104 F.3d at 889.

<sup>19</sup> See *Adamowicz*, 531 F.3d at 161.

<sup>20</sup> *United States v. Clarke*, 134 S. Ct. 2361, 2367 (2014).

<sup>21</sup> *Johnson*, *supra* note 2, at 226.

<sup>22</sup> *Clarke*, 134 S. Ct. at 2367 (quoting *United States v. Biscelgia*, 420 U.S. 141, 146 (1975)).

<sup>23</sup> 26 U.S.C. § 7609(b)(2)(A) (2012).

<sup>24</sup> *Id.* § 7609(d)(2). The petition to quash must be filed within a twenty-day period and copies must be mailed to the third party and the IRS. *Id.* § 7609(b)(2)(B).

requirements needed to initiate a proceeding to quash;<sup>25</sup> however, it is important to note that summons enforcement is not a determination on the merits.<sup>26</sup>

This Note argues that because the Tenth Circuit decision ignores important policy concerns dealing with the efficiency of the IRS, failing to comply with notice requirements under Section 7609(a) should be analyzed under the totality of the circumstances standard. Part I discusses the history and development of Section 7609(a) and notice requirements for third-party summonses in IRS investigations. Part II outlines the general requirements for the enforcement of an IRS summons and how Section 7609(a) is analyzed in light of those requirements. Part III discusses the current circuit split and the significance of each respective court's holdings and reasoning. Part IV argues that the Tenth Circuit's approach, while providing more leverage for taxpayers, ignores important policy arguments. It also argues that the Second, Eleventh, and Sixth Circuits' totality of the circumstances approach to Section 7609(a) violations is more appropriate. Finally, it discusses a number of factors that may improve that approach.

#### I. THE DEVELOPMENT OF SECTION 7609 AND THE NOTICE REQUIREMENT

Section 7609 requires the IRS to give notice to taxpayers when it issues third-party subpoenas in an investigation of the taxpayer, and although the requirements of Section 7609 have expanded over time, those changes have coincided with the continuing belief that strict compliance with those requirements is not necessary. Although today the IRS is required to give notice of third-party summonses, this has not been true historically.<sup>27</sup> It was not until the United States Congress

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<sup>25</sup> *Fogelson v. United States*, 579 F. Supp. 573, 574 (D. Kan. 1983) (explaining that even where a taxpayer notified the third party by telephone, making delivery of a hard copy of the petition to quash redundant, "[f]ailure of the complainant to mail by registered or certified mail a copy of the petition to the persons summoned not later than 20 days from the receipt of notice requires dismissal of the complaint . . .").

<sup>26</sup> *See Reisman v. Caplin*, 375 U.S. 440, 450 (1964). Enforcing a summons allows the IRS to obtain information; it does not seal the taxpayer's fate.

<sup>27</sup> J. COMM. ON TAXATION, 94TH CONG., SUMMARY OF THE TAX REFORM ACT OF 1976 61 (Comm. Print 1976).

enacted Section 7609 in 1976 that taxpayers received this right.<sup>28</sup> The version of Section 7609 enacted in 1976 required the IRS to notify a taxpayer of summonses issued to “third-party recordkeeper[s]” so taxpayers had an opportunity to contest the summons.<sup>29</sup> A third-party recordkeeper included: banks, credit unions, consumer reporting agencies, individuals extending credit through credit cards, brokers, lawyers, accountants, barter exchanges, and regulated investment companies.<sup>30</sup> If the party served was not considered a third-party recordkeeper under the statute, the taxpayer would have no right to notice or to intervene in a proceeding to enforce the summons.<sup>31</sup> Further exceptions to the application of Section 7609 included records of a party that relate to its status as such, even though the party was indeed a third-party recordkeeper.<sup>32</sup>

After the enactment of the 1998 IRS Reform Act, the IRS was given greater notice responsibilities.<sup>33</sup> Instead of merely applying to third-party recordkeepers, Section 7609 now applied to almost all third parties served.<sup>34</sup> Congress believed that expanding the notice requirement “will ensure that taxpayers will receive notice and an opportunity to contest any summons issued to a third party in connection with the determination of their tax liability.”<sup>35</sup> The more expansive Section 7609 provides, in relevant part:

If any summons to which this section applies requires the giving of testimony on or relating to, the production of any portion of records made or kept on or relating to, or . . . with respect to, any person (other than the person summoned) who is identified in the summons, then notice of the summons *shall* be given to any person so identified within 3 days of the day on which such

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<sup>28</sup> 26 U.S.C. § 7609(a) (2012).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* § 7609(a)(3).

<sup>31</sup> *See id.* § 7609(a)(1).

<sup>32</sup> *See* United States v. Exxon Co., 450 F. Supp. 472, 477 (D. Md. 1978).

<sup>33</sup> *See* Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105–206 (1998) (codified at 26 U.S.C. § 7609(a) (2012)).

<sup>34</sup> 26 U.S.C. § 7609(a) (2012).

<sup>35</sup> J. COMM. ON TAXATION, 105TH CONG., GENERAL EXPLANATION OF TAX LEGIS. ENACTED IN 1998 (Comm. Print 1998). This is important because the information sought in third-party summonses goes towards the determination of a taxpayer’s tax liability, making notice an important tool for taxpayers to attempt to limit that liability.

service is made, but no later than the 23rd day before the day fixed in the summons as the day upon which such records are to be examined.<sup>36</sup>

Under common rules of statutory interpretation, the “shall” in Section 7609(a) would connote a mandatory requirement.<sup>37</sup> However, even though Section 7609(a) was meant to expand notice requirements and give taxpayers greater opportunity to contest summonses, courts have generally been unwilling to quash a summons based solely on a Section 7609(a) violation, dismissing it as a mere technical error.<sup>38</sup>

Additionally, greater notice requirements were not meant to dilute the power of the IRS to obtain needed information.<sup>39</sup> For example, Section 7609(g) contains situations in which the IRS may seek to be excused from the Section 7609 notice requirements.<sup>40</sup> The IRS may forgo notice to the taxpayer if it presents reasonable cause that notice may lead the taxpayer to attempt to: (1) “conceal, destroy or alter records,” (2) use “intimidation, bribery, or collusion” to “prevent the communication of information,” or (3) “flee to avoid prosecution, testifying, or production of records.”<sup>41</sup> Thus, while the drafters of Section 7609 were concerned with the right of taxpayers to receive notice of and contest a summons, they were also highly aware of the importance of IRS ability to obtain information on tax liability. The case law directly following Section 7609 reflects a continuing struggle to balance these competing interests.

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<sup>36</sup> *Id.* § 7609(a)(1) (2012) (emphasis added).

<sup>37</sup> The canons of statutory interpretation include the employment of “shall” when action is mandatory and “may” when action is permissive. *See* NORMAN J. SINGER & J.D. SHAMBIE SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 21:8, at 172 (7th ed. 2009).

<sup>38</sup> *See Kellogg v. Rossotti*, No. 03CV0055 BTM(LSP), 2003 WL 21224782, at \*4 (S.D. Cal. Apr. 11, 2003) (explaining that strict compliance with the requirements of Section 7609 is not necessary for the IRS to survive a motion to quash if the IRS made a good faith effort to provide timely notice and if the taxpayer was not prejudiced by the late notice).

<sup>39</sup> *Azis v. U.S. I.R.S.*, 522 F. App'x 770, 777 (11th Cir. 2013) (citing *United States v. Bank of Moulton*, 614 F.2d 1063, 1066 (5th Cir. 1980)) (“[N]othing in the language of the Internal Revenue Code mandates the non-enforcement of an IRS summons because of an infringement of the Code.”).

<sup>40</sup> 26 U.S.C. § 7609(g) (2012).

<sup>41</sup> *Id.*

## II. *UNITED STATES V. POWELL*: FOUR REQUIREMENTS TO ENFORCE ADMINISTRATIVE SUMMONSES

In *United States v. Powell*,<sup>42</sup> the United States Supreme Court set an extremely high standard for petitions to quash the enforcement of IRS summonses, tipping the scale in favor of IRS authority over taxpayer rights.<sup>43</sup> There, the IRS summoned Max Powell, the President of William Penn Laundry (“William Penn”), to appear before an IRS agent to give testimony and produce records regarding William Penn’s tax returns.<sup>44</sup> Powell refused to produce the requested documents on the grounds that the IRS had previously examined those records and that the statute of limitations barred examination in this circumstance except in the case of fraud.<sup>45</sup> The IRS then sought the enforcement of the administrative summons for production of the records under Section 7604(b), which allows the IRS to seek court enforcement of a summons when the person served fails to comply with that summons.<sup>46</sup> The IRS claimed that re-examination of the records was needed because of suspected fraud on two years of tax returns.<sup>47</sup> Powell objected, claiming that the IRS must show probable cause for suspecting fraud pursuant to Section 7605(b), which protects taxpayers from “unnecessary examination or investigations.”<sup>48</sup>

The district court disagreed with Powell, holding that probable cause was not necessary to enforce a summons that would permit the re-examination of records.<sup>49</sup> However, the court of appeals reversed the decision, holding that the IRS cannot re-examine records “unless [it] possessed information ‘which might cause a reasonable man to suspect that there has been fraud in the return . . . ; and whether this standard has been met is decided ‘on the basis of the showing made in the normal course of an adversary proceeding.’ ”<sup>50</sup>

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<sup>42</sup> 379 U.S. 48 (1964).

<sup>43</sup> *Id.* at 57–58.

<sup>44</sup> *Id.* at 49.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*; 26 U.S.C. § 7604(b).

<sup>47</sup> *Powell*, 379 U.S. at 50.

<sup>48</sup> *Id.* at 50, 52.

<sup>49</sup> *Id.* at 50.

<sup>50</sup> *Id.* Because Section 7604(b) requires a hearing where “satisfactory proof” should be made, the court of appeals reasoned that it could not determine whether



To settle the issue of whether probable cause was needed to enforce the summons, the Supreme Court granted certiorari in 1964.<sup>51</sup> The Court ultimately reversed the court of appeals, holding that Section 7605(b) did not require a showing of probable cause for suspicion of fraud to enforce an administrative summons brought under Section 7604(b).<sup>52</sup> Rather, to avoid the enforcement of the summons, the taxpayer must show that enforcement would be “an abusive use of the court’s process.”<sup>53</sup> Thus, the taxpayer has the burden of proving that the IRS failed on one of the following four elements: (1) “that the investigation will be conducted pursuant to a legitimate purpose,” (2) “that the inquiry may be relevant to the purpose,” (3) “that the information sought is not already within the Commissioner’s possession,” and (4) “that the administrative steps required by the Code have been followed.”<sup>54</sup>

In coming to its conclusion, the Court recognized that although it had set a high standard for taxpayers to meet, it did “not make meaningless the adversary hearing to which the taxpayer is entitled before enforcement is ordered.”<sup>55</sup> The Court explained that a taxpayer could meet its burden, for example, “if the summons had been issued . . . for any . . . purpose reflecting on the *good faith* of the particular investigation.”<sup>56</sup> Thus, the Court seemed to suggest that an important part of the analysis is a consideration of all the circumstances surrounding the investigation, both taxpayer and IRS interests alike.

After the *Powell* decision, lower courts have used the standard that was set for the enforcement of an IRS summons pursuant to Section 7605(b) as the standard for the enforcement of summonses pursuant to other sections of the Code as well as

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such proof has been presented without the IRS disclosing what created its suspicion of fraud. *United States v. Powell*, 325 F.2d 914, 916 (3d Cir. 1963).

<sup>51</sup> *Powell*, 379 U.S. at 50–51.

<sup>52</sup> *Id.* at 51.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 57–58.

<sup>55</sup> *Id.* at 58. Whereas the taxpayer must make more than a “mere showing” that there had been “an abuse of the court’s process,” the IRS must only present a prima facie showing that it fulfilled the requirements. *Id.* at 57–58. The dissent argued, however, that without a “minimum safeguard” of requiring more from the IRS on its suspicion of fraud, the statute would become “rather meaningless.” *Id.* at 60 (Douglas, J., dissenting).

<sup>56</sup> *Powell*, 379 U.S. at 58 (majority opinion) (emphasis added).

summonses from other administrative agencies.<sup>57</sup> There is no debate among circuits that *Powell* does in fact apply to all kinds of administrative summonses.<sup>58</sup> There is, however, debate as to how to interpret a violation of Section 7609 in a *Powell* analysis.

### III. THE CIRCUIT SPLIT: TWO APPROACHES IN APPLYING *POWELL* TO SECTION 7609

Although Section 7609 is an administrative step under *Powell*, circuits have not consistently regarded Section 7609 as an administrative step that requires strict compliance. The United States Court of Appeals for the Second, Eleventh, and Sixth Circuits chose to analyze a Section 7609 violation under a “totality of the circumstances” approach, while the United States Court of Appeals for the Tenth Circuit mandates strict compliance with the notice requirements.<sup>59</sup> These contrary approaches further demonstrate the conflict of interests at play in the enforcement of IRS summonses.

#### A. *The Totality of the Circumstances Approach*

The Second, Eleventh, and Sixth Circuits have attempted to balance the IRS’s interest in obtaining information on taxpayers against the taxpayer’s interests in receiving proper notice by adopting a totality of the circumstances approach, which defers substantially to the authority of the IRS. Each circuit ultimately enforced the summons in question.

For example, in *Adamowicz v. United States*, the United States Court of Appeals for the Second Circuit denied the taxpayers’ petition to quash several third-party summonses

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<sup>57</sup> For example, the four factors from *Powell* have been used to determine whether a summons issued in the course of a SEC investigation should be enforced. *SEC v. Jerry T. O’Brien, Inc.*, 467 U.S. 735, 747–49 (1984). The target of an SEC investigation sought to quash a third-party summons issued without his prior notice, relying on *Powell*’s requirement that all “administrative steps” be followed. *Id.* at 747. The Court ruled that *Powell* did apply to the enforcement of SEC summonses, but because no statute mandated the SEC to issue notice in its investigations into federal securities law violations, the summons would be enforced. *Id.* at 751. Explaining further, the Court relied on many of the concerns the IRS faces, such as the burden to the agency and the courts and the possibility that notice would facilitate individuals to impede the investigatory process. *Id.* at 749–51.

<sup>58</sup> See *United States v. Clarke*, 134 S. Ct. 2361 (2014).

<sup>59</sup> See *Adamowicz v. United States*, 531 F.3d 151, 161 (2d Cir. 2008); *Azis v. U.S. I.R.S.*, 522 F. App’x 770, 777 (11th Cir. 2013); *Cook v. United States*, 104 F.3d 886, 889 (6th Cir. 1997).

because they failed to show that the IRS's violation of the Code, under a totality of the circumstances approach, was a basis to quash.<sup>60</sup> There, an IRS agent issued third-party summonses in an investigation of the estate and gift tax liability of the decedent, Mary Adamowicz.<sup>61</sup> The investigation was to determine if Mary gave monetary gifts to family members before she died that should have been taxed.<sup>62</sup> The IRS issued summonses to Mary's children, who were also the executors of her estate, Michael Adamowicz and Elizabeth Fraser.<sup>63</sup> A summons was also sent to Mary's bank, Roslyn Savings Bank.<sup>64</sup> Mary's children refused to produce a number of documents requested and argued, among other things, "that the IRS failed to follow proper administrative procedures," including failure to timely notify parties in violation of Section 7609.<sup>65</sup> The IRS argued that untimely notice is an improper basis for quashing the summonses because the parties were not prejudiced.<sup>66</sup>

The court concluded, "minor notice violations are not a basis for quashing a summons."<sup>67</sup> It found no reason to depart from other courts that "have 'declined to elevate form over substance and have rejected the suggestion that every infringement of a requirement of the Internal Revenue Code absolutely precludes enforcement of an IRS summons.'"<sup>68</sup> Thus, the court relied on the standard used by various other circuits and adopted the totality of the circumstances approach.<sup>69</sup> Factors to consider under this standard are: "[T]he seriousness of the infringement, the harm or prejudice, if any, caused thereby, and the government's good faith."<sup>70</sup> In applying this test, the court found that the taxpayers showed no evidence that they had been "harmed or prejudiced" by the late notice.<sup>71</sup> The court noted that the purpose of Section 7609 is to provide taxpayers with enough

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<sup>60</sup> *Adamowicz*, 531 F.3d at 161–62.

<sup>61</sup> *Id.* at 154.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 160–61.

<sup>66</sup> *Id.* at 161.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* (quoting *United States v. Bank of Moulton*, 614 F.2d 1063, 1066 (5th Cir. 1980)).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 162.

time to commence an action to quash a summons, and as there was “no question” the taxpayers knew about the summonses with enough time to question them if they chose to, they were not prejudiced.<sup>72</sup> Further, the court found no bad faith on behalf of the IRS even though there were multiple summonses in the case that failed to meet Section 7609(a) requirements.<sup>73</sup>

Similarly, in *Azis v. United States Internal Revenue Service*,<sup>74</sup> the United States Court of Appeals for the Eleventh Circuit held that the taxpayer failed to show specific harm resulting from the shortened time he had to petition to quash a summons, and therefore was not prejudiced by the Section 7609(a) violation.<sup>75</sup> There, Jeffrey Azis was being audited by the IRS regarding his accounting and consulting business.<sup>76</sup> During the investigation, the IRS issued summonses to banks where Azis held business accounts.<sup>77</sup> In response, Azis sought to quash the summonses on various grounds, including that the summonses violated Section 7609(a) and therefore did not meet the *Powell* requirements.<sup>78</sup> Azis was not given complete copies of the summonses within the appropriate time, as the copies he received were missing a list of the specific records sought from the banks.<sup>79</sup> The IRS agent who made the error had been out of town and eventually faxed the list to Azis seven days later, failing to meet the statutory notice requirement.<sup>80</sup> The IRS argued that the violation was inadvertent and did not result in taxpayer prejudice.<sup>81</sup>

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 154; *cf.* *Larson v. United States*, No. CV 91-151-BLG-JDS, 1992 WL 104791, at \*2, \*4 (D. Mont. Mar. 30, 1992) (holding that because there were numerous violations of the Code in the issuance of summonses, and because the IRS failed to show that it would be prejudiced should it have to reissue the summonses properly, the summonses were quashed).

<sup>74</sup> 522 F. App'x 770 (11th Cir. 2013).

<sup>75</sup> *Id.* at 777.

<sup>76</sup> *Id.* at 772.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 776; *see* 26 U.S.C. § 7603(a) (2012) (requiring a request for the production of books, papers, records, or other data to describe such materials with reasonable certainty).

<sup>80</sup> *Azis*, 522 F. App'x at 777.

<sup>81</sup> *Id.* at 773.

The Court concluded that the IRS met its burden under *Powell*, because the failure to provide the full summonses “‘was quickly cured and no prejudice resulted,’”<sup>82</sup> and the error “‘was, at most, technical and not serious.’”<sup>83</sup> The court reasoned that, despite the IRS’s error, Azis was not prejudiced by the delay because he still had notice of the summons with sufficient time to file a petition to quash, and he showed no evidence of harm resulting from the delay.<sup>84</sup> Thus, the circumstances did not suggest that taxpayer interests were diminished such that the IRS should have to reissue the summons.<sup>85</sup>

Finally, in *Cook v. United States*,<sup>86</sup> the United States Court of Appeals for the Sixth Circuit held that late notice imputed no prejudice to a taxpayer who had already pleaded guilty to two criminal tax evasion charges, and that the “equitable resolution” dictates that late notice alone cannot form the basis to quash an IRS summons.<sup>87</sup> There, the IRS was investigating a married couple’s tax returns for embezzlement and money laundering shortly after the husband had been sentenced for evading personal income taxes and for diverting corporate funds “as fictitious business deductions.”<sup>88</sup> During the investigation, the IRS issued a summons to a third-party bank to retrieve the couple’s bank records.<sup>89</sup> The couple then petitioned to challenge the summons on the basis that they received notice of the summons one day later than the statutory time period required under Section 7609(a).<sup>90</sup>

In reaching its conclusion, the court examined the language of the statute itself.<sup>91</sup> The court noted that Section 7609(a) uses “shall,” which usually “signifies that Congress intended strict and nondiscretionary application of the statute.”<sup>92</sup> However, the court reasoned absent “a clear legislative statement,” it could not discern congressional intent to void every third-party summons

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<sup>82</sup> *Id.* at 777 (quoting *United States v. Bank of Moulton*, 614 F.2d 1063, 1066 (5th Cir. 1980)).

<sup>83</sup> *Id.* (quoting *United States v. Payne*, 648 F.2d 361, 363 (5th Cir. 1981)).

<sup>84</sup> *Id.* at 777.

<sup>85</sup> *Id.*

<sup>86</sup> 104 F.3d 886 (6th Cir. 1997).

<sup>87</sup> *Id.* at 887, 889.

<sup>88</sup> *Id.* at 887–88.

<sup>89</sup> *Id.* at 887.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 889.

<sup>92</sup> *Id.* (citing *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935)).

that did not comply with “every technical stricture of [S]ection 7609.”<sup>93</sup> The court pointed out not only that the taxpayers were not prejudiced, but also that quashing the summons would be an “exercise in futility.”<sup>94</sup> To quash the summons would only compel the IRS to issue a new third-party summons with proper notice, achieving the same result as denying the petition to quash but with the additional time and resources needed to issue it a second time.<sup>95</sup> Thus, courts have discretion to excuse a technical notice violation when the circumstances reflect an absence of taxpayer prejudice and IRS bad faith.<sup>96</sup>

### B. *The “Strict Compliance” Approach*

In contrast to the totality of the circumstances approach, the United States Court of Appeals for the Tenth Circuit construes “shall” in Section 7609(a) as mandatory and requires strict compliance with the statute, giving more deference to taxpayer rights. In *Jewell v. United States*,<sup>97</sup> the court granted four petitions to quash summonses when it held that the statutory language of Section 7609(a) does not give courts discretion to excuse a violation.<sup>98</sup> There, the IRS was investigating several nursing homes owned by Sam Jewell.<sup>99</sup> As part of the investigation, the IRS sent summonses to four banks, two in the Eastern District of Oklahoma, and two in the Western District of Oklahoma.<sup>100</sup> Mr. Jewell received late notice of these summonses and filed petitions to quash in the Eastern and Western

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<sup>93</sup> *Id.* (explaining that voiding every summons that included technical violations of Section 7609(a) would create a greatly inefficient system that would be contrary to public policy).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 890.

<sup>96</sup> *Id.* In excusing the technical violation in this case, the court was compelled to warn the IRS that these types of technical violations will be increasingly scrutinized. *Id.* at 890–91; *see also* *United States v. Ritchie*, 15 F.3d 592, 600 (6th Cir. 1994) (explaining that although it would be a waste of resources to have the IRS start the entire process over again in this case, the IRS now has notice that it must comply with the Code in the future). These warnings, however, seem to be empty threats caught in a circular logic. *See Boyd v. United States*, 87 F. App’x 481, 485 (6th Cir. 2003) (dismissing a taxpayers claim that, based on the decision in *Cook*, summonses filed late should be quashed because the technical violation did not prejudice the taxpayer).

<sup>97</sup> 749 F.3d 1295 (10th Cir. 2014).

<sup>98</sup> *Id.* at 1297.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

Districts.<sup>101</sup> The Eastern District granted Mr. Jewell's petition, explaining "that the plain language of Section 7609(a)(1)" requires the IRS to give notice to taxpayers of third-party summonses at least twenty-three days before the records are produced, and thus the eighteen day notice given in this case was reason enough to quash the summons.<sup>102</sup> The Western District denied Mr. Jewell's petition, explaining that although the notice was three days late, because the taxpayer had time to file a petition to quash and have his complaint considered by the court, there was no reason to quash the summons.<sup>103</sup>

The Tenth Circuit resolved this split in authority by conducting a careful analysis of the meaning of "shall" in Section 7609(a) and the meaning of "administrative steps" in the *Powell* decision.<sup>104</sup> The court premised its analysis with a canon of statutory interpretation: "If the plain language of the statute is clear, our inquiry ordinarily ends."<sup>105</sup> With this canon in mind, the court moved to the meaning of the word "shall," which it explained plainly denotes "a mandatory intent."<sup>106</sup>

The government, in an effort to rebut the court's argument, relied on two cases where an exception to the definition of "shall" was recognized.<sup>107</sup> One of the cases the government relied on was *Barnhart v. Peabody Coal Co.*,<sup>108</sup> where the Commissioner of Social Security was obliged by statute to assign a company that would fund benefits for retired coal industry workers eligible for those benefits.<sup>109</sup> The other case relied on was *Dolan v. United States*,<sup>110</sup> where a district court was obliged by statute to

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<sup>101</sup> *Id.*

<sup>102</sup> *Jewell v. United States*, No. 12-CV-424-JHP, 2013 WL 870079, at \*3 (E.D. Okla. Mar. 7, 2013).

<sup>103</sup> *Jewell v. United States*, No. CIV-12-1125-C, 2013 WL 752625, at \*2 (W.D. Okla. Feb. 27, 2013).

<sup>104</sup> *Jewell*, 749 F.3d at 1298-00.

<sup>105</sup> *Id.* at 1298.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> 537 U.S. 149 (2003).

<sup>109</sup> *Id.* at 150. 26 U.S.C. § 9706(a) (2012) states that the Commissioner of Social Security "shall" assign every retired coal industry worker eligible for benefits under the Coal Industry Retiree Health Benefit Act to a company that would then be responsible for funding the benefits.

<sup>110</sup> 560 U.S. 605 (2010).

determine the restitution owed to the defendant.<sup>111</sup> In both cases, the government was also required to follow statutory deadlines in the execution of their obligations.<sup>112</sup> The government failed in both cases to meet their deadline obligations, but both courts excused the noncompliance because the government's underlying obligations of assigning benefits to retired coal industry workers and determining restitution owed to defendants were more important.<sup>113</sup>

The *Jewell* Court distinguished those cases from the facts before it.<sup>114</sup> It reasoned that because the IRS was not statutorily required to issue summons, like the Commissioner of Social Security in *Barnhart* was required to assign benefits and the district court in *Dolan* was required to determine restitution, there was no mandatory intent to conflict with the notice requirement, and thus, no reason to make an exception to the canon of statutory interpretation that “shall” connotes mandatory action.<sup>115</sup>

The court then concluded that according to its plain meaning the mandatory notice requirement is an “administrative step” under *Powell*.<sup>116</sup> “Administrative” is defined as “[p]ertaining to, or dealing with, the conduct or management of affairs.”<sup>117</sup> Thus, even if late notice were simply a technical violation, it would still fall under this broad definition.<sup>118</sup> Having found that notice is mandatory and an “administrative step” was not followed, the court ruled that the IRS did not make a prima facie showing that would enable the court to enforce the summons.<sup>119</sup>

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<sup>111</sup> *Id.* at 605. The Mandatory Victims Restitution Act states a court “shall” set a date for determining a victim’s losses no later than ninety days after sentencing if such losses cannot be determined ten days before sentencing. *Id.*

<sup>112</sup> *Jewell*, 749 F.3d at 1299.

<sup>113</sup> *Id.* The court posed the following questions:

“In *Barnhart*, did the failure to timely comply mean that the Social Security Commissioner no longer had to designate a company to fund benefits for retirees entitled to benefits? And, in *Dolan*, did the district court’s failure to timely comply mean that the victim would no longer get the restitution that Congress said he was owed?” *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* The IRS “shall” give notice of third-party summonses, but is only “authorized” to issue summonses. See 26 U.S.C. § 7609(a) (2012); *Id.* § 7602(a)(2) (2012).

<sup>116</sup> *Jewell*, 749 F.3d at 1299–00.

<sup>117</sup> *Id.* at 1299 (quoting THE OXFORD ENGLISH DICTIONARY 163 (2d ed. 1989)).

<sup>118</sup> *Id.* at 1300.

<sup>119</sup> *Id.*



#### IV. THE TOTALITY OF THE CIRCUMSTANCES: THE MORE EFFICIENT APPROACH

Because *Jewell* ignores important policy concerns dealing with the functionality and efficiency of the IRS, and because other taxpayer protections are built into the Code, the failure to comply with notice requirements under Section 7609(a) should be analyzed under the “totality of the circumstances” standard. This is not to say that the notice requirements are rendered meaningless, but rather, that the notice requirements are part of a larger statutory scheme that serves an important societal purpose that cannot be ignored. However, an analysis of the totality of the circumstances should include more factors than those used by jurisdictions that currently adopt this approach.

##### A. *Statutory Interpretation: A Different Look at Jewell’s Analysis of “Shall”*

The *Jewell* Court placed heavy emphasis on the mandatory intent behind the word “shall,”<sup>120</sup> but overlooked policy reasons for providing leniency to the IRS and an argument for making an exception to that interpretation. The United States Court of Appeals for the Tenth Circuit rejected the argument that “shall” is not mandatory under Section 7609(a), reasoning that imposing strict compliance would not thwart the IRS from fulfilling its underlying obligation.<sup>121</sup> The court, however, overlooked an important section of the Code when it found no obligations conflicting with the “shall” in Section 7609(a).

While the Code gives the IRS broad powers, it also entrusts the IRS with many responsibilities. It is true that the IRS is not mandated to issue summonses. The Code gives the IRS authority to issue summonses, and states that it is:

“authorized . . . [t]o 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 . . . .”<sup>122</sup>

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<sup>120</sup> *Id.* at 1298.

<sup>121</sup> *Id.* at 1299.

<sup>122</sup> 26 U.S.C. § 7602(a)(2) (2012) (emphasis added).

Under the language of the statute, it appears as though the IRS is not required to issue summonses in their investigations. However, a broader look at the Code as a whole may reveal a conflict of mandatory intents, although not as direct as those in *Barnhart* and *Dolan*.<sup>123</sup> For example, Section 6201(a) of the Code provides that the IRS is:

“authorized and *required* to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law.”<sup>124</sup>

The section further states that the IRS “*shall* assess all taxes determined by the taxpayer . . . as to which returns or lists are made under this title,”<sup>125</sup> requiring the IRS to investigate and assess which taxes are owed to the United States government. This is the underlying obligation the IRS seeks to fulfill when it issues summonses to third parties. If the Code requires the IRS to make inquiries into all taxes while also authorizing it to summon individuals in furtherance of those inquiries, summonses become an important and integral tool that the IRS must use to investigate tax liabilities. Even if the summons authority were considered part of the requirement to assess taxes, enforcing the notice requirements would not completely obstruct the IRS’s underlying obligations because notices can always be reissued. However, given the importance of efficient revenue collecting, and given the available alternative of the totality of the circumstances approach, this may be an appropriate situation to make an exception to the meaning of “shall.”

*B. United States v. Clarke: A Failed Attempt To Weaken IRS Authority Supports the Totality of the Circumstances Approach*

The United States Supreme Court’s decision in *United States v. Clarke*<sup>126</sup> is important because it overruled the Eleventh Circuit’s decision to allow taxpayers evidentiary hearings

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<sup>123</sup> See *Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003); *Dolan v. United States*, 560 U.S. 605 (2010).

<sup>124</sup> 26 U.S.C. § 6201(a) (2012) (emphasis added).

<sup>125</sup> *Id.* § 6201(a)(1) (emphasis added).

<sup>126</sup> 134 S. Ct. 2361 (2014).

without first requiring factual support, by balancing the benefits to the taxpayer against the burden on the IRS and the court system. The United States Court of Appeals for the Tenth, Second, Eleventh, and Sixth circuits were grappling with the same issues when deciding whether to adopt a totality of the circumstances approach for Section 7609(a) violations.<sup>127</sup> Furthermore, the Eleventh Circuit's decision in *Clarke* is similar to the Tenth Circuit's decision in *Jewell* because both represent efforts to increase taxpayer leverage against the IRS in attempts to quash summonses.<sup>128</sup> The Eleventh Circuit in *Clarke* gave taxpayers the ability to flesh out the purpose of an investigation in a hearing, which would require the IRS to defend its initial claim that the purpose was legitimate.<sup>129</sup> Similarly, *Jewell* gives taxpayers greater ability to quash summonses by holding the IRS to a higher burden of strict compliance with Section 7609(a).<sup>130</sup> Thus, the Court's decision to overrule the Eleventh Circuit weakens the *Jewell* Court's position.

In *United States v. Clarke*, the IRS issued five summonses while investigating the tax liabilities of a company, Dynamo Holdings Limited Partnership, and then commenced enforcement proceedings.<sup>131</sup> The IRS made a prima facie showing of the four *Powell* elements. Then, the taxpayers petitioned to quash on the ground that the investigation was not "conducted pursuant to a legitimate purpose."<sup>132</sup> The taxpayers claimed that one reason the summonses were issued was because the IRS was seeking to retaliate against the company for refusing to extend a statute of limitations deadline.<sup>133</sup> The court held that the taxpayers were entitled to a hearing to investigate the purpose of the summons without presenting factual support for their allegation.<sup>134</sup> The court reasoned: "[R]equiring the taxpayer to provide factual support for an allegation of an improper purpose, without giving

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<sup>127</sup> *Id.* at 2367–68.

<sup>128</sup> *United States v. Clarke*, 517 F. App'x 689, 690 (11th Cir. 2013).

<sup>129</sup> *Id.* at 691.

<sup>130</sup> *Jewell v. United States*, 749 F.3d 1295, 1301 (10th Cir. 2014).

<sup>131</sup> *Clarke*, 517 F. App'x at 690.

<sup>132</sup> *Id.* at 691.

<sup>133</sup> *Id.* During the investigation, the IRS convinced the company to extend the statute of limitations on its investigation by two years. *United States v. Clarke*, 134 S. Ct. 2361, 2365 (2014). Towards the end of that extension, the IRS requested additional time, and shortly after the company refused, the IRS issued the summonses at issue here. *Id.* at 2365–66.

<sup>134</sup> *Clarke*, 517 F. App'x at 691.

the taxpayer a meaningful opportunity to obtain such facts, saddles the taxpayer with an unreasonable circular burden, creating an impermissible ‘Catch 22.’”<sup>135</sup>

Just one year later, the United States Supreme Court vacated and remanded the Eleventh Circuit’s decision.<sup>136</sup> In *United States v. Clarke*, the Court held that a taxpayer is entitled to a hearing to determine the purpose of a summons only after presenting specific facts or circumstances that point to an improper purpose.<sup>137</sup> Concerned that the categorical rule imposed by the Eleventh Circuit would “turn[] every summons dispute into a fishing expedition for official wrongdoing,” the Court required taxpayers to offer “credible evidence” in support of their claim.<sup>138</sup> Recognizing the unlikelihood of a taxpayer having direct evidence of bad faith at this stage of proceedings, the Court concluded that circumstantial evidence could meet this burden.<sup>139</sup> On remand in district court, however, the evidence offered raised no “plausible inference” to the court that the IRS issued the summonses for an improper purpose.<sup>140</sup>

The United States Supreme Court’s decision in *Clarke* is yet another example of the Court balancing taxpayer and IRS interests.<sup>141</sup> To deny taxpayers the right to a hearing without factual support reflects the importance of preserving the efficiency of the IRS’s investigation and avoiding possible fishing expeditions. This mirrors the reasoning of the Second, Eleventh, and Sixth Circuits.<sup>142</sup> Their decision to look at the totality of the

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<sup>135</sup> *Id.* This circular burden is not the only one sought to be resolved in the context of enforcing IRS summonses. See cases cited *supra* note 96. This holding was also contrary to the decisions of various other courts of appeals. See, e.g., *Sugarloaf Funding, LLC v. U.S. Dep’t of Treas.*, 584 F.3d 340, 351 (1st Cir. 2009) (holding that evidentiary hearings during summons enforcement proceedings will only be held, at the court’s discretion, if the taxpayer introduces evidence to support his allegation of improper purpose); *United States v. Garden State Nat’l Bank*, 607 F.2d 61, 71 (3d Cir. 1979) (explaining that “if . . . the taxpayer . . . cannot factually support a proper affirmative defense, the district court should dispose of the proceeding . . . without an evidentiary hearing”).

<sup>136</sup> *Clarke*, 134 S. Ct. at 2369.

<sup>137</sup> *Id.* at 2365.

<sup>138</sup> *Id.* at 2367–68.

<sup>139</sup> *Id.*

<sup>140</sup> *United States v. Clarke*, Nos. 11-80456-MC, 11-80457-MC-KLR/JMH, 11-80459-MC-KLR/JMH, 11-80460-MC-KLR/JMH, 11-80461-MC-KLR/JMH, 2015 WL 1324372, at \*3 (S.D. Fla. Feb. 18, 2015), *aff’d* 816 F.3d 1310 (11th Cir. 2016).

<sup>141</sup> *Clarke*, 134 S. Ct. at 2367–68.

<sup>142</sup> See *supra* Section III.A.

circumstances also focuses on avoiding the inefficiency of reissuing summonses with proper notice.<sup>143</sup> Just like fishing expeditions, reissuing summonses requires an expenditure of time and money only to end up in the same place.

On the other hand, *Clarke* is distinguishable. The hearings would have taken place, and time and money spent, regardless of whether the purpose of the summonses was improper. In contrast, with a Section 7609(a) violation, it is clear from the very beginning that the IRS has not complied with the Code. Thus, while it makes sense to cut back on the inefficiency of fishing expeditions lacking factual support, the argument is not quite as strong for the inefficiency of reissuing notice because there is factual evidence of a violation. Nevertheless, because the *Clarke* decision implies that when taxpayers show proof of improper purpose, evidentiary hearings will be allowed,<sup>144</sup> it seems just as equitable that upon proof of late notice, courts will weigh the facts and circumstances to determine an appropriate solution.

*C. How the Totality of the Circumstances Approach Provides a Necessary Check on IRS Authority*

Although most courts are hesitant to weaken IRS authority, the totality of the circumstances approach provides courts with an opportunity to determine when IRS authority has unfairly burdened taxpayer interests. Despite what seems to be an overwhelming advantage for the IRS in tax liability investigations, taxpayers have effectively challenged summonses on the basis of Section 7609 violations.<sup>145</sup> Those challenges, however, are few and often supplemented by various other violations of the Code. For example, in *Larson v. United States*, a magistrate judge granted a taxpayer's petition to quash where the IRS failed to follow numerous administrative steps in the Code that resulted in a slew of technical violations.<sup>146</sup> There, the taxpayer, Richard Larson, was under IRS investigation for

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<sup>143</sup> See *supra* Section III.A.

<sup>144</sup> *Clarke*, 134 S. Ct. at 2365.

<sup>145</sup> See, e.g., *Larson v. United States*, No. CV 91-151-BLG-JDS, 1992 WL 104791, at \*1 (D. Mont. Feb. 6, 1992).

<sup>146</sup> *Id.* at \*2-3.

several years of tax liability.<sup>147</sup> The IRS agent on the case issued third-party summonses to three banks and Larson's accountant.<sup>148</sup>

Upon notice, Larson filed a petition to quash the summonses alleging several problems with the summonses and notice.<sup>149</sup> First, the summons served on the accountant did not include an attested copy of the summons required by Section 7603.<sup>150</sup> Second, the notice to Larson of the summonses issued to the banks was sent twenty-one days prior to examination of the records, instead of the twenty-three days required by Section 7609(a).<sup>151</sup> Third, the court found it questionable that a summons sent to a bank in Washington was properly served, as the summons allegedly was served in Washington the same day it was issued in Montana.<sup>152</sup>

The court concluded that it could overlook one technical violation, but these summonses held a "plethora of . . . irregularities."<sup>153</sup> To "overlook, excuse, modify and amend" so many violations "would only condone and encourage bureaucratic ineptitude."<sup>154</sup> The only reason the court would have considered enforcing the summonses was that Larson did not demonstrate that he had been prejudiced by the inadequacies.<sup>155</sup> However, because the IRS failed to demonstrate that its investigation would be prejudiced should the summonses be quashed, and because the notice and service requirements are meant to protect the taxpayer, the court required the IRS to properly reissue the summons.<sup>156</sup>

The *Larson* Court was concerned with preventing government "ineptitude,"<sup>157</sup> which sets a high bar for taxpayers. Failure to comply with Section 7609(a) alone is unlikely to be considered ineptitude that would be grounds to quash a summons. Further, while some courts may quash a summons if

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<sup>147</sup> *Id.* at \*1.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at \*2.

<sup>151</sup> *Id.* at \*3.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at \*4.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

there is no prejudice to the IRS investigation, many are still not willing to do so without evident taxpayer prejudice.<sup>158</sup> Thus, even though courts give deference to the IRS's interests and the taxpayer's burden remains extremely high, courts can still check IRS authority, if necessary.

*D. How To Improve the Totality of the Circumstances Approach*

Even though the totality of the circumstances approach is more favorable than a "strict compliance" approach, as it provides an opportunity for courts to balance competing interests, courts should conduct a more thorough analysis to determine if a Section 7609(a) violation has burdened the taxpayer. For example, unless a showing of government ineptitude is made, as in *Larson*, courts will consider the taxpayer's ability to file a petition to quash as a lack of prejudice and therefore will not quash a summons.<sup>159</sup> However, a taxpayer's petition will be dismissed if she fails to adhere to the statutory deadline for filing it.<sup>160</sup> Thus, the taxpayer finds herself in a lose-lose situation, unless there are numerous other deficiencies with the summons and notice. Courts, therefore, should conduct a deeper examination of the facts to understand, and not assume, that there is no prejudice.

Courts could weigh a number of additional factors in each case to ensure that all interests are considered equally. First, courts could look into why the IRS agent on the case provided late notice.<sup>161</sup> For example, if that particular agent were habitually late or careless in providing notice, the overall inefficiency of that agent would weigh towards quashing the summons. Second, courts could consider any past dealing or interactions between the taxpayer and the IRS. More weight

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<sup>158</sup> See *Scott v. United States*, No. 1:00CV-215-R, 2001 WL 513398, at \*1 (W.D. Ky. Apr. 3, 2001) (explaining that the Code "requirements have little value if the court simply turn[s] its head any time the I.R.S. fails to comply . . . [T]he I.R.S. should strive for technical compliance . . ."). But see *Kernan v. IRS*, CV. No. 06-00368 DAE-BMK, 2007 WL 1288155, at \*2 (D. Haw. Apr. 30, 2007) (holding that, while the court does not condone the IRS's failure to adhere to the Code, because it found no intentional misconduct on behalf of the IRS, the summons should not be quashed).

<sup>159</sup> See *supra* Section III.A.

<sup>160</sup> See 26 U.S.C. § 7609(b)(2)(B) (2012).

<sup>161</sup> In *Cook v. United States*, the court considered the criminal background of the taxpayers. 104 F.3d 886, 887 (6th Cir. 1997). Thus, it would not be too far of a leap to consider the past conduct of the IRS agent.

should be given to a taxpayer with no experience dealing with the IRS, while more weight should be given to the IRS if the taxpayer has dealt with the IRS or other governmental agencies in the past. Third, the court should look beyond simply whether or not the petition to quash was filed, and consider how difficult filing became because of late notice. For example, a taxpayer with a professional occupation and decent financial means may be able to promptly contact an attorney and file the petition without much added stress, but someone of limited education and financial means may be greatly burdened by the same delay.

Any prejudice found to have affected the taxpayer should then be weighed against any prejudice the IRS faced. Although the facts in *Larson* were unique, the court suggested an examination of prejudice to the investigation itself.<sup>162</sup> If the additional twenty-three days needed to reissue a third-party summons with proper notice would unreasonably burden the IRS in that particular investigation, then the petition to quash should be denied. If not, all of the interests should be balanced. This approach may consume court resources, but it may also motivate the IRS to issue timely notices without having to enforce a strict interpretation of Section 7609(a).

#### CONCLUSION

In conclusion, the split between the United States Court of Appeals for the Tenth Circuit and the United States Courts of Appeals for the Second, Eleventh, and Sixth Circuits, represents the difficulty in interpreting a law in light of competing policy concerns. The Tenth Circuit focused on the plain meaning of the law and canons of statutory interpretation, holding the IRS to the strict letter of the law. The Second, Eleventh, and Sixth circuits looked to the totality of the circumstances and focused on the purpose of the law, to give taxpayers time to file a petition to quash, and the burden that would fall on the IRS. The former interpretation gives clear guidelines for the IRS and the taxpayer as to when a summons may be quashed. The latter interpretation is not as clear, but encompasses the context in which the law was enacted and its practical application.

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<sup>162</sup> *Larson v. United States*, No. CV 91-151-BLG-JDS, 1992 WL 104791, at \*4 (D. Mont. Feb. 6, 1992).



While most courts tend to lean towards the latter interpretation, some of those courts have also warned the IRS that it should strive to adhere to the statute. Nevertheless, courts do not want to be so technical with the IRS as to hinder investigations. Therefore, rather than enforcing an overly technical application of the law, a totality of the circumstances approach allows for a thorough balancing of taxpayer and IRS interests.