Michigan Law Review

Volume 95 | Issue 7

1997

# The "Solely Criminal Purpose" Defense to the Enforcement of IRS Summonses

Darius J. Mehraban
*University of Michigan Law School*

# The "Solely Criminal Purpose" Defense to the Enforcement of IRS Summonses

*Darius J. Mehraban*

## INTRODUCTION

Recent years have witnessed a gradual erosion of the practical distinctions between the civil and criminal investigations performed by federal administrative agencies.[1] This trend arose naturally from a growing number of federal statutes and regulations that carry both civil and criminal penalties for their violation.[2] Administrative agencies today wield investigative summons power[3] almost as expansive as the grand jury subpoena power[4] and can use that power to investigate without first deciding whether criminal or civil liability ultimately will be sought.[5]

The Internal Revenue Service (IRS) has participated to some extent in this intermingling of civil and criminal inquiry — with a corresponding increase in investigative efficiency — despite the fact that before 1982 the IRS issued summonses pursuant to a provision in the Internal Revenue Code, section 7602, that on its face gave the IRS only civil investigative authority.[6] In the 1971 case *Donaldson v. United States*,[7] however, the Supreme Court interpreted section 7602 to allow the IRS to issue summonses for criminal investigation, at least as long as there existed some valid civil purpose.[8] The Court's decision was not surprising: investigations into tax law violations frequently contain the potential for both civil

1. *See* Graham Hughes, *Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process*, 47 VAND. L. REV. 573, 578-80 (1994).

2. *See* Andrew Z. Glickman, Note, *Civil Sanctions and the Double Jeopardy Clause: Applying the Multiple Punishment Doctrine to Parallel Proceedings After* United States v. Halper, 76 VA. L. REV. 1251, 1278 n.145 (1990).

3. For discussions of the administrative summons authority of federal agencies and the history of this authority, see 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 4.1 (3d ed. 1994); Hughes, *supra* note 1, at 595-601.

4. *See infra* Part III.

5. *See* Hughes, *supra* note 1, at 578-80, 587-89.

6. *See* I.R.C. § 7602(a) (1994). Amendments subsequent to 1982 did not change the language of subsection (a).

7. 400 U.S. 517 (1971).

8. *See Donaldson*, 400 U.S. at 535 ("Congress clearly has authorized the use of the summons in investigating what may prove to be criminal conduct.").

The requirement of a concurrent civil purpose was arguably implicit in *Donaldson;* it was made explicit seven years later in *United States v. LaSalle National Bank*, 437 U.S. 298 (1978). *See infra* text accompanying notes 14-18.

and criminal liability.[9] It would have greatly hampered tax law enforcement had the Court forced the IRS either to ignore potentially criminal conduct or to give up its civil investigation altogether once it discovered such conduct.[10]

*Donaldson,* however, placed a singular limitation on the IRS's criminal investigative authority, what this Note calls the "Justice Department referral" doctrine: the IRS must cease issuing summonses for a particular case once it refers that case to the Department of Justice for criminal prosecution.[11] No other federal agency is subject to such a restriction,[12] as the restriction found its roots in the Court's interpretation of the unique language of section 7602.[13]

In the 1978 case *United States v. LaSalle National Bank,*[14] the Court reaffirmed the Justice Department referral doctrine and added an important corollary to it, what this Note calls the "solely criminal purpose" doctrine[15]: even before Justice Department

---

9. *See, e.g., LaSalle,* 437 U.S. at 309 ("Congress has created a law enforcement system in which criminal and civil elements are inherently intertwined. When an investigation examines the possibility of criminal misconduct, it also necessarily inquires about the appropriateness of assessing the . . . civil tax penalty.").

10. *See Donaldson,* 400 U.S. at 535-36 ("To draw a line where [the criminal investigation begins] would require the Service, in a situation of suspected but undetermined fraud, to forgo either the use of the summons or the potentiality of an ultimate recommendation for prosecution.").

11. *See* 400 U.S. at 536 ("[A]n [IRS] summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution.").

Like other federal regulatory agencies that perform civil and criminal investigations, the IRS cannot prosecute criminal cases; only the Department of Justice may do so. Therefore, the IRS, like other agencies, must at some point refer its criminal cases to the Justice Department with a recommendation for prosecution. *See generally* 1 DAVIS & PIERCE, *supra* note 3, § 4.3.

12. Other federal agencies' postreferral investigative powers have been upheld when challenged. *See* United States v. Merit Petroleum, Inc., 731 F.2d 901, 905 (Temp. Emer. Ct. App. 1984) (upholding Department of Energy subpoenas); United States v. Educational Dev. Network Corp., 884 F.2d 737, 742 (3d Cir. 1989) (upholding Defense Department subpoenas); United States v. Aero Mayflower Transit Co., 831 F.2d 1142, 1145-46 (D.C. Cir. 1987) (upholding Defense Department Inspector General subpoenas); United States v. Gel Spice Co., 773 F.2d 427, 432-33 (2d Cir. 1985) (upholding FDA inspections); *In re* EEOC, 709 F.2d 392, 397 (5th Cir. 1983) (upholding EEOC discovery); SEC v. Dresser Indus., 628 F.2d 1368, 1377-80 (D.C. Cir. 1980)(en banc).

13. *LaSalle* put it this way:

> In § 7602 Congress has bestowed upon the Service the authority to summon production for four purposes only: for "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 collecting any such liability." Congress therefore intended the summons authority to be used to aid the determination and collection of taxes. These purposes do not include the goal of filing criminal charges against citizens.

United States v. LaSalle Natl. Bank, 437 U.S. 298, 317 n.18 (1978).

14. 437 U.S. 298 (1978).

15. As a practical matter, this doctrine and the Justice Department referral doctrine gave taxpayers defenses against the enforcement of IRS summonses. The terminology of this Note attempts to be sensitive to the difference between a Court-made "doctrine" that prohibits certain IRS investigative conduct and the "defense" that the doctrine gives taxpayers who

referral, the IRS may not issues summonses *solely* for a criminal investigative purpose.[16] In other words, the IRS loses the power to investigate criminal elements of a particular case once it has completed its civil investigation of that case. The Court stated that it would "not countenance delay in submitting a recommendation to the Justice Department [for criminal prosecution] when there is an institutional commitment to make the referral and the Service merely would like to gather additional evidence for the prosecution."[17] The Court characterized such a delay as the equivalent of issuing summonses after a Justice Department referral and therefore deemed the practice an impermissible expansion of the government's criminal discovery rights.[18]

Congress codified the Justice Department referral doctrine when it amended section 7602 as part of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA).[19] Congress did not codify the solely criminal purpose doctrine, however, and courts have split as to whether this doctrine survived the TEFRA Amendments. Specifically, the Fourth and Seventh Circuits have stated that the solely criminal purpose doctrine survived the amendments,[20] while the Ninth and Eleventh Circuits have held that the amendments to section 7602 eliminated the doctrine.[21]

The solely criminal purpose question is a criminal procedure issue with significant potential consequences for the rights of those under criminal tax investigation. If the *LaSalle* Court was correctly concerned that allowing the issuance of IRS summonses for a solely criminal investigation would permit the government to "expand its criminal discovery rights,"[22] courts should be reluctant to find that Congress implicitly eliminated the solely criminal purpose defense. The IRS should not be able to use its broad civil investigative powers to subvert protections afforded potential criminal tax defendants.

This Note argues, however, that this important concern for procedural rights is misplaced in this case, and sides with those courts that have held that the TEFRA Amendments did eliminate the

---

challenge the enforcement of IRS summonses. Both terms are used, but in situations in which either term would be appropriate, this Note uses "defense" in order to focus on the rule as it affects the taxpayer.

16. *See LaSalle,* 437 U.S. at 313-17.

17. *LaSalle,* 437 U.S. at 316-17.

18. *See LaSalle,* 437 U.S. at 317.

19. Pub. L. No. 97-248, § 333(a), 96 Stat. 324, 622 (codified at I.R.C. § 7602 (1994)).

20. *See* Hintze v. IRS, 879 F.2d 121, 127 n.8 (4th Cir. 1989); United States v. Michaud, 907 F.2d 750, 752 & n.2 (7th Cir. 1990)(en banc).

21. *See* United States v. Abrahams, 905 F.2d 1276, 1281 n.4 (9th Cir. 1990); La Mura v. United States, 765 F.2d 974, 980 n.9 (11th Cir. 1985).

22. *LaSalle,* 437 U.S. at 317.

solely criminal purpose defense. Part I uses the text and legislative history of the amended section 7602 to show that Congress specifically intended to eliminate the solely criminal purpose defense. Part II contends that the Fourth and Seventh Circuits wrongly relied on language in the Supreme Court case *United States v. Stuart*,[23] which does not, as these courts believed, signal the continuing viability of the solely criminal purpose defense. Finally, Part III demonstrates that eliminating the solely criminal purpose defense does not endanger the rights of potential criminal defendants at all. This Note concludes that the Fourth and Seventh Circuits are incorrect both as a matter of statutory interpretation and as a matter of policy, and that courts should not hesitate to implement Congress's clear intent to eliminate the solely criminal purpose defense.

## I. Congressional Intent

This Part argues that Congress intentionally amended section 7602 to eliminate the solely criminal purpose defense. Section I.A contends that this intent is clear from the statutory language, while section I.B shows how this intent is visible in the legislative history of the amended provision.

### A. *The Statute*

Congress eliminated the solely criminal purpose defense by adding subsections (b) and (c) to section 7602. These amendments gave the IRS an explicit grant of authority for criminal investigation and a clearly defined limitation on its use — a limitation that did not include the solely criminal purpose doctrine.

Prior to the TEFRA amendments to section 7602, the IRS possessed no explicit statutory basis for its exercise of criminal investigative authority. The pre-1982 section 7602 — subsection (a) of the current statute — gave the IRS the power to examine any documents that "may be relevant or material" to its investigation and to take testimony from the person under investigation or other persons who may have "relevant or material" things to say.[24] The IRS could do these things

> [f]or 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 . . . .[25]

23. 489 U.S. 353 (1989).

24. I.R.C. § 7602 (1976)(amended version at I.R.C. § 7602(a) (1994)).

25. I.R.C. § 7602 (1976)(amended version at I.R.C. § 7602(a) (1994)).

Yet these were all civil investigative purposes. It was only through the *Donaldson* and *LaSalle* decisions that the IRS's criminal investigative authority was explicitly recognized.[26]

The 1982 amendments to section 7602 gave the IRS express statutory authority to issue summonses for criminal investigations by adding subsection (b), entitled "Purpose may include inquiry into offense."[27] This subsection states, "[t]he purposes for which the Secretary may [issue summonses] include the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws."[28] The word "offense" means criminal violation.[29] Section 7602(b) thus gives the IRS an independent statutory basis for its criminal investigative authority.

In giving the IRS the authority to perform criminal investigations, subsection (b) implicitly overrules the holding of *LaSalle*. The *LaSalle* Court had held that an IRS criminal investigation was permitted only so long as a valid civil investigative purpose was also present, because the statute contained no "affirmative grant of authority for purely criminal investigations."[30] Thus Congress, in providing such an "affirmative grant," effectively changed the fundamental assumptions under which the Court had ruled.

Furthermore, in carving out but a single exception to the IRS's criminal investigative authority in subsection (c), Congress left no room for the solely criminal purpose doctrine. Subsection (c) codifies the Justice Department referral doctrine, providing that "[n]o summons may be issued . . . with respect to any person if a Justice Department referral is in effect with respect to such person."[31] A Justice Department referral is "in effect" in a given case if one of two specific conditions is met: either the IRS has referred the case to the Justice Department for criminal investigation or prosecution, or the Justice Department has requested IRS information on the case for the same purpose.[32] Subsection (c) therefore prohibits the

---

26. *See supra* notes 6-18 and accompanying text.

27. I.R.C. § 7602(b) (1994).

28. I.R.C. § 7602(b) (1994).

29. According to *Black's Law Dictionary,* "[t]he word 'offense' . . . generally implies a felony or a misdemeanor infringing public as distinguished from mere private rights, and punishable under the criminal laws." BLACK'S LAW DICTIONARY 1081 (6th ed. 1990). Congress's use of the term "offense" elsewhere in § 7602 also indicates that Congress meant the term to refer to a criminal violation: A Justice Department referral is "in effect" under § 7602(c) if the IRS "has recommended to the Attorney General a grand jury investigation of, or the criminal prosecution of, [a] person for any *offense*" under the tax laws. I.R.C. § 7602(c)(2)(A)(1994)(emphasis added). Because the grand jury can be used only for criminal investigation, *see* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 8.8(d) (2d ed. 1992) (discussing United States v. Procter & Gamble Co., 356 U.S. 677, 683 (1958), Congress must have intended "offense" to mean a criminal violation.

30. United States v. LaSalle Natl. Bank, 437 U.S. 298, 316 n.18 (1978).

31. I.R.C. § 7602(c) (1994).

32. A Justice Department referral is considered in effect with respect to a person if:

issuing of summonses only if a tax case is already in the hands of the Justice Department, while the solely criminal purpose doctrine operates only *prior* to Justice Department referral.[33] Therefore, the solely criminal purpose doctrine does not fall under subsection (c)'s exception to the IRS's criminal investigative authority. The language of the amended statute thus leaves no room for the continued existence of the solely criminal purpose doctrine.

### B. *The Legislative History*

The legislative history of the TEFRA amendments reveals that Congress intended to eliminate the solely criminal purpose defense. The Report of the Senate Finance Committee, which added the relevant amendments to the summons provision,[34] explains that the defense "spawned protracted litigation without any meaningful results for the taxpayer."[35] The Report then states that in order to have a more workable definition of when the IRS's criminal summons power exists, "it was necessary to *expand* the purposes for which an [IRS] summons may be issued."[36] This expansion was necessary because "[t]he restrictions . . . stated in *LaSalle* arise from the provision of [pre-TEFRA] law which limits the use of administrative summonses to the determination and collection of taxes."[37]

---

(i) the Secretary has recommended to the Attorney General a grand jury investigation of, or the criminal prosecution of, such person for any offense connected with the administration or enforcement of the internal revenue laws, or
(ii) any request is made under section 6103(h)(3)(B) [permitting disclosure of IRS information to the Justice Department upon request for use in criminal investigation or prosecution] for the disclosure of any return or return information . . . relating to such person.

I.R.C. § 7602(c)(2)(A) (1994).

33. *See, e.g., LaSalle*, 437 U.S. at 316-17 ("We shall not countenance *delay* in submitting a recommendation to the Justice Department . . . .") (emphasis added).

34. *See* H.R. CONF. REP. No. 97-760, at 584 (1982) ("The conference agreement follows the Senate amendment.").

35. S. REP. No. 97-494, vol. 1, pt. 2, at 285 (1982), *reprinted in* 1982 U.S.C.C.A.N. 781, 1031. The Committee was criticizing the solely criminal purpose defense for unnecessarily complicating the summons enforcement process. When challenged, IRS summonses must be enforced by a court, *see* I.R.C. § 7604 (1994), which will hear defenses offered by the taxpayer under investigation. Courts ruling on the availability of the solely criminal purpose defense allowed complex discovery and conducted extensive hearings on the question of whether the IRS had made an institutional commitment to refer a case to the Department of Justice. *See generally* Laura S. Wertheimer, Note, *The Institutional Bad Faith Defense to the Enforcement of IRS Summonses*, 80 COLUM. L. REV. 621 (1980). The Committee believed this litigation was wasteful. *See also id.* at 644 ("[T]he lower courts [litigating the solely criminal purpose defense] have expended judicial resources and delayed the enforcement of the revenue laws reviewing allegations that rarely reveal institutional abuse.").

36. S. REP. No. 97-494, at 285 (emphasis added).

37. *Id.* The Committee was correct in its characterization of *LaSalle*. The decision makes this reasoning explicit in a footnote:

Congress . . . intended the summons authority to be used to aid the determination and collection of taxes. These purposes do not include the goal of filing criminal charges against citizens. Consequently, summons authority does not exist to aid criminal investigations solely. The error of the dissent is that it seeks a limit on the face of the statute

Consequently, the Finance Committee decided to insert an independent grant of authority for criminal investigation, thereby eliminating the solely criminal purpose defense: No other understanding of the amendments would account for the Committee's stated intention to "expand the purposes for which an [IRS] summons may be issued."[38] The only limitations on the Service's criminal summons authority prior to TEFRA were the two contained in *Donaldson* and *LaSalle*,[39] and Congress codified one of these limitations, the Justice Department referral defense.[40] If the solely criminal purpose defense were to exist now, there would have been no change whatsoever in IRS summons authority. Therefore, if the legislative history is to have any meaning, it must mean that Congress eliminated the solely criminal purpose defense.

## II. The Impact of *United States v. Stuart*

The Fourth and Seventh Circuits concluded from language in the 1989 Supreme Court case *United States v. Stuart*[41] that the solely criminal purpose defense still survives.[42] This Part asserts that *Stuart* does not signal the continuing viability of the solely criminal purpose defense, and that the Fourth and Seventh Circuits' reliance on *Stuart* was based on a misreading of the language of that case.

In *Stuart*, the Court addressed whether the IRS could issue administrative summonses to assist the Canadian Department of National Revenue (Revenue Canada) in a criminal investigation of Canadian citizens.[43] Pursuant to articles XIX and XXI of the 1942 Convention Respecting Double Taxation between the United States and Canada,[44] Revenue Canada asked the IRS to provide them with records of these taxpayers' accounts at a Washington bank.[45] To this end, the IRS issued summonses for the bank

---

when it should seek an affirmative grant of summons authority for purely criminal investigations.

*LaSalle*, 437 U.S. at 316 n.18.

38. S. Rep. No. 97-494, at 285.

39. *See supra* notes 11-18 and accompanying text.

40. *See supra* notes 31-32 and accompanying text.

41. 489 U.S. 353 (1989). For a more comprehensive discussion of *Stuart*, see Hugh P. Quinn, Note, *Administrative Summonses Can Be Utilized in International Criminal Investigations:* United States v. Stuart, 43 Tax Law. 501 (1990).

42. *See* United States v. Michaud, 907 F.2d 750, 752 n.2 (7th Cir. 1990) (en banc); Hintze v. IRS, 879 F.2d 121, 127 n.8 (4th Cir. 1989).

43. *See Stuart*, 489 U.S. at 356.

44. These Articles give the IRS the power, upon request and when consistent with United States law, to convey taxpayer information within its jurisdiction to Canadian authorities in order to aid them in the determination of Canadian tax liability. *See* Convention Respecting Double Taxation, Mar. 4, 1942, U.S.-Can., arts. 19, 21, 56 Stat. 1399, 1405-06; *see also Stuart*, 489 U.S. at 355-56.

45. *See Stuart*, 489 U.S. at 356.

records, and the Canadian taxpayers challenged these summonses in U.S. district court.[46] The issue before the Supreme Court was whether the IRS must determine that a Canadian tax investigation has not reached a stage analogous to Justice Department referral before the IRS can issue administrative summonses to aid the Canadian investigation.[47] The Court held that neither domestic revenue law nor the 1942 convention required this condition on enforcement.[48]

Dealing with domestic revenue law first, the Court concluded that section 7602(c) did not apply in this case because "it speaks only to investigations into possible violations of *United States* revenue laws."[49] Specifically, section 7602(c) only prohibits the issuance of a summons if a Justice Department referral is in effect.[50] A Justice Department referral was clearly not in effect with respect to the Canadian taxpayers — they were under investigation only by Canadian authorities.[51] The Court read literally the phrase "the Justice Department" in section 7602(c), refusing to analogize to equivalent law enforcement agencies.

In the process of using the legislative history of section 7602(c) to support its position, the Court spoke of *LaSalle* in a way that seemed to indicate that it considered *LaSalle*'s solely criminal purpose doctrine to be good law. After mentioning the two parts of *LaSalle*'s holding — the Justice Department referral doctrine and the solely criminal purpose doctrine — the Court stated: "When Congress codified the essence of our *[LaSalle]* holding in § 7602(c), it apparently shared our concern about permitting the IRS to encroach upon the rights of potential criminal defendants."[52]

The Fourth and Seventh Circuits incorrectly believed that the Court referred to the solely criminal purpose doctrine as the "essence" of the *LaSalle* holding. The Court, however, was in fact describing the Justice Department referral doctrine, which, although first stated in *Donaldson*,[53] was explicitly reaffirmed in *LaSalle*.[54] A close examination of the Court's language reveals the Fourth and Seventh Circuits' mistake: The Court referred to "[w]hen Congress codified the essence of our holding in § 7602(c)

46. *See Stuart*, 489 U.S. at 356-57.

47. *See Stuart*, 489 U.S. at 355-56.

48. *See Stuart*, 489 U.S. at 356.

49. *Stuart*, 489 U.S. at 362 (emphasis added).

50. *See Stuart*, 489 U.S. at 362.

51. *See Stuart*, 489 U.S. at 362.

52. *Stuart*, 489 U.S. at 363.

53. *See* Donaldson v. United States, 400 U.S. 517, 536 (1971).

54. *See* United States v. LaSalle Natl. Bank, 437 U.S. 298, 311-13 (1978).

. . . ."[55] The only court-made rule Congress codified in section 7602(c), however, was the rule that no IRS summons could issue after a Justice Department referral.[56] The solely criminal purpose doctrine is, in fact, conspicuously absent from this subsection. While the Court's choice of words was misleading, the Court's own language reveals that it was describing the Justice Department referral doctrine, and not the solely criminal purpose doctrine.[57] Therefore the *Stuart* case, which was the heart of the Fourth and Seventh Circuits' justification for holding that the solely criminal purpose doctrine survives,[58] says nothing to contradict what Part I of this Note contends — that the TEFRA amendments eliminated the solely criminal purpose defense.

## III. The Solely Criminal Purpose Defense and Individual Rights

This Part demonstrates that the elimination of the solely criminal purpose defense and the consequent expansion of IRS criminal investigative power do not diminish protection of those under criminal tax investigation. In fact, IRS investigations through section 7602 summonses offer greater procedural protection to the potential criminal defendant than do Justice Department investigations using the grand jury subpoena power.[59] Thus the IRS has little incentive to delay referral of a criminal case to the Justice Department. Additionally, insofar as the IRS does delay referral, such delay will not "permit the Government to expand its criminal discovery rights," as the *LaSalle* Court had feared.[60]

---

55. *Stuart*, 489 U.S. at 363.

56. *See supra* section I.A.

57. *See supra* text accompanying note 55.

Judge Richard Posner also reaches this conclusion in his dissent in *Michaud:*

> [M]y brethren infer [from *Stuart*] that the IRS is not permitted to use the summons procedure after the Service "has abandoned any proper civil purpose," even if there has been no referral to the Justice Department. This misunderstands *Stuart;* it also misunderstands section 7602(c) and its interplay with 7602(b). All the passage quoted from *Stuart* means is that subsection (c) defines the forbidden encroachment as occurring when the case is referred to the Justice Department. . . . Before that happens, however, the Service's powers are defined by subsection (b), which *expressly* authorizes the use of the summons procedure to investigate criminal offenses and says nothing about requiring a civil purpose. Nothing in *Stuart* is to the contrary.

United States v. Michaud, 907 F.2d 750, 756-57 (7th Cir. 1990)(en banc)(Posner, J., dissenting).

58. *See Michaud*, 907 F.2d at 752 n.2 (7th Cir. 1990) (quoting *Stuart*, 489 U.S. at 363, and Hintze v. IRS, 879 F.2d 121, 127 (4th Cir. 1989)); *Hintze*, 879 F.2d at 128 n.8 (quoting *Stuart*, 489 U.S. at 363).

59. *See infra* notes 61-73 and accompanying text.

60. United States v. LaSalle Natl. Bank, 437 U.S. 298, 317 (1978).

For a more comprehensive discussion of the policy of the *LaSalle* rules, concluding not only that there is no compelling justification for the "solely criminal purpose" rule, but also that the restriction on the issuance of summonses after referral to the Justice Department is unnecessary, see Hughes, *supra* note 1, at 603-09.

A comparison of grand jury subpoena authority and IRS summons authority reveals that IRS summonses offer greater protection to targets of investigation than do grand jury subpoenas. The grand jury subpoena power wielded by the Justice Department is extensive and largely unrestricted; several features of grand jury subpoenas make them an extremely flexible investigative tool. First, the grand jury itself has almost no control over the investigative subpoena process.[61] Justice Department attorneys may obtain subpoenas from a court clerk without even consulting a grand jury,[62] and they need not make a showing of probable cause.[63] Instead, grand jury subpoenas are subject to only the loosest requirement of relevancy.[64] Furthermore, the denial of a motion to quash a grand jury subpoena is not an appealable final order.[65] Finally, witnesses testifying before the grand jury do not even have the right to the presence of counsel in the grand jury room.[66] In fact, there are only two significant restrictions on grand jury subpoena power: First, the subpoenas can be issued only for criminal investigation, and second, a presumption of secrecy applies to everything that comes before a grand jury.[67]

The IRS summons power, while similar, is more restricted. Like grand jury subpoenas, IRS summonses, when challenged, must be enforced by a court[68] but need not be supported by probable cause.[69] The "good faith" test for enforcement of IRS summonses, although a liberal one,[70] is no more liberal than enforceability

61. *See* JEROLD H. ISRAEL ET AL., WHITE COLLAR CRIME: LAW AND PRACTICE 293-94 (1996).

62. *See id.* at 294.

63. The Supreme Court has held that grand jury subpoenas are not searches or seizures falling under the protection of the Fourth Amendment. *See* United States v. Dionisio, 410 U.S. 1, 15 (1973).

64. *See* LAFAVE & ISRAEL, *supra* note 29, § 8.7(a), (c) (describing liberal reasonableness requirements for subpoenas); Hughes, *supra* note 1, at 606 (stating that grand jury subpoena authority "extends to anything of conceivable relevance to the investigation and prosecution of a criminal case").

65. *See* Cobbledick v. United States, 309 U.S. 323 (1940).

66. This issue has never been squarely ruled upon by the Supreme Court, but there is strong dicta to this effect in *United States v. Mandujano*, 425 U.S. 564, 581 (1976)(plurality opinion), and the lower courts have followed it. *See* LAFAVE & ISRAEL, *supra* note 29, § 8.15.

67. *See* Hughes, *supra* note 1, at 577 (outlining these two restrictions). The Justice Department may have reasons for desiring the latter restriction. *See* LAFAVE & ISRAEL, *supra* note 29, § 8.3(f) (explaining why "secrecy requirements are commonly cited as [an] investigative advantage of the grand jury").

68. *See* I.R.C. § 7604(b) (1994).

69. *See* United States v. Powell, 379 U.S. 48, 52-57 (1964).

70. The IRS need only show that "the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the [Service's] possession, and that the administrative steps required by the Code have been followed." *Powell*, 379 U.S. at 57-58.

requirements for grand jury subpoenas. As one commentator put it:

> The IRS cannot procure anything by way of a summons that a grand jury cannot obtain by use of its subpoena power. Civil summons power simply is not any broader than a grand jury's criminal discovery through compulsory process, which extends to anything of conceivable relevance to the investigation and prosecution of a criminal case.[71]

Furthermore, IRS summonses carry two restrictions that make them more protective of those under investigation than grand jury subpoenas. A taxpayer can appeal the denial of a motion to quash an IRS summons,[72] and persons testifying under administrative summonses may have counsel present when testifying.[73]

Because the use of IRS summonses gives the government no additional investigative power, the IRS gains no advantage by unreasonably delaying referral of a criminal case to the Justice Department. Assuming that the goal of IRS criminal investigation is the successful prosecution of criminal violators of the tax laws, the IRS will have good reason to refer its criminal cases to the Justice Department as soon as it has gathered enough evidence to conclude that prosecution is necessary. Furthermore, if the IRS does, for some reason, delay referral to the Justice Department of a criminal case, this delay will not expand the government's criminal discovery rights for the reasons stated above. Therefore, *LaSalle*'s concern for the rights of potential criminal tax defendants is misplaced.

## CONCLUSION

The solely criminal purpose defense to the enforcement of IRS summonses did not survive the TEFRA amendments to the tax summons provision. A close reading of the statute and legislative history makes this clear, and the discussion of the provision in *United States v. Stuart* says nothing to indicate otherwise. This would be a simple issue of statutory interpretation if eliminating this restriction on the IRS were not perceived as adversely affecting individual rights. Eliminating the solely criminal purpose defense, however, does not lessen the rights of criminal defendants at all. In fact, taxpayers might rather remain under IRS investigation for as long as possible during a criminal investigation because of the

71. Hughes, *supra* note 1, at 606; *see also* Wertheimer, *supra* note 35, at 642 ("Before referral, the substantive power of the agency summons is analogous to that of the grand jury's subpoena, and the procedural protections afforded the taxpayer under the former are greater.") (footnotes omitted).

72. Orders enforcing administrative summonses have been appealable final orders since *ICC v. Brimson*, 154 U.S. 447 (1894).

73. *See* 5 U.S.C. § 555(b) (1994).

somewhat greater protections offered by IRS summonses. The elimination of the defense brings the IRS one step closer to the flexibility afforded other agencies in their investigation of violators of federal statutes, without a corresponding loss in protections for the individual. There is, therefore, no reason for courts to refrain from following the clear intent of Congress to eliminate the solely criminal purpose defense.