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INTERNATIONAL LAW — THE POLITICAL OFFENSE EXCEPTION TO EXTRADITION: A 19TH CENTURY BRITISH STANDARD IN 20TH CENTURY AMERICAN COURTS

The Court of Appeals for the Ninth Circuit is currently reviewing a grant of habeas corpus to a Provisional Irish Republican Army ("PIRA") member previously certified for extradition to the United Kingdom.1 In the United Kingdom, the accused, William Joseph Quinn, faces charges of murder and conspiracy to cause bomb explosions.2 Pursuant to the United States-United Kingdom extradition treaty,3 the United Kingdom government formally requested Quinn’s extradition in November, 1981. At his extradition hearing, Quinn contended that his alleged crimes were political acts within the treaty’s political offense exception clause4 and that, therefore, he

2 Id. at 2.
3 Extradition Treaty, June 8, 1972, United States-United Kingdom, 28 U.S.T. 227, T.I.A.S. No. 8468 [hereinafter cited as Treaty]. The extradition process typically consists of the following steps. The foreign government communicates its request for the accused’s return to the United States through diplomatic channels. Treaty, art. VII. The United States government then applies to a federal magistrate for a provisional arrest warrant on behalf of the foreign government. The magistrate may grant this request if an extradition treaty is in effect, if the offenses charged are within its provisions, and if the accused is within the magistrate’s jurisdiction. Treaty, art. VII; 18 U.S.C. § 3184 (1982). The foreign government then must request extradition formally within 45 days of the accused’s arrest, Treaty, art. VIII, which request must include the accused’s name and nationality, the facts of the offense(s), the text of the law involved, and a warrant of arrest issued by the proper authority of the foreign government. Treaty, art. VII.

The federal magistrate then holds an extradition hearing to decide whether there is sufficient evidence according to United States law to justify committing the accused for trial if the offense charged had been committed in the United States. Treaty, art. IX. The Supreme Court held in Benson v. McMahon, 127 U.S. 457 (1888), that this requires a finding of probable cause akin to that at a preliminary hearing in criminal cases. The magistrate will deny extradition if he determines the evidence is insufficient; this denial is final and not subject to direct appeal. United States v. Mackin, 668 F.2d 122, 125-30 (2d Cir. 1981). However, if the magistrate finds the evidence sufficient, he will grant extradition and certify the defendant’s extradition to the Secretary of State. 18 U.S.C. § 3184. The accused thereafter may petition for writ of habeas corpus to secure his release. Ornelas v. Ruiz, 161 U.S. 502 (1896). If the judiciary certifies extradition, the Secretary of State then will decide whether to allow the extradition. 18 U.S.C. § 3188 (1982); see Note, Executive Discretion in Extradition, 62 COLUM. L. REV. 1313 (1962).

4 Treaty, supra note 3, art. V provides:

(1) Extradition shall not be granted if:

. . .
was protected from extradition. The federal magistrate rejected this allegation and granted the United Kingdom's request in September, 1982. Quinn subsequently petitioned for writ of habeas corpus in federal district court. In October, 1983, the district court judge accepted Quinn's political offense argument and granted his release. The United States, on behalf of the United Kingdom, has appealed the decision to the Ninth Circuit.

In Quinn v. Robinson, the Ninth Circuit faces a question with judicial, international, and societal implications. The judicial significance stems from the failure of United States' extradition treaties to define the phrase "offense of a political character." Courts have stated that their statutory grant of power over extradition requests includes the power to interpret the political offense exception clause. Lower federal courts and magistrates currently employ nineteenth-century standards in interpreting the exception. However, these standards are inadequate for dealing with extraditions that involve terrorists. As one writer noted, United States magistrates and district courts are attempting "to cope with modern terrorism through legal tests and procedures which predate the advent of air travel, guerilla warfare and urban revolution." In Quinn, the Ninth Circuit has a valuable opportunity to modernize the political offense standard

5 In re Quinn, No. Cr-81-146 Misc. at 78 (N.D. Cal., Sept. 28, 1982).
6 Id. at 111-12.
7 Quinn, No. C-82-6688 RPA at 5.
8 Hannay, International Terrorism and the Political Offense Exception to Extradition, 18 COLUM. J. TRANSNAT'L L. 381, 385 (1980).

Courts are granted power to decide extradition requests under 18 U.S.C. § 3184 (1982). See note 3 supra. However, requesting governments often argue that the political offense exception should be decided by the executive branch. Judge Friendly addressed this contention at length in Mackin. In finding that courts have jurisdiction to decide the political offense question, Congress could have expressly excluded the political offense issue in the general grant of extradition power in § 3184, but had not. 668 F.2d at 137. Judge Friendly also pointed out that the judiciary's involvement helped to ensure impartiality and to depoliticize the issue. Id. at 134-35. He finally noted that it was for Congress, if it so chose, to alter the existing procedure, which is based on over a century of case law. Id. at 135, 137.

within its own jurisdiction,\textsuperscript{11} and to influence trends in other jurisdictions.

On an international level, extradition cases in general, and political offense cases in particular, affect a government's foreign relations. By refusing extradition requests, especially on political offense grounds, a government implies its doubt about both the requesting country's good faith and its legal system's integrity. Moreover, the requesting country may see an extradition denial as an endorsement of the accused's actions.\textsuperscript{12} Finally, the judiciary in both countries party to an extradition treaty may interpret the treaty's political offense clause differently, resulting in one country extraditing more offenders than the other. A continued and serious imbalance in the number of extraditions could harm relations between the countries, and even provoke abandonment of the treaty.

The Ninth Circuit's delimitation of the political offense exception in \textit{Quinn} also could have significant societal implications. One judge recently expressed the concern that too freely applying the political offense exception could make the United States a terrorist haven, with no guarantee of their peaceful conduct while they remain in the United States.\textsuperscript{13} Just as late nineteenth-century European courts adapted their application of the political offense exception to deal with anarchists,\textsuperscript{14} now the United States courts must adapt their application of the exception to deal with terrorists.

This comment examines the American courts' application of the political offense exception. Part I details the historical purposes and evolution of the exception. Part II explores current American devel-

\textsuperscript{11} The Ninth Circuit precedent is a highly criticized case involving Yugoslavia's request for the return of an alleged war criminal, Karadzole v. Artukovic, 247 F.2d 198 (9th Cir. 1957), vacated and remanded, 355 U.S. 393 (1958), surrender denied on remand sub nom. United States v. Artukovic, 170 F. Supp. 383 (S.D. Cal. 1959). See note 63 infra.

\textsuperscript{12} I. Shearer, \textit{Extradition in International Law} 192 (1971). The United States is especially vulnerable to these accusations in IRA cases, given popular support in America for the Irish nationalist movement.

\textsuperscript{13} Eain v. Wilkes, 641 F.2d at 520. However, a grant of political offender status and exemption from extradition does not protect the offender from deportation. 18 U.S.C. §§ 1182(a)(28), 1251(a)(1), (6)(1982). Deportation, the unilateral expulsion of an alien, see Fong Yue Ting v. United States, 149 U.S. 698, 713-14 (1893), has been referred to for this reason as "disguised extradition." I. Shearer, supra note 12, at 78; O'Higgins, \textit{Disguised Extradition: The Sablen Case}, 27 MOD. L. REV. 521, 530-31 (1964). Further, deportation is not an unusual step; Desmond Mackin, see note 8 supra, was deported from the United States to the Republic of Ireland after United States courts denied his extradition. N.Y. Times, Dec. 31, 1981, at 22, col. 5.

\textsuperscript{14} See text accompanying note 49 infra.
opments in this area. Part III discusses the factors in, and ramifications of, the most recent case, Quinn v. Robinson.

I. Historical Development

The United States Supreme Court has defined extradition as "the surrender of a criminal by a foreign state to which he has fled for refuge from prosecution to the state within whose jurisdiction the crime was committed upon the demand of the latter state, in order that he may be dealt with according to its laws." Most countries will surrender a fugitive only if an extradition treaty is in force. An Egyptian pharaoh and a Hittite king negotiated the first-known such treaty in the thirteenth century B.C. During centuries of absolute monarchies thereafter, rulers used these treaties primarily to obtain custody of fugitive political offenders rather than common criminals. Monarchs complied with extradition requests to ensure the continued reign of an ally and to guarantee reciprocal treatment.

After the Enlightenment, theorists such as John Stuart Mill championed the individual's right to rebel against oppressive governments. Revolutions replaced many absolute monarchies with democratic governments that were more concerned with human rights. Accordingly, public opinion turned against returning political offenders to states where they would face hostile judges and summary trials. In this period, as one writer stated, the political offense evolved from "what was the extraditable offense par excellence to what has since become the non-extraditable offense par excellence."

16 The United States, for example, recognizes a legal right to demand extradition and a correlative duty to comply with such requests only when an extradition treaty exists. Absent such a treaty, a government may choose to grant extradition on the principle of comity between nations, but it is under no obligation to so act. Factor v. Laubenheimer, 290 U.S. 176, 187 (1933); see also Valentine v. United States ex rel. Neideker, 229 U.S. 5, 7-13 (1913); United States v. Rauscher, 119 U.S. 407, 412-14 (1886); McElvy v. Civiletti, 523 F. Supp. 42, 47 (S.D. Fla. 1981); Holmes v. Laird, 459 F.2d 1211, 1219 n.59 (D.C. Cir. 1972).
17 I. Shearer, supra note 12, at 5.
19 Id.
21 I. Shearer, supra note 12, at 5. This concern is still a factor in judicial decisions. See text accompanying note 50 infra.
22 M. Bassiony, supra note 18, at 371. The French Revolution had a profound impact on this evolution. It is not coincidental that France was among the first countries to include political offense exception clauses in their extradition treaties. See I. Shearer, supra note 12, at 16-29.
In the mid-nineteenth century, Western countries began including clauses exempting political offenders in their extradition treaties.\textsuperscript{23} However, because the treaties did not define "political offenses," courts had difficulty putting the exception into practice.\textsuperscript{24} Nevertheless, courts quickly recognized two distinct categories of political offenses: "pure" and "relative."\textsuperscript{25}

In pure political offenses, the accused has directly injured a right of the government.\textsuperscript{26} Eventually, countries specifically excluded these offenses from the list of extraditable crimes in their treaties.\textsuperscript{27} Courts, therefore, seldom dealt with extraditions involving these pure offenses; they could deny extradition on the ground that the offense charged was not a listed crime.\textsuperscript{28} The second category of political acts identified by courts, the relative political offense, involved common crimes, such as murder or robbery, committed for political motives or in a political context.\textsuperscript{29} In contrast to pure political crimes, these relative offenses, because of their mixed nature, presented courts with classification problems. For guidance, courts looked to the aim of the political offense exception: "[T]o protect those violent acts which are necessary and corollary to political activity, not to sanction gratuitous assaults on human life."\textsuperscript{30}

Judges in different countries developed three distinct tests in applying the political offense exception: the French objective test, the Swiss predominance test, and the Anglo-American incidence test.\textsuperscript{31}

\textsuperscript{23} See I. Shearer, supra note 12, at 16.

\textsuperscript{24} See M. Bassiouni, supra note 18, at 371-72 (stating that by its very nature the political offense exception defies precise definition, and arguing that this promotes a necessary flexibility of the concept).


\textsuperscript{26} Garcia-Mora, supra note 25, at 1230.

\textsuperscript{27} See I. Shearer, supra note 12, at 182.

\textsuperscript{28} Id. In "no list" treaties, the parties merely provide for extradition between the signatories and do not enumerate the offenses covered. Because no offenses are designated specifically, none are excluded. Therefore, the court must address the political offense issue because it cannot deny extradition on the ground that the offense is not covered by the treaty.

\textsuperscript{29} See note 25 supra.

\textsuperscript{30} Lubet & Czackes, supra note 25, at 194-95.

\textsuperscript{31} Commentators have consistently used these three categories. For a full analysis of the categories, see Carbonneau, The Political Offense Exception to Extradition and Transnational Terrorists: Old Doctrine Reformulated and New Norms Created, 1 A.S.I.L.S. Int'l L.J. 1, 10-33 (1977);
The French objective test granted political offender status only when the accused's acts directly injured rights of the State. In the most representative case, In re Giovanni Gatti, the San Marino government asked France to extradite the defendant whom they had charged with the attempted murder of a Communist party member. The defendant contended that he had acted for political reasons. The French court granted extradition, unconvinced by this political offense argument. The court declared that an offense derives its character not from the motive of the accused, but rather from the nature of the rights it injures. Therefore, the court stated, to be of a political character, an act must affect rights of the state. By thus formulating their objective test, French courts severely restricted the scope of the political offense exception, limiting it to only pure political acts and automatically excluding relative political acts.

Under their predominance test, Swiss courts deny extradition when the political elements outweigh, or "predominate" over, the common elements of a crime. A Swiss court, in In re Vogt, listed the pertinent factors in making this decision: the accused's motivation, the circumstances surrounding his commission of the crime, and the proportion between the political objective and the means.
adopted to achieve it.\textsuperscript{41} In \textit{Vogt}, the court felt that the accused's political objective, the removal of police from his district during food riots, did not outweigh the means he used, taking innocent civilian hostages. In granting extradition, the court noted that as the means adopted become increasingly extreme, the political justification must correspondingly intensify in order for the political offense exception to be granted.\textsuperscript{42}

The Swiss predominance test, therefore, unlike the French objective test, encompasses pure and relative political offenses. Moreover, its flexible mechanism for balancing objective and subjective factors is uniquely tailored to assist courts in assessing relative political acts.

Anglo-American courts have derived their incidence test\textsuperscript{43} from the 1891 case \textit{In re Castioni},\textsuperscript{44} where the British court stated the test for a political offense exception as:

\begin{quote}
[W]hether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as part of the political movement and [up]rising in which he was taking part.\textsuperscript{45}
\end{quote}

Courts of both the United Kingdom and the United States have relied explicitly on \textit{Castioni} in political offense exception cases. Each country, however, has developed its own version of the standard. Since \textit{In re Meunier}\textsuperscript{46} in 1894, British courts have required that the acts be incidental to and in furtherance of a two-party struggle for political power. In \textit{Meunier}, France had requested extradition of an anarchist charged with bombing a cafe and a military barracks.\textsuperscript{47} The English court denied the accused political offender status and granted extradition because he was not engaged in a two-party strug-
gle for political power. The court declared that, since anarchists seek to destroy all governments rather than to substitute one form of government for another, they are not entitled to the protection of the political offense exception.

British courts have applied the incidence test flexibly in certain situations. For example, in Regina v. Governor of Brixton ex parte Kolczynski an English court refused to extradite Polish sailors even though Poland had charged them with extraditable offenses which were not committed during a two-party struggle. The defendants, who had mutinied and sailed their trawler into a British port, contended that if they were returned, their totalitarian government might try them for the charged offenses, but would punish them for treason in fleeing to a Western country. The court accepted their argument and denied extradition, emphasizing that the words "offense of a political character" must always be considered "according to the circumstances existing at the time," and that "[t]he present time is very different from 1891 when Castioni's case was decided."

In contrast to the British judiciary, American courts have narrowly interpreted the Castioni test. In 1894, an American court first adopted the Castioni incidence test in In re Ezeta. In Ezeta, the Salvadoran government had requested the extradition of a defendant who faced murder and robbery charges. The court refused the request on political offense grounds, finding that the defendant had acted in support of a contending faction during a rebellion.

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48 Id. at 419.
49 Id.
51 Id. at 548.
52 Id. at 549. However, British courts indicated in Schtraks v. Government of Isr., [1962] 3 All Eng. 529 (H.L.), that their flexibility was limited. Israel sought the defendant's extradition on the charge of violating an Israeli court order to return a child to his parents. The defendant had refused to obey the court order and had fled to the United Kingdom because he feared the parents would not give the child a strict Jewish orthodox upbringing. The House of Lords declared that, as the defendant's acts were not politically motivated and were not protected political offenses, he should be extradited. Id. at 536, 540-41. They continued:

"[I]t is still necessary to have that connexion [between the uprising and political offense]. It is not departed from by taking a liberal view as to what is meant by disturbance . . ., provided the idea of political opposition as between fugitive and requested State is not lost sight of . . .

Id. at 540.
53 See text accompanying note 45 supra.
54 62 F. 972 (N.D. Cal. 1894).
55 Id. at 975-76. The defendant, a general in the previous regime, had committed the alleged crimes during the rebellion by which the requesting government came to power.
56 Id. at 1004-05.
In the 1896 case, *Ornelas v. Ruiz*, the Supreme Court in dicta listed four factors pertinent to a political offense inquiry: (1) the character of the foray; (2) the mode of the attack; (3) the persons killed or captured; and (4) the kind of property taken or destroyed. Lower American courts, however, apparently ignored the Court's guidance in *Ruiz*, and, relying on *Castioni*, established the following requirements for the political offense exception: (1) the existence of a political uprising or a political disturbance; and (2) acts incidental to or in furtherance of the political disturbance. By dismissing the *Ruiz* factors, courts reduced their inquiry to an occurrence-based approach. If a defendant acted during a political uprising, his act was a political offense; conversely, if a defendant did not act during such an uprising, the act was not a political offense and thus not protected. This approach has yielded anomalous and severely
criticized results.64

One factor contributing to the inconsistency of American decisions is the societal changes that have taken place since American courts originally adopted the Castioni test.65 Specifically, modern-day terrorism has posed new problems for courts applying the Castioni nineteenth-century incidence standard. In several recent cases involving requests to extradite terrorists, courts have reexamined this standard.

II. Current American Developments

In three recent cases, In re McMullen,66 Eain v. Wilkes,67 and United States v. Mackin,68 American courts have considered whether the political offense exception protects alleged terrorist acts. In McMullen, the magistrate adhered to the traditional political offense application and denied extradition.69 However, the Eain court developed a narrower approach by redefining the "uprising" and "incidence" elements.70 In so doing, the court provided a viable framework for distinguishing between terrorist acts and offenses of a political character. In Mackin, the Second Circuit implicitly approved the Eain approach by affirming a magistrate's opinion which explicitly endorsed Eain.71

In In re McMullen, British authorities requested extradition of an IRA member charged with attempted murder in connection with the bombing of a military barracks in England.72 McMullen asserted that his acts came within the political offense exception and that ex-

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64 See note 54 supra.
69 In re McMullen, No. 3-78-1899 M.G., reprinted in Hearings on S. 1639, supra note 66, at 294.
70 641 F.2d at 518-23.
71 Mackin, 668 F.2d at 137; see also notes 81-86 infra and accompanying text.
72 In re McMullen, No. 3-78-1899 M.G., reprinted in Hearings on S. 1639, supra note 66, at 294.
tradition should therefore be denied. The magistrate listed the elements of the political offense exception: 1) the act must have occurred during an uprising and the accused must be a member of the group participating in the uprising; 2) the accused must be a person engaged in acts of political violence with a political end. The magistrate found these elements satisfied and therefore denied extradition on political offense grounds.

In Eain v. Wilkes, Israel requested extradition of an alleged member of the Palestinian Liberation Organization ("PLO") charged with exploding a bomb in the marketplace of an Israeli city. Eain challenged the extradition on the basis of the political offense exception in an argument paralleling that used successfully by McMullen. However, unlike the magistrate in McMullen, the Court of Appeals for the Seventh Circuit found that the bombing was not incidental to an uprising and granted extradition. The court introduced a new rationale for determining the political offense issue: to be incidental to a disturbance, the court stated, a direct tie must exist between the perpetrator, a political organization's political goals, and the specific act. More importantly, the court declared that the only acts legitimately part of a political disturbance are those that "disrupt the political structure of a state, and not the social structure that established the government." The court found that because Eain had indiscriminately bombed a civilian target, his act was not a protected political offense.

73 Id. (citing Castioni, [1891] 1 Q.B. 149 and Karadzole v. Artukovic, 247 F.2d 198 (9th Cir. 1957)).
74 Id. at 296. The magistrate found that: (1) a violent political disturbance existed in Northern Ireland at the time of McMullen's alleged act; (2) the PIRA was involved in that uprising; (3) defendant was a member of the PIRA; and (4) the offenses allegedly committed were part of the PIRA's political campaign in Northern Ireland. Id. at 295.
75 641 F.2d at 507.
76 See note 74 supra and accompanying text. Eain introduced evidence to show: (1) the existence of a violent political disturbance at the time of his alleged act; (2) the involvement of the PLO in that disturbance; (3) his membership in the PLO; and (4) the alleged acts were part of the PLO's resistance to the Israeli presence. 641 F.2d at 518.
77 Id. at 523. The court previously had found that "the operative definition of 'political offenses' under extradition treaties as construed by the United States limits such offenses to acts committed in the course of and incidental to a violent political disturbance, such as a war, revolution or rebellion." Id. at 518.
78 Id. at 520.
79 Id. at 520-21 (emphasis added).
80 Id. at 523. The court relied on and quoted extensively from In re Meunier, [1894] 2 Q.B. 415, in its decision. While stating that Eain was not an anarchist, the court felt that his "anarchist-like" behavior was sufficiently close to Meunier's to warrant exclusion from the political offense exception. Id. at 521-22.
In *United States v. Mackin*, the United Kingdom sought the return of an Irish Republican Army ("IRA") member accused of the attempted murder of a British soldier in Belfast, Northern Ireland, and illegal possession of firearms and ammunition. The magistrate’s formulation of the political offense exception elements was similar to that of the *In re McMullen* magistrate’s. However, the magistrate in *Mackin* also explicitly endorsed the *Eain* court’s direct link requirement. In denying extradition, the magistrate emphasized that while Mackin’s acts were directed against military personnel, Eain’s had been aimed at civilians:

[If the offense committed was anarchistic in nature and focused toward the disruption of the social fabric rather than the political structure of the State, we would not conclude that the act bore any connection to the political activity nor that it was committed “in furtherance” of a political uprising.]

The United States appealed the magistrate’s non-extradition order and, alternatively, petitioned for a writ of mandamus to require the magistrate to grant extradition. The Court of Appeals for the Second Circuit held that the magistrate’s opinion was not appealable and, because the magistrate had not exceeded her jurisdiction in deciding the alleged acts were political offenses, there existed no basis for a writ of mandamus.

These three cases reflect American courts’ shifting attitude toward the application of the political offense exception. The *McMullen* magistrate stated the political offense inquiry as:

1. whether there was a war, rebellion, revolution or political uprising at the time and site of the commission of the offense;
2. whether Mackin was a member of the uprising group; and
3. whether the offense was “incidental to” and “in furtherance” of the political uprising.

In re *Mackin*, No. 80 Cr. Misc. 1, reprinted in *Hearings on S. 1639*, supra note 66, at 186. The *Mackin* magistrate “distilled” these standards from the case law. *Id.* at 166-74.

The magistrate felt that because Mackin’s acts were directed against military personnel, whereas Eain’s were directed at civilians, “the well-reasoned limitations circumscribing the application of the political offense exception set forth in . . . *Eain v. Wilkes* [were] inappropriate in the case before us.” *Id.* at 237-38.

81 668 F.2d at 124.
82 *See* text accompanying note 73 supra. The magistrate stated the political offense inquiry as:
83 *Id.* at 235-38. *See* text accompanying note 78 supra. The magistrate felt that because Mackin’s acts were directed against military personnel, whereas Eain’s were directed at civilians, “the well-reasoned limitations circumscribing the application of the political offense exception set forth in . . . *Eain v. Wilkes* [were] inappropriate in the case before us.” *Id.* at 237-38.
84 *Id.* at 237.
85 668 F.2d at 123.
86 *Id.* at 137.
87 For a comparative discussion of these three cases, see Lubet, *supra* note 10, at 254-56; Murphy, *Legal Controls and the Deterrence of Terrorism: Performance and Prospects*, 13 RUTGERS L.J. 465, 479-80 (1982); Sternberg & Skelding, *State Department Determination of Political Offenses*: 1016 NOTRE DAME LAW REVIEW [1984]
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len magistrate, while slightly varying the traditional statement of the standard, followed a broadly scoped inquiry, denying extradition if the act occurred during, and was incidental to, a political uprising. The Seventh Circuit in Eain, while using a similar definition, required a much closer link between the perpetrator, the political organization's goals, and the act. The Eain court thus separated terrorist acts from protected conduct under the exception, a result more consistent with the philosophy underlying the exception.88 In Mackin, the Second Circuit indicated its support for this development. Quinn now provides the Ninth Circuit with the opportunity to reconsider its position.

III. Quinn v. Robinson

United Kingdom officials have charged William Joseph Quinn, an alleged PIRA member,89 with murder and conspiracy to cause bomb explosions. Quinn allegedly conspired with PIRA members in planning a series of bomb incidents between 1974 and 1975, directed at military, governmental, and civilian targets.90 Quinn also allegedly shot and killed an off-duty, out-of-uniform police constable.91

In May, 1975, while the Northern Ireland government was holding Quinn on unrelated charges, a witness in the United Kingdom

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88 See text accompanying note 30 supra.
89 The PIRA is a militant offshoot of the Irish Republican Army dedicated to using terrorist methods to achieve the removal of the British from Northern Ireland. See In re Mackin, 80 Cr. Misc. 1, reprinted in Hearings on S. 1639, supra note 66, at 198-204, In re Quinn, CR-81-146 Misc. at 86-88.
90 Quinn, No. C-82-6688 RPA, at 5-8 (N.D. Cal., Oct. 3, 1983). The Roman Catholic Bishop to the British Armed Forces, a Crown Court Judge, and the Chairman of the Daily Express newspaper each received a letter bomb during this period. In other incidents, police discovered bombs in a Hampshire County railroad station, a London pub and a London restaurant. On all these occasions, police matched fingerprints on the bombs, or their wrappings, to those of Quinn and/or those of his alleged co-conspirators. In addition, police found the alleged co-conspirators' fingerprints throughout two flats which contained bomb-making materials.
91 Id. at 8-11. Upon emerging from a flat which was later found to contain bomb-making materials, a man was stopped and questioned by a police constable. He ran off when the constable, suspicious of his actions and nervous behavior, attempted to search him. An off-duty constable noticed the chase. He blocked the suspect's path, whereupon the man pulled a gun and shot him three times, causing the constable's death.

For detailed account of charges and surrounding facts, see In re Quinn, CR-81-146 Misc. at 9-58.
identified him as the constable’s murderer. Sometime in 1976, Quinn, a United States citizen, returned to the United States. United Kingdom authorities traced Quinn to California and instituted extradition proceedings.

At the magistrate’s hearing, Quinn attempted to block his extradition by asserting the political offense exception. In his opinion, the magistrate stated the appropriate inquiry for denying extradition through the political offense exception:

1. Whether there was a war, rebellion, revolution or political uprising at the time and place of the offenses;
2. Whether Quinn was a member of the uprising group; and
3. Whether the offenses for which extradition is sought were “incidental to” and “in furtherance of” the political uprising.

Relying extensively on the Eain court’s approach, the magistrate found that Quinn failed this test because he did not prove he was a member of the uprising group and because his acts were not incidental to a political disturbance. The district court, however, rejected the magistrate’s formulation of the test, his reliance on Eain, and his finding. The district judge limited the requirements to:

1. Each charged offense must have been committed at a time of an uprising, or other violent political disturbance, such as war, revolution, or rebellion; and
2. Each charged offense must have been incidental to and in the course of the uprising or violent political disturbance.

The district court then applied a traditional approach, similar to that used in McMullen, and denied extradition.

Both the magistrate and the district court included a political disturbance and an incidence requirement in their definitions of the political offense exception. However, the district court specifically rejected the magistrate’s membership requirement. The judge stated

92 Id. at 9-10.
93 Id. at 78.
94 Id. at 80. The magistrate’s requirements paralleled those used by the magistrate in Mackin. See note 82 supra and accompanying text.
95 See notes 75-80 supra.
96 In re Quinn, CR-81-146 Misc. at 98, 106, 109.
98 See note 73-74 supra and accompanying text.
99 Quinn, No. C-82-6688 RPA at 40, 44.
100 See notes 94, 97 supra and accompanying text.
that no English or American precedent supported this requirement and, therefore, "such an additional requirement to invoking the exception [was] unwarranted."\(^{101}\) An analysis of precedent, however, confirms that authority for such a requirement does in fact exist.

In the original English case, *In re Castioni*,\(^ {102}\) mention of the membership element recurred throughout the decision. Judge Denman stated in his opinion that a political act must be committed during "a dispute between *two parties* in the State."\(^ {103}\) Similarly, in his concurring opinion, Judge Hawkins declared that a political offender was someone "taking part in a movement . . . which he chose to join . . . for the benefit of the political side to which he desired to attach himself."\(^ {104}\) Moreover, British courts since 1894 have specified that the accused must be a member of a "two-party struggle" to qualify under the political offense exception.\(^ {105}\)

In early American cases, courts established a de facto membership requirement by granting political offender status only to defendants who were members of either the existing government or the rebel forces.\(^ {106}\) In two more recent American cases, *Mackin* and *McMullen*, magistrates expressly included a membership requirement in the standard.\(^ {107}\) In *Eain v. Wilkes*, although the Seventh Circuit did not expressly list membership as a requirement, the court affirmed the magistrate's finding that membership must be tied to the specific act alleged.\(^ {108}\)

\(^{101}\) *Quinn*, No. C-82-6688 RPA at 17.
\(^{102}\) [1891] 1 Q.B. 149.
\(^{103}\) *Id.* at 156 (emphasis added).
\(^{104}\) *Id.* at 166 (emphasis added).
\(^{105}\) *In re Meunier*, [1894] 2 Q.B. 415; see text accompanying notes 46-49 *supra*.
\(^{106}\) Three cases in particular illustrate this point. In *In re Ezeta*, 62 F. 972, 997 (N.D. Cal. 1894), the court refused to extradite the defendant on political offense grounds, noting that he was a military officer and a member of the "contending forces." Similarly, in *Ramos v. Diaz*, 179 F. Supp. 459 (S.D. Fla. 1959), the court held that since the defendants were officers in Castro's revolutionary army, the political offense barred their extradition. And, in *Karadzole v. Artukovic*, 247 F.2d 198 (9th Cir. 1957), the court refused to extradite a former member of the Croatian government for war crimes he committed during World War II.

The Supreme Court also discussed the significance of defendant's political affiliation in *Ornelas v. Ruiz*, 161 U.S. 502 (1896). The Court upheld the magistrate's holding of extradition and his finding that the accused were "bandits, without uniform or flag." *Id.* at 510.

However, membership, while necessary, will not be sufficient absent a political disturbance. *See, e.g.*, *Garcia-Guillern v. United States*, 450 F.2d 1189 (5th Cir. 1971), *In re Gonzalez*, 217 F. Supp. 717 (S.D.N.Y. 1963) (absent a political uprising, acts of military personnel or former government officials are not political offenses). *Cf. In re Mylonas*, 187 F. Supp. 716 (N.D. Ala. 1960) (defendant was non-extraditable given his act as a government official occurred in the aftermath of a political uprising).

\(^{107}\) *See* notes 73 and 82 *supra* and accompanying text.
\(^{108}\) 641 F.2d at 520.
The *Quinn* district court, in addition to denying that precedent supported a membership requirement, also noted certain evidentiary problems inherent in a membership requirement. The court asserted that compelling the defendant to prove membership to a preponderance might infringe his fifth amendment protection against self-incrimination, furnish circumstantial evidence of his guilt, and prejudice his right to maintain his innocence. The court also predicted practical problems in dealing with the membership requirement, such as the level of organization required to constitute a political group and the degree of involvement required to constitute membership in that group.

The *Quinn* court's concerns, however, do not necessitate eliminating a membership requirement. Since courts already consider and evaluate membership in political offense determinations, requiring defendants to prove membership merely acknowledges existing practice. Moreover, under the specialty doctrine, the requesting state can only try the defendant for the offenses for which he is extradited. The accused, therefore, could not be tried for membership in an outlawed organization. Finally, past cases indicate that the burden of proof in establishing membership would not be an onerous one.

109 *Quinn*, No. C-82-6688 RPA at 20. While noting that "no appellate court has yet held what the burden of proof should be or where it should be placed," the magistrate required the petitioner to plead, and prove by a preponderance of the evidence, each prerequisite to the political offense exception. *In re Quinn*, No. CR-81-146 Misc. at 80. The magistrate, based his holding on the analysis of the Mackin magistrate (*In re Mackin*, 80 Cr. Misc. 1, reprinted in *Hearings of S. 1639*, supra note 66, at 182-86) and Lubet and Czackes (*Lubet & Czackes*, supra note 25, at 208-10). *In re Quinn*, No. CR-81-146 Misc. at 81. The district court reached no conclusion as to the burden of proof in political offenses. *Quinn*, No. C-82-6688 RPA at 47 n.6. For further discussion of the burden of proof issue, see *Lubet*, supra note 10, at 261-67, 274-79.

110 *Quinn*, No. C-82-6688 RPA at 20-21.

111 *Id.* at 21-22.

112 See notes 72, 83 and 107-09 supra and accompanying text.

113 Under the specialty doctrine, the requesting state may try the accused only for those offenses for which the surrendering state agreed to extradite him. United States v. Rauscher, 119 U.S. 407, 420-21 (1886). The United States applies this doctrine unless it is excluded from the applicable treaty. See M. Bassiouuni, supra note 18, at 355. Article XII of the United States-United Kingdom Extradition Treaty contains the appropriate provision. See *Treaty*, supra note 3, art. XII.

114 In the recent IRA extradition cases, the courts noted past convictions for IRA membership, involvement of close relatives in the IRA, actions of the British indicating their suspicions as to the accused's affiliations (such as surveillance, stopping and searching), and the accused's prior IRA activities. *In re Mackin*, 80 Cr. Misc. 1, reprinted in *Hearings on S. 1639*, supra note 68, at 223-30; *In re McMullen*, No. 3-78-1899 M.G., reprinted in *Hearings on S. 1639*, supra note 66, at 295.
Membership, therefore, is not merely evidence which implies that an accused's particular offense was politically motivated. It is also a necessary prerequisite to applying the political offense exception. In order to reflect court practice and precedent, a political offense exception test must include a membership requirement.

In Quinn, the district court and magistrate agreed upon the nature and proof of the political disturbance requirement in the political offense definition. Both accepted the fact that the accused's (Quinn's) evidence established a state of political unrest in the United Kingdom during the period in question. However, although both agreed that finding the alleged act "incidental to" the political disturbance was a prerequisite to applying the political offense exception, they interpreted this requirement differently. The magistrate found Quinn's acts not incidental to the disturbance, while the district court found to the contrary.

The district court rejected the magistrate's findings on two grounds. First, the court declared that the magistrate had based her determination on inappropriate considerations. Second, the court held that the magistrate had erred in relying on Eain in reaching her conclusions. Both these grounds reflect the different meanings the magistrate and district court gave to the phrases "incidental to" and

115 In re Quinn, No. CR-81-146 Misc. at 95; Quinn, No. C-82-6688 RPA at 23. Their findings on this point paralleled those of the magistrates in the other IRA cases, McMullen and Mackin. Although the political disturbance requirement is stated in exclusively temporal terms, by necessity the spatial dimension must also be considered. In Quinn, the alleged acts occurred, not in Northern Ireland, the principal territorial area of the political disturbance, but in London, a separate geographical area. The magistrate in McMullen implicitly accepted that the Northern Ireland "political disturbance" extended to England in holding a bombing in North Yorkshire was part of the Northern Ireland conflict. The magistrate in Quinn went beyond this and explicitly linked Northern Ireland with the entire United Kingdom in constitutional (England and Northern Ireland are both part of the United Kingdom) (In re Quinn, No. CR-81-146 Misc. at 95) and legal terms (the Prevention of Terrorism Act, unlike preceding legislation against terrorism, applied to all of the United Kingdom, not just Northern Ireland). Id. at 94. In a similar vein, while the Eain court refused to take judicial notice of the existence of a political and military conflict between Israel and its neighboring states and national liberation movements in the Middle East, the magistrate did receive evidence regarding the geographic dimensions of such a conflict to establish that the act occurred at a time of political disturbance. 641 F.2d at 519-21. The court's geographical delineation of the conflict could be critical in determining whether or not the political offense exception applies to a specific act. That is, if a Palestinian shoots an Israeli military attaché in Paris, is the act incidental to the Middle East conflict? Or, if an IRA member robs a Lloyds bank in Boston, is this act incidental to the Northern Ireland conflict?

116 Quinn, No. C-82-6688 RPA at 16-17.
117 Quinn, No. C-82-6688 RPA at 43, 28.
118 Id. at 29.
119 Id. at 35-36.
“in furtherance of.” The magistrate adopted the stricter construction of the *Eain* court, focusing on connecting the two clauses and requiring a relationship between the accused, his act, and the goals of the uprising. The district court more broadly construed the phrases, emphasizing the “incidental” clause and applying an occurrence approach. Each court’s approach essentially predetermined the factors considered in, and, hence, the ultimate finding of, whether the alleged act was incidental to and in furtherance of the disturbance.

The district court and the magistrate disagreed on the importance of several factors, the most significant of which are two closely related considerations: 1) the character of the acts; and (2) the identities of the victims. Relying on *Eain*, the magistrate found that the character of the acts, i.e., the mode and manner of the attacks, placed them outside the historical context of the exception. The district court disregarded this in assessing the incidence of the act to the political disturbance. In so doing, the district court rejected precedents dating back to the source of the political offense exception, *Castioni*. In these cases, courts generally only applied the exception to acts occurring during heated, spontaneous exchanges between combatants. Judge Hawkins, in an often quoted concurrence in *Castioni*, stressed that violent acts may be excused as incidental to a political uprising if done “in heat and in heated blood.” Also, in *Ornelas v.*
The only case in which the United States Supreme Court has commented on the exception, the Court found that a magistrate was correct in considering the circumstances surrounding the accused’s act. The Court specifically stated that the magistrate was justified in refusing to apply the political offense exception “in view of the character of the foray [and] the mode of the attack.”

The spontaneous nature of particular acts has also affected contemporary political offense cases. For example, the court granted the political offense exception in *Ramos v. Díaz* to a guard accused of murder where an escaping prisoner had assaulted him. And in *United States v. Mackin*, a court granted political offender status to the accused who, when confronted by a British soldier while fleeing arrest, had shot the soldier.

Against this background, Quinn’s alleged acts can be more accurately evaluated. While Quinn’s shooting of the constable could be considered spontaneous, since he was escaping from possible arrest, the bombings were undoubtedly premeditated and calculated acts. Therefore, the character of the bombing acts falls outside the historical context of the incidence requirement of the political offense exception.

The “character of the attack” is also a part of the second factor on which the magistrate and district court disagreed in *Quinn*. Again relying on *Eain*, the magistrate found that the identity of the victim weighed heavily in the incidence requirement. The district court disagreed, once again rejecting significant precedent. In both *Omelas v. Ruiz* and *Eain v. Wilkes*, where innocent civilians were killed, the courts held that the acts were not incidental to the political uprising. In *Ruiz*, the Court specifically listed “the persons killed or captured” as a factor to be considered. In *Eain*, the Second Circuit stated:

The [political offense] exception does not make a random bombing intended to result in the cold-blooded murder of civilians incidental to a purpose of toppling a government, absent a direct link between the perpetrator, a political organization’s political

125 161 U.S. 502 (1896).
126 Id. at 511-12.
127 Id. at 511.
128 179 F. Supp. at 462-63.
129 668 F.2d 122 (2d Cir. 1981).
130 In re Quinn, No. CR-81-146 Misc. at 108-09.
131 161 U.S. 502 (1896).
132 641 F.2d 504 (7th Cir. 1981).
133 161 U.S. at 511.
goals, and the specific act. . . . Otherwise, isolated acts of social violence undertaken for personal reasons would be protected simply because they occurred during a time of political upheaval, a result we think the political offense exception was not meant to produce.\textsuperscript{134}

The district court’s subsequent attempt to factually distinguish \textit{Quinn} from \textit{Eain} does not stand up to scrutiny. The district court in \textit{Quinn} characterized Eain’s marketplace bombing as being aimed directly at a civilian population, with the goal of eliminating a segment of the population.\textsuperscript{135} It found that Quinn’s bombings, in contrast, were aimed at the government and thereby were incidental to the goal of ending British rule.\textsuperscript{136} This may correctly characterize the bombs Quinn allegedly sent to government personnel, but only those. The bombs Quinn allegedly placed in a pub, restaurant, and railway station are undeniably different; these bombings are equivalent to Eain’s marketplace bombing. Innocent civilians would have been killed in these attacks. Quinn’s actions, therefore, because of this threat to innocent civilian lives, exceed the historical scope of the exception.

\section*{IV. Conclusion}

In \textit{Quinn v. Robinson}, a United States district court stated that the executive and/or legislative branch must resolve the difficulties inherent in applying the political offense exception to terrorism.\textsuperscript{137} Some commentators have stated that this responsibility should rest with the executive branch of the government.\textsuperscript{138} Regardless of the merits of these contentions, however, the reality is that the judiciary currently decides this issue. Therefore, courts must formulate a viable standard for determining what acts are protected by the exception.

Recently, in both \textit{Eain v. Wilkes}\textsuperscript{139} and \textit{United States v. Mackin},\textsuperscript{140} courts have suggested a solution. One element of this solution is for

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\textsuperscript{134} 641 F.2d at 521.
\textsuperscript{135} \textit{Quinn}, No. C-82-6688 RPA at 36.
\textsuperscript{136} \textit{Id.} at 39-40.
\textsuperscript{137} \textit{Id.} at 39.
\textsuperscript{138} For a discussion of the relative advantages and disadvantages of the respective approaches, see \textit{Hearings on S. 1639}, supra note 66, at 29-64 (testimony of W. Hannay advocating executive treatment); Lubet, supra note 10, at 267-91 (advocating judicial treatment); Sternberg & Skelding, supra note 87, at 152-71 (advocating judicial treatment); Note, \textit{Terrorist Extra-\textit{dition and the Political Offense Exception: An Administrative Solution}}, 21 VA. J. INT’L L. 163-183 (1980) (advocating executive treatment).
\textsuperscript{139} 641 F.2d 504 (7th Cir. 1981).
\textsuperscript{140} 668 F.2d 122 (2d Cir. 1981).
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courts to require membership in a bona fide contending political group. This would exclude from the political offense exception those who engage in random acts of social violence. Another element of the solution is for courts to require a closer relationship between the political organization’s goal and the violent act itself. In particular, courts should focus on the character of the act and the identities of the victims.

The political offense exception originated from a nineteenth-century belief in the individual’s right to agitate for political change, even through violent means. Exempting political dissidents from extradition ensured that their freedom from prosecution and punishment did not depend upon the success or failure of their actions. Twentieth-century governments, and therefore courts, have continued to espouse this principle. However, terrorist acts, which often are directed against purely civilian rather than government and military targets, have moved beyond the parameters of the traditional political offense inquiry. Recently, even the Republic of Ireland evidenced a willingness to differentiate between protected acts and the terrorist activities of the IRA, PIRA, and their offshoots. In McGlinchey v. Wren, [1983] I.L.R.M. 169, the Irish Supreme Court granted Northern Ireland’s extradition request for McGlinchey, one of the most wanted men in Ireland and the suspected leader of the Ireland National Liberation Army. The Court stated that “modern terrorist violence...is often the antithesis of what could reasonably be regarded as political.” Id. at 172.

Ironically, on St. Patrick’s Day in 1984, the Supreme Court reaffirmed this order and the recently-captured McGlinchey was handed over to Northern Ireland authorities. THE SUNDAY TIMES (London), Mar. 18, 1984, at 1, col. 5.

* The authors researched and wrote this comment while studying at the University of Notre Dame Concannon Programme of International Law in London.
TAX LAW—COLLATERAL-PURPOSE THIRD-PARTY SUMMONSES: WHAT’S LEFT OF I.R.C. SECTION 7609(f)?

The “John Doe summons”1 is a summons in which the Internal Revenue Service (“Service”) compels an individual to produce records or testimony relating to unnamed others. The device enables the Service to compel an entity2 to identify its constituents who the Service suspects are evading taxes. While the device is an effective tool in the Service’s efficient enforcement of our tax laws, its overuse could threaten individual privacy interests. In order to safeguard such interests, Congress enacted Internal Revenue Code (“I.R.C.”) section 7609(f),3 which restricts the use of these summonses.

Not all courts, however, have required the Commissioner of Internal Revenue (“Commissioner”) to adhere to the congressional John Doe summons safeguards. For example, in United States v. Tiffany Fine Arts, Inc.,4 the Service selected a tax shelter operation for examination and summoned the operation’s participant lists pursuant to the general summons provision of section 7602. The Service argued that the participant lists were relevant or material to its examination of the shelter operation.5 Despite the Service’s failure to comply with section 7609(f), the United States Court of Appeals for the Second Circuit enforced the summonses.6 The result of Tiffany Fine Arts is that the Service enjoys unfettered discretion in selecting

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1 “Summons” refers to the investigative procedure through which the Internal Revenue Service (“Service”) compels individuals to produce records or testimony. See notes 10-12 infra and accompanying text. In a John Doe summons, the object of the Service’s investigation is not the summonee, but the individuals implicated in the summoned records or testimony.

2 The Service has, for example, summoned the participant lists of abusive tax shelters. See, e.g., United States v. Samuels, Kramer & Co., 712 F.2d 1342 (9th Cir. 1983); Agricultural Asset Mgmt. Co., v. United States, 688 F.2d 144 (2d Cir. 1982). The Service routinely summons the membership rosters of barter exchanges. See, e.g., United States v. Gottlieb, 712 F.2d 1363 (11th Cir. 1983); United States v. Thompson, 701 F.2d 1175 (6th Cir. 1983); United States v. Barter Sys., 694 F.2d 163 (8th Cir. 1982); United States v. Pittsburgh Trade Exch., 644 F.2d 302 (3d Cir. 1981); United States v. Island Trade Exch., 535 F. Supp. 993 (E.D.N.Y. 1982); United States v. Constantinides, 80-2 U.S. Tax Cas. (CCH) ¶ 9830 (D. Md. 1980), motion for stay denied, 81-1 U.S. Tax Cas. (CCH) ¶ 9317 (D. Md. 1981). Potential applications of the John Doe summons are limitless, extending to every circumstance in which one person possesses information regarding unnamed others. See notes 126-27 infra and accompanying text.

3 I.R.C. § 7609(f) (West Supp. 1983); see notes 51-59 infra and accompanying text.


5 718 F.2d at 8-9.

6 Id. at 14.
tax liabilities for examination. The Tiffany Fine Arts rationale permits the Service to use this discretion to select examinees for the collateral purpose of identifying those examinees’ participants, thus avoiding section 7609(f). This comment reviews the propriety of judicial enforcement of such disguised John Doe summonses where the Service has not complied with the congressional John Doe summons safeguards.

Section 7602 permits the Service to summon books, documents, or testimony for the purpose of examining the tax liability of any person. The Service has used its section 7602 summons power for a variety of collateral purposes. This comment, however, reviews section 7602 summonses issued by the Service to third-party recordkeepers for the collateral purpose of identifying those recordkeepers’ participants.

Part I of this comment reviews the background of the Commissioner’s John Doe summons power, and then examines the scope of congressional controls on that power. Part II analyzes the schism that has developed among the courts of appeals on the Service’s use of its summons power for the collateral purpose of obtaining lists of suspected tax evaders. Part II further tests this collateral purpose problem in light of law and public policy. Part III concludes that courts should require the Service to comply with section 7609(f) whenever the Service selects an examinee with intent to identify that examinee’s participants.

I. The John Doe Summons Power

A. Origins

Congress’ tax law enforcement scheme vests the Secretary of the Treasury (“Secretary”) and his delegates with broad summons power. I.R.C. section 7601 charges the Secretary to investigate all persons who may be liable for any federal tax. To aid in these investigations, section 7602 empowers the Secretary to compel the production of any books, documents, or testimony which may be “relevant or material” to a federal tax liability of any person. If the

7 See note 10 infra and accompanying text.
8 See notes 10-12 infra and accompanying text.
9 For example, the Service has issued section 7602 summonses for the collateral purpose of performing research. See note 75 infra and accompanying text.
10 I.R.C. § 7601 (West 1967).
11 I.R.C. § 7602 (West Supp. 1983) provides in pertinent part:

EXAMINATION OF BOOKS AND WITNESSES

(a) Authority to summon, etc.—For the purpose of ascertaining the correctness
summoned fails to comply with such summons, section 7604 authorizes the Secretary to bring enforcement proceedings in United States district court.12

The Supreme Court’s 1964 United States v. Powell13 decision has endured as the benchmark delineating the bounds of the Commissioner’s summons power. In Powell, the Service issued a section 7602 summons to the proprietor of a laundry business.14 When the proprietor refused to comply with the summons, the Service instituted section 7604 enforcement proceedings.15 The proprietor argued that the Service had not shown probable cause to suspect fraud, the summons’ asserted basis, and that the summons was therefore invalid.16 The Court rejected this argument, saying that a probable cause stan-

12 I.R.C. § 7604 (West Supp. 1983) provides in relevant part:

ENFORCEMENT OF SUMMONS

(b) Enforcement.—Whenever any person summoned under section . . . 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court or to a United States commissioner within which the person so summoned resides or is found for an attachment against him as for contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the requirements of the summons and to punish such person for his default or disobedience.

14 Id. at 49. The summons issued from an investigation in which the Service sought to determine whether the laundry business’ tax returns had been fraudulently falsified. Id. at 50.
15 Id. at 49-51.
16 Id. at 49, 53-54.
standard for section 7602 summonses would unduly restrict the Commissioner's investigations.\textsuperscript{17} Instead, the Court established four requirements for an enforceable section 7602 summons. The Commissioner must show that: (1) the investigation is pursuant to a legitimate purpose; (2) the summons may be relevant to its stated purpose; (3) the Service does not already possess the desired information; and (4) the Code's administrative steps have been followed.\textsuperscript{18} Since the \textit{Powell} summons met these criteria, the Court reversed the court of appeals' decision denying enforcement.\textsuperscript{19}

In dictum, the \textit{Powell} Court articulated the summonee's right to challenge a section 7602 summons on "any appropriate ground" in a section 7604 enforcement proceeding.\textsuperscript{20} The Court cautioned against attempts by the Service to abuse district courts' process through proceedings to enforce summonses issued for an "improper purpose."\textsuperscript{21} The Court listed harassing taxpayers, pressuring them to settle collateral disputes, or "any other purpose reflecting on the good faith of the particular transaction" as examples of such improper purposes.\textsuperscript{22} However, the Court placed on taxpayers the burden of proving such abuse of process.\textsuperscript{23}

Eleven years after \textit{Powell}, the Court reviewed the Service's use of John Doe summonses in \textit{United States v. Bisceglia}.\textsuperscript{24} In that case, a bank deposited \$40,000 in old, damaged \$100 bills with the Cincinnati Branch of the Federal Reserve Bank.\textsuperscript{25} The Service suspected that unreported income attended this deposit, and issued a section 7602 summons for the bank's deposit records.\textsuperscript{26} The bank refused to comply, arguing that the summons failed to identify a specific taxpayer under investigation.\textsuperscript{27} The Service responded by bringing a section 7604 action in district court.\textsuperscript{28}

\textsuperscript{17} \textit{Id}. at 57-58.
\textsuperscript{18} \textit{Id}.
\textsuperscript{19} \textit{Id}. at 50, 59.
\textsuperscript{20} \textit{Id}. at 58 (quoting Reisman v. Caplin, 375 U.S. 440, 449 (1964)).
\textsuperscript{21} \textit{Id}.
\textsuperscript{22} \textit{Id}.
\textsuperscript{23} \textit{Id}.
\textsuperscript{24} 420 U.S. 141 (1975).
\textsuperscript{25} \textit{Id}. at 142.
\textsuperscript{26} \textit{Id}. at 142-43. The money could, for example, have represented proceeds realized by the depositor in an unrecorded sale or treasure trove found by the depositor, either of which constitutes gross income under I.R.C. § 61 (West 1967). \textit{See}, \textit{e.g.}, \textit{Cesarini v. United States}, 296 F. Supp. 3 (N.D. Ohio 1969), \textit{aff'd}, 428 F.2d 812 (6th Cir. 1970) (old currency found in piano constituted § 61 gross income to finder).
\textsuperscript{27} \textit{Id}. at 143, 149.
\textsuperscript{28} \textit{Id}. at 143-44.
In ruling the Bisceglia summons enforceable, the Supreme Court broadly deferred to the Commissioner’s summons power and literally interpreted the relevant statutes.\(^{29}\) The Court noted that section 7601 grants the Service a broad scope of investigation by permitting inquiry into “all persons . . . who may be liable to pay any internal revenue tax.”\(^{30}\) The Court observed that, additionally, section 7602 confers a broad summons power, authorizing the Service to summon “any person” to give testimony or produce books or records which may be “relevant or material” to the tax liability of “any person.”\(^{31}\) The Court considered this broad summons power important to the Commissioner’s investigative efficiency and thus declined to narrowly construe the language of section 7602 “absent unambiguous direction from Congress.”\(^{32}\)

Dissenting in Bisceglia, Justice Stewart interpreted the section 7602 “tax liability of any person” language to require that a particular person’s tax liability be the subject of an investigation by the Service.\(^{33}\) Justice Stewart believed the Bisceglia summons lacked a substantive basis for suspicion of fraud, and issued only on the mere unusual character of a transaction.\(^{34}\) Justice Stewart further reasoned that courts should review the revenue statutes for constitutionality only, and defer questions of their efficiency to their author, Congress.\(^{35}\)

B. Congressional Controls

The threat to individual privacy that Congress perceived in the Biseglia holding prompted a swift legislative response.\(^{36}\) In 1976, Congress enacted I.R.C. section 7609 to regulate third-party summons.\(^{37}\) Section 7609(a) provides that when the Service issues a section 7602 summons for the records\(^{38}\) of certain third parties, the Service must notify persons “identified” in the summons.\(^{39}\) Any per-

\(^{29}\) Id. at 151.
\(^{30}\) Id. at 149 (emphasis in original).
\(^{31}\) Id.; see note 11 supra.
\(^{32}\) Id. at 150.
\(^{33}\) Id. at 153-56 (Stewart, J., dissenting).
\(^{34}\) Id. at 156.
\(^{35}\) Id. at 159.
\(^{38}\) Section 7609 summonses reach records (including books, papers, and other data) as well as recordkeeper testimony. I.R.C. § 7609(c)(3) (West Supp. 1983).
\(^{39}\) I.R.C. § 7609(a), (c) (West Supp. 1983). The Service must mail this notice between
son entitled to such notice may thereafter bring a proceeding under section 7609(f) to quash the summons or intervene in its enforcement. However, the section 7609 notice requirements apply to only a limited group of third-party recordkeepers. These include (1) "banks, savings and loan associations, credit unions, or similar associations"; (2) lawyers; (3) accountants; (4) securities brokers; (5) "persons extending credit through credit cards or similar devices"; (6) "consumer reporting agencies"; and (7) barter ex-

Recordkeepers served with a § 7609 summons must assemble for the Service the records identified in the summons, I.R.C. § 7609(i)(1) (West Supp. 1983), and are immune from liability for their good faith compliance. I.R.C. § 7609(i)(3) (West Supp. 1983). Recordkeepers refusing to comply with a court order to produce records or testimony under § 7609 risk being held in contempt. I.R.C. § 7604; see note 12 supra.

Certain provisions allow the Service to forgo the notice requirements in particular situations. Section 7609 notice requirements do not apply when the Service summons to collect a tax liability assessed by the Service or judgment rendered thereon. I.R.C. § 7609(c)(2)(B) (West Supp. 1983). The Service may also forgo § 7609 when it summons solely to identify a person having a numbered account at a financial institution. I.R.C. § 7609(c)(2)(A) (West Supp. 1983).

Finally, the Service may petition a district court and argue that reasonable cause exists to believe the giving of notice may lead to attempts to obstruct or avoid an examination. If the court agrees, the Service may bypass § 7609's notice requirements and the targeted taxpayers lose their right to move to quash the summons or intervene in its enforcement. I.R.C. § 7609(g) (West Supp. 1983).

40 I.R.C. § 7609(b) (West Supp. 1983). Moving to quash the summons or intervening in its enforcement tolls the running of civil and criminal statutes of limitation with respect to the tax liability targeted by the summons. I.R.C. § 7609(e) (West Supp. 1983).

41 I.R.C. § 7609(a)(3)(A) (West Supp. 1983). In Fink v. United States, 84-1 U.S. Tax Cas. (CCH) ¶ 9163 (E.D. Mo. 1983), a bank's subsidiary engaged in the business of servicing mortgages. The court ruled the function performed by the subsidiary in relation to its customers' accounts sufficiently similar to that of a traditional bank to make the subsidiary a § 7609(a)(3)(A) "similar association."


45 I.R.C. § 7609(a)(3)(C) (West Supp. 1983). Treas. Reg. § 301.7609-2(a)(3) (1984), provides that a "persons extending credit through . . . credit cards or similar devices" for this purpose:
The Service, desiring its section 7602 summons power to remain as unfettered as possible by section 7609's procedural requirements, has achieved some success in persuading courts to narrowly construe these categories.

Generally includes any person who issues a credit card. It does not include a seller of goods or services that honors credit cards issued by other parties but does not extend credit on the basis of credit cards or similar devices issued by itself.

An object is a "similar device" to a credit card...only if it is physical in nature, such as a coupon book, charge plate, or a letter of credit. Thus, a person who extends credit by requiring...customers to sign sales slips without requiring use of physical objects issued by that person is not a third party recordkeeper under section 7609(a)(3).

In United States v. New York Tel. Co., 682 F.2d 313 (2d Cir. 1982), the Service issued a § 7602 summons for New York Telephone Company's billing records relating to taxpayer. Taxpayer argued that the Company was a § 7609(a)(3)(C) "person extending credit" with respect to taxpayer, and thus that taxpayer was entitled to intervene under § 7609(b) in the ensuing § 7604 enforcement proceeding. Id. at 314. Taxpayer based this argument on the Company's practices of extending credit to certain customers through credit cards and generally billing its customers one month in arrears. Id. at 316. Although the Company did not extend credit to taxpayer through a credit card, the court granted taxpayer's motion to intervene, as the credit records the Company maintained with respect to its credit card holders were essentially identical to those it maintained with respect to taxpayer. Id. at 315, 319. The court said:

Any other rule would make the question of standing to assert available defenses to the production of records turn upon the fortuitous possession of a piece of plastic, and the possibility that it was used at some point during the time period for which the records are sought. Such a rule, we think, would elevate the technical form of a transaction over its substance.

Any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means of or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

"Barter exchange" for this purpose "means any organization of members providing property or services who jointly contract to trade or barter such property or services." I.R.C. § 6045(c)(3) (West Supp. 1983).

In addition to the controls placed upon summonses which identify the person whose tax liability the Service seeks to examine, Congress provided special controls over the Service's power to issue a John Doe summons. Section 7609(f) forbids the Service from issuing these summonses unless the Service has established three facts in an ex parte proceeding before a district court: (1) that the summons relates to an investigation of a particular person or ascertainable group or class of persons; (2) that a reasonable basis exists for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law; and (3) that the information sought through the summons, including the targeted taxpayer's identity, is not readily available from other sources.

Section 7609 notice requirements do not apply to a section 7609(o) summons. Also, since section 7609 provides that only those entitled to notice of a third-party summons may move to quash the summons or intervene in its enforcement, the susceptibility of a section 7609(o) summons to such action is uncertain. At a minimum, the Supreme Court's Powell decision requires that the third-party recordkeeper have an opportunity to contest the summons' enforcement on "any appropriate ground."

49 A "John Doe" summons is one that fails to identify the person whose tax liability the Service seeks to examine. I.R.C. § 7609(f) (West Supp. 1983).
50 Section 7609(f) applies to any summonses issued under section 7602's general summons provision. I.R.C. § 7609(e), (f). Thus, courts have held that § 7609(f) procedures are not limited to summonses issued to one of § 7609(a)(3)'s seven categories of protected recordkeepers. See, e.g., United States v. Mobil Corp., 543 F. Supp. 507, 516 (N.D. Tex. 1981); see also notes 41-48 supra and accompanying text.
51 I.R.C. § 7609(f), (h)(1), (2) (West Supp. 1983).
52 I.R.C. § 7609(a)(4)(C) (West Supp. 1983). Indeed, since the Service issues such summonses to identify the targeted taxpayers, prior notice to such taxpayers would be impossible.
54 United States v. Powell, 379 U.S. 49, 58; see note 20 supra and accompanying text. In Agricultural Asset Mgmt. Co., v. United States, 688 F.2d 144 (2d Cir. 1982), the court restricted enforcement litigation of a § 7609(f) summons to the issue of the Service's compliance with the four Powell tests. The court reasoned that litigating the Service's compliance with § 7609(f)'s three criteria at an enforcement proceeding would render the earlier ex parte pro-
In formulating section 7609(f), Congress acknowledged the usefulness of the John Doe summons in civil tax investigations.\(^5\) Congress expressed concern, however, over the potential of these summonses to offend individual privacy rights.\(^6\) The section 7609(f) requirement of an ex parte proceeding before a district judge represents Congress' compromise between these two rival interests.\(^7\)

II. The Collateral Purpose Question

The Commissioner has urged that third-party recordkeepers' participant lists are relevant or material\(^8\) to such recordkeepers' tax liabilities, and thus are within the Commissioner's section 7602 superfluous. \(^9\) The court further argued that had Congress envisioned litigation of the three § 7609(f) tests, it would have required, in that section, notice and an adversary hearing, instead of only an ex parte proceeding. \(^10\) Other courts, however, have allowed litigation of the Service's compliance with § 7609(f)'s three tests at a summons enforcement proceeding. See, e.g., United States v. Brigham Young Univ., 679 F.2d 1345, 1347-48 (10th Cir. 1982), vacated for consideration of mootness, 103 S. Ct. 713 (1983); United States v. Maxwell, 81-1 U.S. Tax Cas. (CCH) ¶ 9378, at 87,028 (D. Nev. 1981).


\(^6\) Id. at 306, 1979 U.S. CODE CONG. & AD. NEWS at 3202.

\(^7\) In reporting out § 7609(f), the House Ways and Means Committee said:

The use of the administrative summons, including the third-party summons, is a necessary tool for the IRS in conducting many legitimate investigations concerning the proper determination of tax. The administration of the tax laws requires that the Service be entitled to obtain records, etc., without an advance showing of probable cause or other standards which usually are involved in the issuance of a search warrant. On the other hand, the use of this important investigative tool should not unreasonably infringe on the civil rights of taxpayers, including the right to privacy.

\(^8\) Id. at 306, 1976 U.S. CODE CONG. & AD. NEWS at 3202.

\(^9\) The question of whether a recordkeeper's participant lists are relevant or material to its tax liability has not been litigated. Arguably, such lists could be relevant or material to a recordkeeper's tax liability. Although the accounting profession's generally accepted auditing standards do not control examinations conducted by the Service, those principles are illuminating here. To determine whether an entity has properly reported its revenues, auditors often communicate directly with a sample of the sources of that revenue. They then compare the reported amounts to the revenues actually recorded by the entity in question. AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, U.S. AUDITING STANDARDS AS OF JUNE 1, 1983, at Au §§ 326.07, 326.15, 350.17 (1983); see also W. MEIGS, E. LARSEN, AND R. MEIGS, PRINCIPLES OF AUDITING 445-50, 655 (6th ed. 1977). Thus, the Service could, for example, argue that in an examination of an entity which markets tax shelters, it would be necessary for the Service to communicate directly with a sample of the entity's customers as to the commissions they paid to the entity. The Service could not select such a sample without access to the entity's customer lists.

Although a recordkeeper's participant lists could be relevant or material to an examination of the recordkeeper's tax liability, those lists would be relevant or material only if the Service actually intends to use them to test the recordkeeper's reported revenues or other tax liability components.
mons authority. The courts of appeals for the Second, Fifth, Eighth, and Eleventh Circuits have accepted this argument and enforced section 7602 summonses issued to identify the summonee's participants, despite the Service's failure to comply with section 7609(f). The Sixth Circuit, however, requires compliance with section 7609(f) whenever the Service's motive in issuing a summons includes the collateral purpose of identifying the summonee's participants. Otherwise, the Sixth Circuit reasons, the Service could avoid section 7609(f) requirements by simply selecting examinees whose records would yield the desired information, thus thwarting the will of Congress.

A. United States v. Tiffany Fine Arts, Inc.

_Tiffany Fine Arts_ is the most recent decision enforcing a collateral-purpose third-party summons despite the Service's noncompliance with section 7609(f). In _Tiffany Fine Arts_, the Service examined a holding company which had subsidiaries in the business of promoting tax shelters. The Service sought to identify individuals to whom these subsidiaries had sold licenses by issuing section 7602 summonses to the holding company. When the holding company refused to comply with the summonses, the Service brought a section 7604 enforcement action in district court. The Commissioner argued that the licensee lists were necessary to determine whether the holding company had properly reported licensing income on its consolidated tax return. The holding company asserted that the Service actually desired the lists for the collateral purpose of examining the licensees' tax liabilities, and thus that the summonses could issue only if the Service complied with section 7609(f).

The Second Circuit enforced the summonses, basing its decision

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59 See notes 63-90 infra and accompanying text.
60 See notes 76-81 infra and accompanying text.
61 See notes 82-90 infra and accompanying text.
62 See notes 91-107 infra and accompanying text.
64 718 F.2d at 8-9.
65 _Id._
66 The court observed that enforcement proceeded under §§ 7402(b) and 7604. _Id._ at 9. Section 7402(b), like § 7604(a), confers enforcement jurisdiction on United States district courts. I.R.C. § 7402(b) (West 1967); I.R.C. § 7604(a) (West 1967). Section 7604(b) empowers district judges or commissioners, upon satisfactory proof, to order summonses enforced. See note 12 supra.
67 _Tiffany Fine Arts_, 718 F.2d at 1; see note 58 supra.
68 718 F.2d at 9-10.
on three grounds. First, the court stated that, as far as it could determine, Congress only intended section 7609(f) to apply to situations like *Bisceglia* in which the Service had issued a summons without any interest in the recordkeeper’s tax liability.\(^6\) That the Service had a collateral purpose was irrelevant. However, the court did not cite any judicial or legislative authority for this determination.

Second, the court noted that every summons issued by the Service implicates individuals other than the taxpayer named as the subject of the summons.\(^7\) The court concluded that requiring the Service to follow section 7609(f) procedure each time the Service issues a summons implicating individuals other than the taxpayer named in the summons would unduly burden the Service.\(^8\) In this reasoning, however, the court overlooked the critical factor of the Service’s intent in selecting tax liabilities for examination. The court’s conclusion therefore became overinclusive, for in the vast majority of cases, the Service selects an examinee only because the examinee’s tax liability genuinely concerns the Service. Requiring compliance with section 7609(f) procedure only in cases where the Service’s purpose in selecting an examinee includes summoning the examinee’s participant lists would not unduly burden the Service.\(^9\) No court has proposed requiring the Service to comply with section 7609(f) whenever a summons implicates individuals not named in the summons, absent intent by the Service to investigate those persons.

Third, the court relied on case law. The court cited two lines of cases that the court said analogously supported its decision to enforce the *Tiffany Fine Arts* collateral-purpose third-party summonses. One group of cases held that a section 7602 summons is enforceable even if issued to investigate suspected criminal conduct, provided the Service has not abandoned its pursuit of a civil tax determination or collection.\(^10\) These cases, however, did not involve a specific limita-

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\(^6\) *Id.* at 13.

\(^7\) *Id.*

\(^8\) *Id.*

\(^9\) Section 7604 enforcement proceedings provide summonees with an appropriate forum for carrying their Powell-imposed burden of proving such collateral purpose. *See* note 12 *supra* and accompanying text; *see also* text accompanying note 23 *supra.*

\(^10\) *Tiffany Fine Arts*, 718 F.2d at 13. These cases involved a common law rule which Congress later made statutory in I.R.C. § 7602(c) (West Supp. 1983). Section 7602(c) forbids the Service from issuing a summons with respect to any person for whom a Justice Department referral is in effect. “Justice Department referral” for this purpose means either (1) a recommendation by the Service to the Attorney General for a grand jury investigation or a criminal prosecution of a suspected violation of federal tax law, or (2) a request, pursuant to I.R.C.
tion on the Service's summons power, such as that embodied in section 7609(f), and thus are distinct from the *Tiffany Fine Arts* scenario.\(^\text{74}\) The other line of cases relied on by the Second Circuit in *Tiffany Fine Arts* held that a court may enforce a section 7602 summons issued by the Service for research purposes, provided a civil tax determination also supports the summons.\(^\text{75}\) Gathering research, however, is a far more innocuous collateral purpose than an intent to investigate tax liabilities of the summonee's participants. The second line of cases, then, represents a slender reed of support for the *Tiffany Fine Arts* holding.

The Second Circuit also found authority for its *Tiffany Fine Arts* holding in *United States v. Barter Systems, Inc.*\(^\text{76}\) an Eighth Circuit decision. In *Barter Systems*, the Service selected a barter exchange for examination pursuant to section 7601 and issued a section 7602

\(\text{\S}\) 6103(h)(3)(B) (West 1980), by the Attorney General for information from the Service relating to a taxpayer under investigation. I.R.C. \(\text{\S}\) 7602(a).

\(^{74}\) One of the cases cited by the court was *United States v. LaSalle National Bank*, 437 U.S. 298 (1978), in which a summonee asserted that the Service issued a \(\text{\S}\) 7602 summons to him solely to gather evidence for a criminal prosecution, in violation of the Powell good faith criterion. See text accompanying note 22 supra. In enforcing the summons, the court found that when the Service issued it, the Service had not recommended criminal prosecution of the summonee to the Justice Department, but was merely investigating him. 437 U.S. at 318. Thus, in issuing the summons, the Service did not violate the proscription against issuing a summons to a person for whom a Justice Department referral is in effect. See note 73 supra. Conversely, the *Tiffany Fine Arts* summonses did violate \(\text{\S}\) 7609(f)'s specific limitation on the Service's summons power.

\(^{75}\) *Tiffany Fine Arts*, 718 F.2d at 13. One of the cases cited by the court, *United States v. First Nat'l Bank in Dallas*, 635 F.2d 391 (5th Cir. 1981), cert. denied, 452 U.S. 916 (1981), involved the Taxpayer Compliance Measurement Program ("TCMP"). In the TCMP, the Service randomly selects a sample of tax returns and then examines those returns to determine the degree of taxpayer compliance with tax laws and to identify problem compliance areas. Id. at 393-94. In *First Nat'l Bank*, a TCMP examinee contested summonses issued to three banks for documents relating to the examinee, arguing that a primary purpose of gathering research data would not support issuance of a \(\text{\S}\) 7602 summons. Id. at 392-93. The court rejected this contention and held that the Service could issue a \(\text{\S}\) 7602 summons for research purposes, provided an investigation of a particular tax liability also supported the summons. Id. at 396. Collateral-purpose third-party summonses, in which the Service selects recordkeepers for examination with intent to summon the recordkeeper's participant lists, bear little resemblance to TCMP's random selection process. Moreover, there is no authority that the Service has ever summoned a recordkeeper's participant lists through TCMP.

The court also cited *United States v. Pittsburgh Trade Exch.*, 644 F.2d 302, 308 (3d Cir. 1981) ("[i]t is settled . . . law in this circuit that a dual purpose for issuance of a summons is permissible, at least up until the . . . Service has made an institutional commitment to recommend prosecution, so long as one purpose is determination of the civil tax liability of taxpayers") and *United States v. Island Trade Exch.*, 535 F. Supp. 993 (E.D.N.Y. 1982) (collateral research purpose will not invalidate an *otherwise valid* summons).

\(^{76}\) 694 F.2d 163 (8th Cir. 1982).
summons for the exchange's membership lists. The barter exchange opposed the summons, arguing that the Service actually wanted the lists for the collateral purpose of examining the exchange's members, and that the summons should issue only after the Service complied with section 7609(f). The Eighth Circuit found this argument unpersuasive and enforced the summons. In so doing, however, the Eighth Circuit relied heavily on United States v. Euge. In Euge, the Supreme Court ruled the Service's summons power valid absent an express statutory prohibition. Thus, the Eighth Circuit's reliance on Euge seems misplaced, since section 7609(f) expressly prohibits enforcement of a John Doe summons where the Service has not complied with section 7609(f).

Finally, the Second Circuit relied on United States v. Gottlieb, an Eleventh Circuit decision. In Gottlieb, a barter exchange-examinee refused to comply with a section 7602 summons issued for its membership lists. In the ensuing section 7604 enforcement proceedings, the district court ruled that it would enforce the summons only if the Service either (1) renounced its intent to examine the exchange's members, or (2) complied with section 7609(f). The Court of Appeals for the Eleventh Circuit reversed the district court. The court adopted the Barter Systems rationale that the Service may issue a section 7602 summons for membership lists, provided the Service has a legitimate interest in the summonee's tax liability. The court reasoned that denying enforcement of the summons would require the Service to follow section 7609(f) procedure every time it examines a recordkeeper, essentially precluding such examinations.

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77 Id. at 164-65.
78 Id. at 165.
79 Id. at 169.
81 Barter Systems, 694 F.2d at 167 (quoting Euge, 444 U.S. at 715) (court's emphasis). Euge did not involve the express limitation on the Service's summons power embodied in § 7609(f). Rather, Euge concerned whether § 7602 empowered the Service to compel a person to give handwriting exemplars. Euge, 444 U.S. at 709. After reviewing the history of the summons power, and noting that "[t]he compulsion of handwriting exemplars has been the subject of far less protection than the compulsion of testimony and documents," id. at 718, the Supreme court enforced the Euge summons. Id. at 719.
82 712 F.2d 1363 (11th Cir. 1983).
83 Id. at 1365.
84 Id. at 1366.
85 Id. at 1370.
86 The court relied on the same Euge passage used by the Eighth Circuit in Barter Systems. Id. at 1368; see note 81 supra.
87 Gottlieb, 712 F.2d at 1368-69. The court did not indicate how a contrary holding would make it impossible for the Service to examine recordkeepers.
soning, however, the court, like the Second Circuit in *Tiffany Fine Arts*, failed to consider the key element of the Service's intent in issuing summonses.

In dictum, the Eleventh Circuit recognized two circumstances in which recordkeepers could successfully challenge collateral-purpose third-party summonses. First, the court said that a recordkeeper could allege that the Service's examination was a "mere pretext or subterfuge" to obtain the recordkeeper's participant lists. Second, the court noted that a summonee could assert that a summons violates the *Powell* good faith requirement. Thus, *Gottlieb* represents no more than a qualified endorsement of the collateral-purpose third-party summons.

In summary, both *Barter Systems* and *Gottlieb* represent questionable authority for the *Tiffany Fine Arts* holding. The Eighth Circuit's *Barter Systems* decision rests on a doubtful interpretation of precedent. And in *Gottlieb*, the Eleventh Circuit, like the Second Circuit in *Tiffany Fine Arts*, failed to consider the critical factor of the Service's intent in issuing summonses.

B. United States v. Thompson

The Court of Appeals for the Sixth Circuit expressed its position on the collateral-purpose third-party summons question in *United States v. Thompson*. In *Thompson*, the Service selected a barter exchange for examination pursuant to section 7601 and issued a section 7602 summons for transaction lists which identified the exchange's members. When the exchange declined to comply with the summons, the Service brought section 7604 enforcement proceedings. Service personnel testified at the proceedings that they intended to use the summoned lists to examine the tax liabilities of the exchange's members.

The Sixth Circuit ruled the summons invalid, since it failed to

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88 See notes 70-72 supra and accompanying text.
89 *Gottlieb*, 712 F.2d at 1369; see also *United States v. Constantinides*, 81-1 U.S. Tax Cas. (CCH) ¶ 9317, at 86,822 (D. Md. 1981), denying motion for stay from 80-2 U.S. Tax Cas. (CCH) ¶ 9830 (D. Md. 1980) (court enforced § 7602 summons for a barter exchange's membership lists, saying in dicta that the exchange "may protect [its] interests by seeking suppression of the names of the . . . members . . . in any enforcement proceeding").
90 *Gottlieb*, 712 F.2d at 1369-70.
91 701 F.2d 1175 (6th Cir. 1983).
92 *Id.* at 1176.
93 *Id.* at 1175, 1177.
94 *Id.* at 1177.
95 *Id.*
comply with section 7609(f).\textsuperscript{96} Looking to the statute's legislative history, the court noted that section 7609(f) emerged from Congress' concern, in the wake of \textit{Bisceglia}, for individual privacy rights.\textsuperscript{97} The court noted that, in reporting out section 7609(f), the House Ways and Means Committee expressed its intent that section 7609(f) apply to \textit{any} John Doe summons issued by the Service.\textsuperscript{98} The court was unwilling to allow collateral-purpose third-party summonses to transgress this clear expression of congressional intent.\textsuperscript{99} The court implied that Congress would not have restricted the Service's summons power by enacting section 7609(f), if it had intended to grant the Service discretion to defeat those restrictions in another statute.\textsuperscript{100} Moreover, the court suggested that the Service's use of its section 7602 summons power to procure participant lists in avoidance of section 7609(f) probably would violate the \textit{Powell} legitimate purpose test.\textsuperscript{101}

\textsuperscript{96} \textit{Id.}

\textsuperscript{97} \textit{Id.} at 1180. The court also observed that § 7609(f) represented Congress' attempt to balance this concern for privacy rights with the policy of administrative efficiency. \textit{Id.; see notes 55-57 supra} and accompanying text.

\textsuperscript{98} \textit{Thompson,} 701 F.2d at 1180. The Ways and Means Committee said:

The committee believes that many of the problems in this area would be cured if the parties to whom the records pertain were advised of the service of a third-party summons, and were afforded a reasonable and speedy means to challenge the summons where appropriate. While the third-party [recordkeeper] also has this right of challenge, even under present law, the interest of the [recordkeeper] in protecting the privacy of the records in question is frequently far less intense than that of the person to whom the records pertain.

In the case of a John Doe summons, advance notice to the taxpayer is obviously not possible. Here the committee decided that the IRS agent should be required to show adequate grounds for serving the summons in an independent review process before a court before \textit{any} such summons can be served.


\textsuperscript{99} The court said:

We do not believe that the IRS can avoid the requirements of section 7609(f) merely by identifying the record keeper as a person with respect to whose liability the summons is issued. Nor do we believe that even a legitimate investigation of a record keeper's own tax liability can be used to exempt the IRS from following section 7609(f) procedures when at the time of its issuance a summons in fact also pertains to the liability of other identified persons. To hold otherwise would present the IRS with an irresistable invitation to avoid the clear Congressional safeguards of § 7609(f).

\textit{Thompson,} 701 F.2d at 1179 n.8.

\textsuperscript{100} \textit{Id.} at 1179-80.

\textsuperscript{101} \textit{Id.} at 1178. The court also noted that the Service had internally recognized the rationale of its holding. \textit{Id.} at 1176. As a result of the Service's "Barter Exchange Project" then underway, the Service's manual provided in pertinent part:

If the operator of the exchange declines to furnish the identities of participants and
The significance of the Sixth Circuit's *Thompson* decision is the importance the court placed on the Service's intent in issuing summonses. The court held that the Service must comply with section 7609(f) when it issues a summons with a clear intent to investigate unknown third parties.\(^{102}\) The court said that the required intent probably does not exist when there is only a remote possibility of discovering information which would lead to examination of these unidentified taxpayers.\(^{103}\) The court dismissed distinctions between a primary and secondary intent to investigate unknown third parties, saying that “[i]t is enough that the intent was a motivating factor in the issuance of the summons.”\(^{104}\) Presumably, whether the Service possesses the necessary intent is a question for the trier of fact.

The Sixth Circuit said that its *Thompson* holding would not unduly burden the Service.\(^{105}\) In limiting its holding to cases in which both (1) the Service issues a summons with intent to examine unknown third parties, and (2) there is more than a remote possibility of the Service discovering the identity of such third parties, the court suggested that its holding would not apply to the vast majority of summonses issued by the Service.\(^{106}\) Moreover, the court noted that even where section 7609(f) procedures do apply, those procedures impose only slight burdens on the Service.\(^{107}\)

In summary, the courts of appeals are sharply divided on the collateral-purpose third-party summons question. The Sixth Circuit's *Thompson* decision, though the minority position, reflects clearer reasoning and a more accurate interpretation on the congressional intent underlying section 7609(f) than *Tiffany Fine Arts*, *Barter Systems*, or *Gottlieb*.

### C. Constitutional and Public Policy Issues

Collateral-purpose third-party summonses raise constitutional issues that courts have not discussed thus far. Judicial enforcement details of their transactions, a John Doe summons should be issued after consultation with District Counsel. The provision of Section 7609(f) . . . must be followed before a John Doe summons is issued.

*Id.* (quoting *MANUAL SUPPLEMENT 45G-324, DEPT. OF TREAS., IRS § 7.021* (March 11, 1980).

102 *701 F.2d at 1180*. The necessary intent must exist in an “institutional sense.” *Id.*

103 *Id.*

104 *Id.* at 1181 (emphasis added).

105 *Id.* at 1180.

106 *Id.* at 1180-81.

107 *Id.* at 1180.
of these summonses infringes on three rights protected by the liberty component of the fifth amendment's due process clause.\textsuperscript{108} These are the right to freely contract, the right to enjoy a statutory entitlement, and the right to privacy in economic affairs. The Supreme Court has recognized all three of these rights, albeit in different contexts.

The Supreme Court has recognized the right to freely contract as within the liberty component of the fifth amendment's due process clause.\textsuperscript{109} Undeniably important is an individual's right to engage in lawful economic transactions without governmental interference. Section 7609(f) provides minimal procedural safeguards to protect individuals' economic transactions from unrestricted inquiry by the IRS. Nonenforcement of section 7609(f) could prompt individuals to economically disassociate themselves from persons who are likely targets of collateral-purpose third-party summonses. Thus, enforcement of collateral-purpose third-party summonses arguably infringes on the right of individuals to freely contract.

The Supreme Court recently recognized, in \textit{Hewitt v. Helms},\textsuperscript{110} the right to procedural due process before deprivation of a statutory entitlement. In \textit{Hewitt}, a Pennsylvania statute established the procedures prison officials must follow to lawfully confine a prisoner to segregated quarters.\textsuperscript{111} The court held that the statute conferred on prisoners a protected liberty interest in remaining in the general prison population, absent compliance with the statutory procedures.\textsuperscript{112} In enacting section 7609(f), Congress similarly conferred on taxpayers a protected liberty interest in not having their names disclosed in response to an IRS summons, absent the Service's compliance with section 7609(f) procedures. Enforcement of summonses in disregard of the section 7609(f) procedural safeguards thus deprives targeted taxpayers of a statutory entitlement conferred on them by Congress.

The Supreme Court first recognized the right of individual privacy in "penumbras . . . formed by emanations" from the first, third, fourth, fifth, and ninth amendments.\textsuperscript{113} The Court has since

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\textsuperscript{108} The liberty component of the fifth amendment's due process clause provides that "\textit{[n]o person shall . . . be deprived of . . . liberty . . . without due process of law.}" \textbf{U.S. CONST. amend. V}.

\textsuperscript{109} Board of Regents v. Roth, 408 U.S. 564, 572 (1972) (quoting \textit{Meyer v. Nebraska}, 262 U.S. 390, 399 (1923)).

\textsuperscript{110} 103 S. Ct. 864 (1983).

\textsuperscript{111} \textit{ld.} at 867.

\textsuperscript{112} \textit{ld.} at 871.

\textsuperscript{113} Griswold v. Connecticut, 381 U.S. 479, 484 (1965).
\end{footnotesize}
established that the liberty components of the fifth and fourteenth amendments' due process clauses encompass the privacy right,\(^\text{114}\) and that John Doe summonses encroach on targeted taxpayers' privacy.\(^\text{115}\) Section 7609(f) minimally protects this privacy right from inquiry by the Service. Enforcement of summonses that contravene the section 7609(f) safeguards therefore violates the economic privacy rights of targeted taxpayers.

Judicial enforcement of collateral-purpose third-party summonses, then, deprives targeted taxpayers of three interests protected by the liberty component of the fifth amendment's due process clause. In *Mathews v. Eldridge*,\(^\text{116}\) the Supreme Court established three factors courts must consider in determining what process must attend constitutional deprivation of a protected liberty interest: (1) the private interest affected by the governmental action; (2) the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; and (3) the government's interest, including the function involved and the final and administrative burdens that the additional or substitute procedures would entail.\(^\text{117}\) This balancing test provides the framework for determining whether enforcement of collateral-purpose third-party summonses deprives targeted taxpayers of the enumerated liberty interests without due process of law.

Under the first *Eldridge* factor, the "private interests" affected by collateral-purpose third-party summonses are, as previously stated,\(^\text{118}\) targeted taxpayers' rights to freely contract, enjoy a statutory entitlement, and economic privacy. Applying the second *Eldridge* factor, section 7609(f) provides individuals with some protection from erroneous deprivation of these interests.\(^\text{119}\) Under the third *Eldridge* factor, the government's interest in urging enforcement of collateral-purpose third-party summonses is in efficient enforcement of the revenue laws. In upholding the Commissioner's summons power, the

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\(^{115}\) In enforcing the *Bisceglia* John Doe summons, the Court said:

> Although such investigations unquestionably involve some invasion of privacy, they are essential to our self-reporting system, and the alternatives could well involve far less agreeable invasions of house, business, and records.


\(^{117}\) Id. at 335.

\(^{118}\) See notes 109-14 *supra* and accompanying text.

\(^{119}\) See notes 49-54 *supra* and accompanying text.
Supreme Court has consistently expressed its view that an effective revenue-raising agency is an integral component of the federal government.\textsuperscript{120} Given the Court’s view, the procedural safeguards of section 7609(f) probably satisfy the \textit{Eldridge} balancing test. Thus, judicial enforcement of collateral-purpose third-party summonses where the Service has complied with section 7609(f) deprives targeted taxpayers of protected liberty interests with due process of law.

However, enforcement of collateral-purpose third-party summonses where the Service has not complied with section 7609(f) deprives targeted taxpayers of these protected liberty interests with no process whatsoever. Such summonses issue pursuant to section 7602, which provides procedural safeguards to persons named in the summons.\textsuperscript{121} Since collateral-purpose third-party summonses do not name the targeted taxpayers, enforcement of these summonses deprives targeted taxpayers of not only the benefit of a section 7609(f) ex parte hearing, but also of their section 7602 notice and procedural rights. Therefore, enforcement of collateral-purpose third-party summonses deprives the unnamed taxpayers of protected liberty interests without due process of law.

In addition to legal rights and interests, public policy concerns are also involved when the Service issues collateral-purpose third-party summonses. These policy concerns are fourfold. Congress considered two of these concerns in evaluating the propriety of John Doe summonses after the Supreme Court’s decision in \textit{Bisceglia}.\textsuperscript{122} First, Congress acknowledged that the federal government has a legitimate interest in the Service’s efficient enforcement of duly enacted revenue laws.\textsuperscript{123} Second, Congress recognized that collateral-purpose third-party summonses threaten important individual rights.\textsuperscript{124} Section 7609(f) represented Congress’ balance between these competing

\textsuperscript{120} In \textit{Powell}, the Court said:

\begin{quote}
Although a more stringent interpretation is possible, one which would require some showing of cause for suspecting fraud, we reject such an interpretation because it might seriously hamper the Commissioner in carrying out investigations he thinks warranted, forcing him to litigate and prosecute appeals on the very subject which he desires to investigate . . . .
\end{quote}

379 U.S. at 53-54; see also \textit{Euge}, 444 U.S. at 714-16; \textit{Bisceglia}, 420 U.S. at 146, 150.

\textsuperscript{121} Section 7609(a)’s notice provision and § 7609(b)’s motion to quash and intervention provisions apply to any summons issued pursuant to § 7602. I.R.C. § 7609(c)(1) (West Supp. 1983); see notes 36-48 \textit{supra} and accompanying text.

\textsuperscript{122} See note 36 \textit{supra} and accompanying text.

\textsuperscript{123} See note 55 \textit{supra} and accompanying text.

\textsuperscript{124} See note 56 \textit{supra} and accompanying text.
Third, the Service could issue collateral-purpose third-party summonses to a broad spectrum of recordkeepers. Thus far, the Commissioner has substantially confined use of the device to barter exchanges and tax shelter operations. However, extended use of the device to extract the client lists of a professional, such as a lawyer or an accountant, could injure not only the targeted clients, but also the summonee-professional. Section 7609(f) judicial review requirements minimally protect these interests from unfounded use of the Commissioner’s John Doe summons power.

Finally, federal courts must enforce the Constitution and laws of the United States. The Second, Eighth, and Eleventh Circuits’ decisions enforcing collateral-purpose third-party summonses contravene Congress’ clearly-expressed intent in enacting section 7609(f). Selective judicial enforcement of constitutional legislative enactments could engender disrespect among the citizenry for all laws.

In summary, judicial enforcement of collateral-purpose third-

125 See note 57 supra and accompanying text.
126 The attorney-client privilege, however, protects communications between a lawyer and his client from administrative summonses. In Upjohn v. United States, 449 U.S. 383 (1981), the Service issued a § 7602 summons to a corporation’s general counsel. The summons sought the lawyer’s files relating to an investigation he had undertaken to identify any payments made by the corporation to foreign government officials. Id. at 386-87. The Court refused to enforce the summons based on both the attorney-client privilege and the work product doctrine. Id. at 396-97, 401-02. The Court noted that “the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.” Id. at 390. Arguably, this “information” includes client names. However, lists of client names are more administrative in nature than the litigation-anticipating files in Upjohn and a court could find that the attorney-client privilege does not protect them from summonses.
127 An accountant-client privilege does not exist for federal tax purposes. In United States v. Arthur Young & Co., 52 U.S.L.W. 4355 (U.S. Mar. 20, 1984) (No. 82-687), the Service issued a § 7602 summons for an accountant’s “tax accrual workpapers” that analyzed a corporation’s contingent tax liabilities. In opposing the summons, the accountant asserted that a work-product doctrine should immunize such workpapers from summonses issued by the Service. Id. at 4357. The accountant argued that such a doctrine would enhance the integrity of the securities markets by encouraging publicly-held corporations to fully disclose their tax matters to their independent accountants. Id. at 4359. The Supreme Court declined to adopt a tax accrual workpaper privilege for accountants. Id. at 4360. The Court said that the policy of full corporate disclosure should be weighed against the policy of efficient federal revenue collection and that this balancing was solely within Congress’ domain. Id. The Court was unwilling to restrict the Service’s traditionally broad summons power absent express direction from Congress. Id. at 4358 (citing United States v. Euge, 444 U.S. 707, 711 (1980)); see also Couch v. United States, 409 U.S. 322, 335 (1973) (no confidential accountant-client privilege exists under federal law). Thus, it is unlikely that the Court would find that privilege restricts the Service’s power to summon an accountant’s lists of client names.
128 Judiciary Act of 1789, § 8, 1 Stat. 73, 76 (1845).
129 See notes 97-100 supra and accompanying text.
party summonses deprives targeted taxpayers of protected liberty interests without due process of law. The Sixth Circuit's Thompson decision provides minimal procedural safeguards to protect the liberty interests of targeted taxpayers threatened by collateral-purpose third-party summonses. Moreover, public policy considerations support the Thompson position.

III. Conclusion

The John Doe summons is important to the federal revenue raising system. Unbridled, however, the IRS' use of the device threatens Americans' rights to contractual freedom and economic privacy. Congress attempted to balance these rival interests by enacting I.R.C. section 7609(f). Nonetheless, some courts have allowed the Service to bypass the congressional John Doe summons safeguards. These courts have allowed the Service to select third-party recordkeepers for examination and then use its general summons power to procure those recordkeepers' participant lists. This practice deprives individuals of their right to enjoy a statutory entitlement embodied in section 7609(f).

Congress should give effect to the intent it expressed in enacting section 7609(f) and remove the ambiguity that some courts have read into that statute. Congress could do this by enacting a law requiring the Service to follow section 7609(f) procedure whenever the Service issues a summons with the intent to identify the summonee's participants. Until Congress so acts, however, courts should decline to enforce collateral-purpose third-party summonses. By enforcing these summonses, the Second, Eighth, and Eleventh Circuits are granting the Commissioner discretion to circumvent an act of Congress.

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