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Whitney B. Arp

THE IRS'S FAILURE TO COMPLY: DOES "SHALL" STILL MEAN "SHALL"?

Whitney B. Arp*

INTRODUCTION

The Internal Revenue Service (IRS) routinely issues summonses to compel taxpayers or third parties to testify and produce "any books, papers, records or other data" relevant to an inquiry.[1] Section 7609(a)(1) of the Internal Revenue Code (the Code) requires that the notice of summonses "shall be given to any person so identified within 3 days of the day on which such service is made, but no later than the 23rd day before the day fixed in the summons as the day upon which such records are to be examined."[2] However, there is a discrepancy as to whether the IRS's failure to comply with the notice requirement renders the summons unenforceable.[3]

By answering this question, a court provides a bigger picture of whether "shall" represents a mandatory command or simply serves as a suggestion that does not demand compliance.[4] "First, *shall* is the most important word of legal drafting—contracts, wills, trusts, and the many forms of public and private legislation . . . . *Shall* is the very word that is supposed to create a legal duty. Second, *shall* is the most misused word in the legal vocabulary."[5] Unfortunately, even circuit courts have been unable to agree on the correct approach to address this issue.[6]

Five circuit courts—the First, Second, Fifth, Sixth, and Eleventh Circuit Court of Appeals—have openly refused to enforce the

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* J.D. Candidate 2016, Georgia State University College of Law. I would like to thank my parents—Rick and Angie Arp—for always pushing me to be the best person I can be.

1. I.R.C. § 7602(a)(1) (2012).
2. I.R.C. § 7609(a)(1) (2012).
3. *See infra* note 54.
4. Jewell v. United States, 749 F.3d 1295, 1300 (10th Cir. 2014) (noting that multiple circuits have declined to enforce the twenty-three-day requirement as mandatory despite the statute's use of the word "shall").
5. Joseph Kimble, *The Many Misuses of Shall*, 3 SCRIBES J. LEGAL WRITING 61, 61 (1992).
6. *See Jewell*, 749 F.3d at 1300.

twenty-three day requirement as a mandatory command and upheld the IRS's summonses even if they were delivered after the deadline.[7] The Tenth Circuit Court of Appeals recently decided *Jewell v. United States*, which not only reinforced "shall" as a mandatory command, but created a circuit split on the IRS's obligation to comply with § 7609(a)(1).[8] This Note discusses the circuit split surrounding the IRS's third-party summonses, Code § 7609(a)(1)'s "shall be given" twenty-three day notice requirement, and courts' interpretations of the legal term "shall."[9]

Part I introduces the IRS's summons power[10] and examines the limits on this power imposed by Congress and the additional rules governing third-party summons.[11] Further, Part I presents the grounds for challenging a summons, particularly the IRS's failure to satisfy the requirements established in *United States v. Powell*.[12] After examining the requirements for the IRS to make a prima facie case for enforcement of a summons, the issue will be narrowed to one simple element: "[whether] the administrative steps required by the Code have been followed."[13] Lastly, Part I discusses the controlling precedent leading to the recent circuit split.[14]

Part II analyzes the divide between the circuits regarding the application of the *Powell* requirements,[15] some courts' tendency to consider the totality of the circumstances,[16] and the circuit split

7. Azis v. U.S. IRS, 522 F. App'x 770, 777 (11th Cir. 2013); Adamowicz v. United States, 531 F.3d 151, 161 (2d Cir. 2008); Cook v. United States, 104 F.3d 886, 889–90 (6th Cir. 1997); Sylvestre v. United States, 978 F.2d 25, 28 (1st Cir. 1992); United States v. Bank of Moulton, 614 F.2d 1063, 1066 (5th Cir. 1980).

8. *Jewell*, 749 F.3d at 1300–01.

9. *See infra* Part I, II, III; *see also* I.R.C. § 7609(a)(1) (2012).

10. *See infra* Part I.A.

11. *See infra* Part I.A; *see generally* I.R.C. § 7609 (2012); Brian E. Holthus, Comment, *Caveat Taxpayer: How and Why the Internal Revenue Service May Examine Your Book, Your Accountant and Even Your Attorney*, 12 PEPP. L. REV. 769, 775 (1985).

12. *See infra* Part I.B.

13. United States v. Powell, 379 U.S. 48, 57–58 (1964); *see also infra* Part I.B.

14. *See infra* Part I.C.

15. *See infra* Part II; *see also Powell*, 379 U.S. at 57–58.

16. *See infra* Part II; *see also* Adamowicz v. United States, 531 F.3d 151, 161 (2d Cir. 2008) (noting the enforcement of the summons "depends upon the totality of the circumstances, including the seriousness of the infringement, the harm or prejudice, if any, caused thereby, and the government's good faith"); Robert v. United States, 364 F.3d 988, 996–97 (8th Cir. 2004) (enforcing the Circuit's rule "that the enforceability of a summons that the IRS issued through a violation of a law or rule depends

created by the Tenth Circuit's strict interpretation in *Jewell v. United States*.[17]

Finally, Part III discusses a proposal for an agreement that the IRS must follow the statutory requirements of the Code and a uniform enforcement of "shall" as a mandatory command.[18] This Part supports this proposal by discussing growing disapproval by courts of the IRS's failure to comply with its own Code[19] and the importance of the interpretation of "shall" within the legal community.[20]

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upon all of the circumstances surrounding the summons, including the seriousness of the violation, the government's good faith, and the harm, if any, caused by the violation"); Cook v. United States, 104 F.3d 886, 889 (6th Cir. 1997) (employing a harmless error type analysis to conclude that a oneday late notice did not warrant quashing the summons); Sylvestre v. United States, 978 F.2d 25, 28 (1st Cir. 1992) (holding untimely notice was not a basis for quashing the summons where the taxpayer was not harmed by the late notice); United States v. Bank of Moulton, 614 F.2d 1063, 1066 (5th Cir. 1980) ("The correct approach for determining whether to enforce a summons requires the court to evaluate the seriousness of the violation under all the circumstances, including the government's good faith and the degree of harm imposed by the unlawful conduct.").

17. Jewell v. United States, 749 F.3d 1295, 1300 (10th Cir. 2014) ("We are hesitant to create a circuit split, but we have little choice because we are obliged to follow the Supreme Court's holding in *Powell* even if other circuit courts have not.").

18. *See infra* Part III.

19. *See Cook*, 104 F.3d at 890 ("However, this opinion must not be construed as investing the [IRS] with a license to ignore statutory deadlines or to negligently violate other legal requirements. This court is disturbed by a history of [IRS] irresponsibility in honoring and respecting filing requirements which borders upon an expression of arrogant immunity from executive, legislative, and judicial mandates."); United States v. Gertner, 65 F.3d 963, 972 n.9 (1st Cir. 1995) ("We note, too, that the Sixth Circuit explicitly warned the IRS that it was issuing a 'one-time only' free pass."); United States v. Ritchie, 15 F.3d 592, 600 (6th Cir. 1994) ("We are not suggesting that the IRS may in the future avoid going through the ex parte proceeding required by § 7609(f), for now the IRS has fair notice that if it cannot demonstrate a bona fide interest in investigating the tax liability of the party summoned, it must comply with § 7609(f)."); Holthus, *supra* note 11, at 778 ("The courts have recognized that such IRS powers are subject to abuse. Therefore, the courts have taken it upon themselves, in party, to oversee the IRS and protect the taxpayer from undue harassment.").

20. *See* Francis A. Gilligan & Edward J. Imwinkelried, *Bringing the "Opening the Door" Theory to a Close: The Tendency to Overlook the Specific Contradiction Doctrine in Evidence Law*, 41 SANTA CLARA L. REV. 807, 831–32 n.157 (2001) ("The legislature's use of 'shall' ordinarily signals a mandatory intent."); *see also* Lexecon v. Milberg Weiss Berhsad Hynes & Lerach, 523 U.S. 26, 27 (1998); Green v. Bock Laundry Mach. Co., 490 U.S. 504, 514 (1989); Keith v. Rizzuto, 212 F.3d 1190, 1193 (10th Cir. 2000); In re Barbieri, 199 F.3d 616, 619–20 (2d Cir. 1999); United States v. Maria, 186 F.3d 65, 70 (2d Cir. 1999); United States v. Myers, 106 F.3d 936, 941 (10th Cir. 1997); Ass'n of Civilian Technicians, Mont. Air Chapter No. 29 v. Fed. Labor Relations Auth., 22 F.3d 1150, 1153 (D.C. Cir. 1994); Sverdrup Corp. v. WHC Constructors, Inc., 989 F.2d 148, 151 (4th Cir. 1993); Mallory v. Mortg. Am., Inc., 67 F. Supp. 2d 601, 608 (S.D. W. Va. 1999); United States v. Davis, 801 F. Supp. 581, 583 (M.D. Ala. 1992); United States v. McKenna, 791 F. Supp. 1101, 1109 (E.D. La. 1992).

I. BACKGROUND

A. The IRS's Summons Power

The IRS has far-reaching examination and inspection powers, including the authority to issue a summons.[21] "Traditionally, the IRS . . . used summonses only as a last resort after exhausting [all other] means of obtaining information."[22] Code § 7602 grants the IRS summons powers for multiple purposes,[23] but probable cause is not required to support the issuance or enforcement of a summons.[24] "[A] summons may be issued merely on 'official curiosity.'"[25] Additionally, the type of information the IRS can obtain is almost limitless.[26] The IRS may issue a summons to compel a taxpayer or third party to testify and produce "any books, papers, records or other data" relevant or material to an inquiry.[27]

Not all IRS summonses are created equal.[28] Summonses issued to third parties holding financial information about the taxpayer, such as banks, consumer reporting or credit agencies, brokers, attorneys, and accountants, are subject to special rules.[29] A "third-party recordkeeper" summons initiates deadlines and a procedure for

21. Holthus, *supra* note 11, at 771 ("The IRS has been granted far-reaching examination and inspection powers by Congress. Such authority is not a modern development. In fact, the government has had wide-ranging powers to examine books and witnesses since 1927.").

22. Todd A. Izzo, *The IRS Summons Power*, FED. B. ASS'N SEC. TAX'N REP., Fall 1998, at 1, 2.

23. I.R.C. § 7602(a) (2012); Holthus, *supra* note 11, at 772 ("The IRS is given summons powers under section 7602 for the following purposes: (1) to determine if a tax return is correct; (2) to make a return where none has been made; and (3) to determine the tax liability of any person or the liability, at law or in equity, of any transferee or fiduciary of that person, or to collect such liability.").

24. IAN M. COMISKY ET AL., TAX FRAUD & EVASION ¶ 4.04[4] (2015) ("Probable cause is not required to support the issuance or enforcement of a summons. . . . The issuance and enforcement of a summons are not circumscribed by any civil or criminal statute of limitations.").

25. *Id.* ("A summons can require the production of documents and information whether or not they were used in the preparation of a tax return or would themselves be admissible in a judicial proceeding."); *see also* United States v. Powell, 379 U.S. 48, 51 (1964); United States v. Morton Salt Co., 338 U.S. 632, 650 (1950); United States v. Cortese, 614 F.2d 914, 915 (3d Cir. 1980); United States v. Giordano, 419 F.2d 564, 568 (8th Cir. 1969) (comparing the IRS summons power to a "license[] to fish"); United States v. Richards, 479 F. Supp. 828, 830 (E.D. Va. 1979).

26. Izzo, *supra* note 22, at 2 (The IRS can obtain almost any information in furtherance of "an ongoing investigation to ascertain the correctness of a return, to make a return when none has been made, to determine the liability of any person, or to collect a tax liability.").

27. I.R.C. § 7602(a)(1) (2012).

28. COMISKY ET AL., *supra* note 24, at ¶ 4.04[4][a].

29. *Id.*; *see also* I.R.C. § 7603(b)(2) (2012).

objection that is governed by Code § 7609.[30] First, the taxpayer named in the summons "shall be given" notice within three days of service on the third party and at least twenty-three days before the examination date.[31] The taxpayer then has a deadline to file a petition to quash the summons and stop the third party's compliance pending judicial proceedings.[32]

The taxpayer under investigation may challenge the summons on any appropriate ground, including: (1) the IRS failed to satisfy the requirements set out in *United States v. Powell*; (2) the summoned party does not have actual or constructive possession of the requested documents; (3) the summoned party has already complied with the summons; (4) the summoned materials are protected from disclosure; (5) compliance with the summons would impose an unreasonable burden on the summoned party; or (6) the summons violates a constitutional or express statutory protection.[33] The taxpayer must act within the timeframe allotted to him under § 7609(b)(2), which is within twenty days of receiving notice, or his right to intervene and petition to quash the summons is lost.[34]

B. The Powell Standard

The IRS's compliance, or lack thereof, with the requirements in *United States v. Powell*, is the disputed issue within the context of third party summonses. Under *Powell*, the summons must: (1) be issued in an examination being conducted for a legitimate purpose; (2) seek information relevant to that purpose; (3) seek information not already within the IRS's possession; and (4) satisfy all administrative steps required by the Code.[35] All four requirements are

30. COMISKY ET AL., *supra* note 24, at ¶ 4.04[4][a]; I.R.C. § 7609 (2012).

31. I.R.C. § 7609(a)(1) (2012) (stating "notice of the summons shall be given to any person so identified within 3 days of the day on which such service is made, but no later than the 23rd day before the day fixed in the summons as the day upon which such records are to be examined").

32. I.R.C. § 7609(b)(2)(a) (2012) ("Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to begin a proceeding to quash such summons not later than the 20th day after the day such notice is given in the manner provided in subsection (a)(2).").

33. Izzo, *supra* note 22, at 6; COMISKY ET AL., *supra* note 24, at ¶ 4.04[4][a].

34. I.R.C. § 7609(b)(2)(A) (2012).

35. United States v. Powell, 379 U.S. 48, 57–58 (1964) (noting that the "administrative steps

necessary for the IRS to make a prima facie case for enforcement of a summons, but most of the parties in the following cases agree that the fourth prong determines whether the summons must be quashed.[36]

"While failure to comply with required statutory or constitutional procedures generally renders the summons unenforceable," this element provides taxpayers the least amount of assistance in fighting against summonses.[37] Courts are willing to enforce summonses despite the IRS violating one of its own internal procedures or guidelines,[38] and are very generous to the IRS when defining sufficient notice.[39] For various reasons, five circuit courts rejected petitions to quash summonses when the IRS failed to comply with the requirements under § 7609.[40]

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required by the Code [must] have been followed").

36. *Id.*; *see also* Jewell v. United States, 749 F.3d 1295, 1298 (10th Cir. 2014).

37. Izzo, *supra* note 22, at 6; Gerald A. Kafka, *Administrative Summons: Use and Enforcement*, ST009 A.L.I. – A.B.A. CONTINUING LEGAL EDUC. 255, 267 (2011) (noting "[t]he fourth element of the *Powell* standard, that the IRS comply with the administrative steps required by the [c]ode, has provided the least amount of defensive comfort in opposition to a summons").

38. Izzo, *supra* note 22, at 4.

39. *See generally* Richard B. Gallagher, Annotation, *Requirement, Under 26 U.S.C.A. § 7609(a), that Notice be Given Taxpayer of Internal Revenue Service Summons Served on Third-Party Recordkeeper for Production of Records Relating to Business Transactions or Affairs of Taxpayer*, 64 A.L.R. FED. 552 (1983); *see also* United States v. Hamilton Fed. Sav. & Loan Ass'n, 566 F. Supp. 755, 757–58 (E.D.N.Y. 1983) (holding the taxpayer received sufficient notice even though the notice was mailed to taxpayer at incorrect address); United States v. Shelby State Bank, No. G78-7, 1978 WL 4512, at *4 (W.D. Mich. Apr. 26, 1978) (ruling IRS complied with notice requirement when the record showed the taxpayers had knowledge of the summons even though the taxpayers claimed they did not receive such notice). *But see* United States v. Desert Palace, Inc., No. Civ. LV-78-263 HEC, 1979 WL 1319, at *4 (D. Nev. Mar. 12, 1979) (ruling since the taxpayer did not receive any formal notice of the summons the court did not have personal jurisdiction over the taxpayer).

40. *Jewell*, 749 F.3d at 1300 ("We are mindful of the fact that five other circuit courts have declined to apply *Powell* in this manner."); Azis v. U.S. IRS, 522 F. App'x 770, 777 (11th Cir. 2013) (holding that *Powell* applied but assuming the court had equitable power to excuse the notice defect after "evaluating the seriousness of the infraction under all the circumstances"); Adamowicz v. United States, 531 F.3d 151, 161 (2d Cir. 2008) (holding that *Powell* applied but assuming the court had equitable power to excuse the notice defect if the IRS passed a "totality of the circumstances" test); Cook v. United States, 104 F.3d 886, 889–90 (6th Cir. 1997) (holding that *Powell* applied but the trial courts had discretion to "excuse the Service's technical notification default *if, and only if,* the party (or parties) entitled to statutory notification was (or were) not substantially prejudiced by the violation—that is, if the error was harmless"); Sylvestre v. United States, 978 F.2d 25, 28 (1st Cir. 1992) (holding that *Powell* applied but then failing to find that the twenty-three day requirement under section 7609(a) is an "administrative step" required in the tax code); United States v. Bank of Moulton, 614 F.2d 1063, 1066 (5th Cir. 1980) (declining to apply *Powell* all together).

C. Creating a Circuit Split

The first decision, over fifteen years after the Supreme Court decided *Powell*, came from the Fifth Circuit in *United States v. Bank of Moulton*.[41] The Fifth Circuit emphasized the government's good faith and the absence of material injury to the taxpayer, rejected the application of *Powell*, and justified enforcement of the summons to avoid promoting "form over substance."[42] Twelve years later, the First Circuit decided *Sylvestre v. United States*.[43] The First Circuit held the IRS summons enforceable despite the notice falling two days beyond the statutory provision's requirement.[44] In addition to looking for bad faith or harm to the taxpayer, the court also considered the purpose of the notice statute.[45] Because the taxpayer was able to timely move to quash the summons before any records were examined, the court felt the IRS complied with the intent of the statute.[46]

In 1997, the Sixth Circuit found the summonses in *Cook v. United States* enforceable despite the IRS conceding that it had technically violated Code § 7609(a)(1).[47] The Sixth Circuit reasoned that quashing the summonses for missing the deadline by one day was not an "effective and efficient enforcement of the national revenue laws" and created a "futile and pointless duplication of effort [for] the government . . . ."[48] This allowed the trial court to exercise discretion in excusing the IRS's technical violation if the taxpayer was not substantially prejudiced by the violation.[49] In *Adamowicz v. United States IRS*, the Second Circuit followed the other circuits and weighed the enforceability of the summons on "the totality of the

41. *Bank of Moulton*, 614 F.2d at 1063.
42. *Id.* at 1066.
43. *Sylvestre*, 978 F.2d at 25.
44. *Id.* at 27.
45. *Id.* at 28 (noting the purpose of the notice is to allow the taxpayer "the opportunity to invoke his right to intervene and seek to quash the summons before that examination").
46. *Id.*
47. Cook v. United States, 104 F.3d 886, 888–90 (6th Cir. 1997).
48. *Id.* at 889–90.
49. *Id.* at 889 (noting that this discretion only applies "if, and only if, the party (or parties) entitled to statutory notification was (or were) not substantially prejudiced by the violation—that is, if the error was harmless") (emphasis omitted).

circumstances, including the seriousness of the infringement, the harm or prejudice, if any, caused thereby, and the government's good faith."[50] The Eleventh Circuit also came to the same conclusion in *Azis v. United States Internal Revenue Service*.[51]

Of these five circuits, four courts acknowledge the *Powell* requirement, but failed to interpret the "shall be given" notice requirement as a mandatory command.[52] Even after evaluating *Powell*, one court did not classify the twenty-three day notice requirement to be a tax Code administrative step.[53] Recognizing that it was creating a split among circuits, the Tenth Circuit took a strict approach to the twenty-three day notice requirement and quashed a third-party summons because the IRS did not give the taxpayer proper notice.[54] The Tenth Circuit classified the statutory notice requirement as an "administrative step," and felt obligated to apply the Supreme Court's *Powell* test.[55] Further, the court clarified the meaning of "shall" as a mandatory intent, upholding "the age-old precept that 'shall' means 'shall.'"[56]

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50. Adamowicz v. United States, 531 F.3d 151, 161 (2d Cir. 2008) ("We see no reason to vary from this general approach taken by our sister Circuits.").

51. Azis v. U.S. IRS, 522 F. App'x 770, 777 (11th Cir. 2013) (finding the summons enforceable "after evaluating the seriousness of the infraction under all the circumstances, including the government's good faith and the degree of harm imposed").

52. I.R.C. § 7609(a)(1) (2012); *Azis*, 522 F. App'x at 777 (holding that *Powell* applied but assuming the court had equitable power to excuse the notice defect after "evaluating the seriousness of the infraction under all the circumstances"); *Adamowicz*, 531 F.3d at 161 (holding that *Powell* applied but assuming the court had equitable power to excuse the notice defect if the IRS passed a "totality of the circumstances" test); *Cook*, 104 F.3d at 889–90 (holding that *Powell* applied but that the trial courts had discretion to "excuse the Service's technical notification default *if, and only if,* the party (or parties) entitled to statutory notification was (or were) not substantially prejudiced by the violation—that is, if the error was harmless"); Sylvestre v. United States, 978 F.2d 25, 28 (1st Cir. 1992) (holding that *Powell* applied but then failing to find that the twenty-three day requirement under section 7609(a) is an "administrative step" required in the tax code).

53. *Sylvestre*, 978 F.2d at 28.

54. Jewell v. United States, 749 F.3d 1295, 1300–01 (10th Cir. 2014) ("We are hesitant to create a circuit split, but we have little choice because we are obliged to follow the Supreme Court's holding in *Powell* even if other circuit courts have not.").

55. *Id.* at 1299–1300 ("In *Powell*, the Supreme Court did not define the term 'administrative step.' Thus, we start with the common meaning of the term. The term is broad, defined in one leading dictionary as '[p]ertaining to, or dealing with, the conduct or management of affairs.'").

56. *Id.* at 1298–99 (distinguishing *Jewell* from Barnhart v. Peabody Coal Co., 537 U.S. 149 (2003) and Dolan v. United States, 560 U.S. 605 (2010)); *see also* Forest Guardians v. Babbitt, 174 F.3d 1178, 1187 (10th Cir. 1999) ("The Supreme Court and this circuit have made clear that when a statute uses the word 'shall,' Congress has imposed a mandatory duty upon the subject of the command."); United

From this brief overview of the decisions that have addressed this issue, it is clear that there is a divide among the circuits.[57] Although there are many judicial decisions indicating that "shall" represents a mandatory command,[58] most circuits struggle with extending that idea to Code § 7609(a)(1).[59] Despite their differences, it is in the public's best interest for courts to address this issue and send a clear message of the court's expectations to the IRS.[60] Although many circuits rejected the idea of quashing the summons for "technical" violations, the courts were not without expressed concerns.[61] Some courts quickly and directly informed the IRS that they were successful this time, but it should not be interpreted as an acceptance of IRS's failure to meet deadlines.[62] In fact, some court opinions came in the form of a warning to the IRS about future compliance.[63]

States v. Myers, 106 F.3d 936, 941 (10th Cir. 1997) ("It is a basic canon of statutory construction that use of the word 'shall' indicates a mandatory intent.").

57. *Jewell*, 749 F.3d at 1300.

58. Gilligan & Imwinkelried, *supra* note 20, at 831–32 n.157 ("The legislature's use of 'shall' ordinarily signals a mandatory intent."); *see also* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 525 n.32 (1989); Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 27 (1998); Keith v. Rizzuto, 212 F.3d 1190, 1193 n.3 (10th Cir. 2000); In re Barbieri, 199 F.3d 616, 620 (2d Cir. 1999); United States v. Maria, 186 F.3d 65, 70 (2d Cir. 1999); United States v. Myers, 106 F.3d 936, 941 (10th Cir. 1997); Ass'n of Civilian Technicians, Mont. Air Chapter No. 29 v. Fed. Labor Relations Auth., 22 F.3d 1150, 1153 (D.C. Cir. 1994); Sverdrup Corp. v. WHC Constructors, Inc., 989 F.2d 148, 151 (4th Cir. 1993); Mallory v. Mortg. Am., Inc., 67 F. Supp. 2d 601, 608 (S.D. W. Va. 1999); United States v. Davis, 801 F. Supp. 581, 583 (M.D. Ala. 1992); United States v. McKenna, 791 F. Supp. 1101, 1109 (E.D. La. 1992).

59. *See* Azis v. U.S. IRS, 522 F. App'x 770, 777 (11th Cir. 2013); Adamowicz v. United States, 531 F.3d 151, 161 (2d Cir. 2008); Cook v. United States, 104 F.3d 886, 889–90 (6th Cir. 1997); Sylvestre v. United States, 978 F.2d 25, 28 (1st Cir. 1992); United States v. Bank of Moulton, 614 F.2d 1063, 1066 (5th Cir. 1980).

60. Warren Gorham et al., *CA-6, Fed Up With IRS Arrogance, Will Do Something About It–Will Other Courts Follow Suit?*, 86 J. TAX'N 382, 1997 WL 799455, at *1 (1997).

61. *Cook*, 104 F.3d at 888–90 (specifying that this court's opinion does not intend to grant the IRS "a license to ignore statutory deadlines or to negligently violate other legal requirements. This court is disturbed by a history of [IRS] irresponsibility in honoring and respecting filing requirements which borders upon an expression of arrogant immunity from executive, legislative, and judicial mandates.").

62. United States v. Ritchie, 15 F.3d 592, 600 (6th Cir. 1994) ("We are not suggesting that the IRS may in the future avoid going through the ex parte proceeding required by § 7609(f), for now the IRS has fair notice that if it cannot demonstrate a bona fide interest in investigating the tax liability of the party summoned, it must comply with § 7609(f)."); United States v. Gertner, 65 F.3d 963, 972 n.9 (1st Cir. 1995) ("We note, too, that the Sixth Circuit explicitly warned the IRS that it was issuing a 'one-time only' free pass.").

63. *Cook*, 104 F.3d at 890–91 ("This court shall review future violations of technical legal requirements by the [IRS] and its agents and attorneys with an increasingly critical eye.").

II. THE CIRCUIT SPLIT

A. Preventing "Form Over Substance"

In the context of third-party summons, the struggle over the correct interpretation of "shall" has been taken to a new level. Five circuit courts have openly refused to enforce the twenty-three day requirement as a mandatory command despite the use of "shall" in the statute.[64] Surprisingly, the Sixth Circuit acknowledged that "shall" is "the language of command" that reflects Congress's intention of "strict and nondiscretionary application of the statute."[65] Even with the acknowledgement that Congress's intention for the IRS to comply with the twenty-three day requirement left the IRS "no discretionary authority" to do otherwise, the Sixth Circuit still declined to quash the summons.[66] The court, instead, assumed equitable power to excuse the IRS's noncompliance with § 7609(a).[67]

The five circuit courts that found in favor of the IRS believe the language of the Code, or the absence of certain language, gives the court the power to excuse the IRS's failure to satisfy their obligation.[68] The Sixth Circuit points to § 7609's absence of a consequence for noncompliance[69] as proof of Congress's intention to not render void every third-party summons that does not comport.[70] Further, the Tenth Circuit refuses to impose sanctions where Congress has declined to do so.[71] As a result, multiple circuits held

64. *Azis*, 522 F. App'x at 777; *Adamowicz*, 531 F.3d at 161; *Cook*, 104 F.3d at 889–90; *Sylvestre*, 978 F.2d at 28; *Bank of Moulton*, 614 F.2d at 1066.

65. *Cook*, 104 F.3d at 889 (quoting Escoe v. Zerbst, 295 U.S. 490, 493 (1935)); *see also* sources cited *supra* note 20. *But see Azis*, 522 F. App'x at 777; *Adamowicz*, 531 F.3d at 161; *Sylvestre*, 978 F.2d at 28.

66. *Cook*, 104 F.3d at 889–90.

67. *Cook*, 104 F.3d at 889 ("A more equitable resolution would confer discretion upon the trial courts to excuse the Service's technical notification default *if, and only if,* the party (or parties) entitled to statutory notification was (or were) not substantially prejudiced by the violation—that is, if the error was harmless.").

68. *See*, *e.g.*, *Bank of Moulton*, 614 F.2d at 1066 (rejecting the suggestion that "every infringement of a requirement of the Internal Revenue Code absolutely precludes enforcement of an IRS summons" explaining that [n]othing in the language of the [c]ode itself mandates this sanction for infringement").

69. I.R.C. § 7609 (2012).

70. *Cook*, 104 F.3d at 889 ("However, Congress has *not* evidenced an intention to render *void* every third party summons which does not comply with every technical stricture of section 7609.").

71. Jewell v. United States, 749 F.3d 1295, 1301 (10th Cir. 2014) (Tymkovich, J., dissenting)

that the IRS's failure to satisfy § 7609(a) did not require the court to quash a third-party summons. [72]

After the court determines it has the discretion to decide when to quash a third-party summons, the next question is which test to use to determine if the court should excuse the IRS's violation. [73] In determining the enforceability of the summons, the court must evaluate the "totality of the circumstances, including the seriousness of the infringement, the harm or prejudice, if any, caused thereby, and the government's good faith." [74] In *Ritchie*, the Sixth Circuit believed assessing these factors would reveal whether the summons should be held as enforceable and prevent the promotion of form over substance. [75] Although these courts have interpreted § 7609(a) differently on the issue of enforceability, the Eighth and Ninth Circuits have joined the First, Second, Fifth, Sixth, and Eleventh Circuits in their reading of *Powell* to allow for a totality of the circumstances test in the event of a technical breach of the Code's administrative steps—allowing the court to use its discretion instead of following the language of the Code. [76]

Evaluating whether a taxpayer is prejudiced by the IRS's violation is one of the most important factors courts consider. [77] The purpose of

("Where 'a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction.'") (quoting United States v. James Daniel Good Real Prop., 510 U.S. 43, 63 (1993)).

72. *Azis*, 522 F. App'x at 777 (decided two years ago); *Adamowicz*, 531 F.3d at 161 (decided seven years ago); *Cook*, 104 F.3d at 889–90 (decided eighteen years ago); *Sylvestre*, 978 F.2d at 28 (decided twenty-three years ago); *Bank of Moulton*, 614 F.2d at 1066 (decided thirty-five years ago).

73. *See, e.g.*, *Adamowicz*, 531 F.3d at 161.

74. *Id.*; *see also* Robert v. United States, 364 F.3d 988, 996–97 (8th Cir. 2004) (holding the IRS's violation depends on "all of the circumstances surrounding the summons, including the seriousness of the violation, the government's good faith, and the harm, if any, caused by the violation"); *Bank of Moulton*, 614 F.2d at 1066 (finding the enforceability of a summons requires the court to evaluate "the seriousness of the violation under all the circumstances, including the government's good faith and the degree of harm imposed by the unlawful conduct").

75. United States v. Richey, 632 F.3d 559, 565 (9th Cir. 2011).

76. *See Richey*, 632 F.3d at 565 (finding "substantial compliance with . . . service requirements" sufficient if the IRS acts in good faith and the taxpayer is not prejudiced); *Robert*, 364 F.3d at 996–97 ("Our approach, however, was not to adopt a per se rule and hold unenforceable all summonses that involve a violation of a rule or law.").

77. Cook v. United States, 104 F.3d 886, 890 (6th Cir. 1997) ("This court stresses that it rules *only* that the district courts possess discretionary authority to excuse the Service's technical notice errors where the party in interest suffered no actual prejudice").

§ 7609(a)'s twenty-three day requirement is to allow taxpayers the opportunity to invoke their right to intervene and seek to quash the summons before the third-party action is taken.[78] As a result, courts consistently deem the IRS's error harmless when taxpayers are not precluded from filing their motion to quash the summons before the third-party production occurs.[79] The court reasons that if taxpayers are able to file the petition to quash in a timely manner, the taxpayers receive every benefit due to them under § 7609(a).[80]

All five circuit courts—the First, Second, Fifth, Sixth, and Eleventh Circuits—also consider whether the government has acted in good faith.[81] Unfortunately for the taxpayer, it has proven difficult to show bad faith when the IRS only misses the deadline by a few days and the taxpayer is still able to timely file a petition to quash.[82] Even the IRS's acknowledgment that it did not comport with the twenty-three day requirement falls short of proving bad faith.[83]

Even though the court evaluates the "totality of the circumstances" when determining the enforceability of a third-party summons, policy reasons appear to play a large role in the decisions of these five circuit courts.[84] Without specifically stating a preference for the IRS, the circuit courts have reflected on the Supreme Court's recommendation to "be slow to erect barriers to enforcement of IRS

78. Sylvestre v. United States, 978 F.2d 25, 28 (1st Cir. 1992).

79. *Cook*, 104 F.3d at 888 ("The [taxpayers] have conceded that they suffered no actual prejudice as a consequence of the delayed notice, as they were able to initiate their petition to quash the summons in a timely manner and prior to the date of compliance commanded by the summons.").

80. *Sylvestre*, 978 F.2d at 28 (finding the taxpayer complied with the purpose of the notice requirement under section 7609 when he timely moved to quash the summonses before the examination of the documents, even though the taxpayer received his notice twenty-one, rather than twenty-three, days before the date set for examination).

81. Azis v. U.S. IRS, 522 F. App'x 770, 777 (11th Cir. 2013) (holding the IRS offered a good faith reason for not complying with the 7609(a) requirement when the IRS employee "was unable to fax the attachments because he was out of town for training"); Adamowicz v. United States, 531 F.3d 151, 162 (2d Cir. 2008) (finding no bad faith when taxpayers produced "no evidence from which [the court] could conclude that the IRS acted in bad faith"); *Cook*, 104 F.3d at 888 (finding no bad faith despite the IRS conceding that it technically violated section 7609(a)(1) by mailing the notice one day late); *Sylvestre*, 978 F.2d at 28 ("We find no reason to suspect bad faith in the two day shortfall in notice.").

82. *Sylvestre*, 978 F.2d at 28.

83. *Cook*, 104 F.3d at 888 ("The [IRS] has conceded that it technically violated section 7609(a)(1) by mailing statutory notice to the Cooks on March 30, 1995, one day following the close of the legislatively mandated notification period.").

84. *See, e.g.*, *Adamowicz*, 531 F.3d at 161.

summonses where the summonses are being used to further the IRS[‘s] mission of effectively investigating taxpayer liabilities.”[85] Because a decision to quash the summons would result in the IRS having to reissue the summons to the third party and the taxpayer, courts have expressed concern with the efficiency of such a ruling.[86] This concern is exacerbated when the IRS has missed the deadline for compliance by a very short amount of time.[87]

The preceding factors led the First, Second, Fifth, Sixth, and Eleventh Circuits to believe that forcing the IRS to comply with the “shall” language in the twenty-three day notice requirement of § 7609(a) would be a gross elevation of “form over substance.”[88]

B. “Shall” as a Mandatory Command

1. Jewell v. United States

In April 2014, the Tenth Circuit heard the case of *Jewell v. United States* regarding four IRS summonses that were issued to banks requesting information about taxpayer Sam T. Jewell.[89] When Jewell received his summonses less than twenty-three days before the records were to be examined, he filed petitions to quash the summonses for inadequate notice.[90] The IRS admitted that Jewell had not received the statutory notice he was entitled to under

85. Robert v. United States, 364 F.3d 988, 996 (8th Cir. 2004) (citing United States v. Euge, 444 U.S. 707, 711 (1980)).

86. *Cook*, 104 F.3d at 889 (“Given the public interest at stake in effective and efficient enforcement of the national revenue laws, this court will not impute such an intention to Congress in the absence of a clear legislative statement.”); United States v. Ritchie, 15 F.3d 592, 600 (6th Cir. 1994) (explaining “it would exalt form over substance to make the IRS go through the motions of having an ex parte court proceeding, getting the summons issued, serving it, defending a motion to quash, and filing a motion for enforcement, all to bring us back to where we are now”).

87. *Cook*, 104 F.3d at 890 (holding that requiring the IRS to reissue the summons after missing the deadline by one day is a “futile and pointless duplication of effort by the government, the attendant waste of public resource and those of the [third-party], and the concomitant delay of a criminal investigation which would flow from a rigid formal adherence to statutory notification requisites divorced from the realities of the particular case.”).

88. *See Ritchie*, 15 F.3d at 600; United States v. Bank of Moulton, 614 F.2d 1063, 1066 (5th Cir. 1980).

89. Jewell v. United States, 749 F.3d 1295, 1297 (10th Cir. 2014)

90. *Id.*

§ 7609(a)(1).[91] This left the Tenth Circuit with the question of "whether [the court was] free to disregard the statutory requirement of [twenty-three] days' notice."[92] This, of course, was a question that five other circuit courts had already answered.[93]

The Tenth Circuit evaluated this case under *Powell*'s four requirements to make a prima facie case for enforcement of an administrative summons.[94] Both Jewell and the IRS agreed the fourth prong of *Powell*—that "the IRS must have followed the 'administrative steps required by [the Internal Revenue Code]'"—determined whether the summonses must be quashed.[95] The court concluded the meaning of the term "administrative" is broad and left undefined by the Supreme Court but would definitely include the sort of "technical requirement" that § 7609(a) offers.[96]

The Tenth Circuit also evaluated § 7609(a)'s use of the word "shall" and what obligation it imposed on the IRS.[97] The court began by finding that the Tenth Circuit repeatedly interpreted "shall" to indicate a mandatory intent.[98] Further, the court rejected the IRS's argument that "shall" does not always signify a mandatory command.[99] The court concluded that this issue "did not disturb the age-old precept that 'shall' means 'shall.'"[100] Thus, the language of § 7609(a)(1), stating that the notice of summonses "shall be given" at

91. *Id.* at 1298.
92. *Id.*
93. *See supra* Part II.A.
94. *Jewell*, 749 F.3d at 1297.
95. *Id.* at 1297–98.
96. *Id.* at 1299–1300.
97. *Id.* at 1298.
98. *Id.* ("It is a basic canon of statutory construction that use of the word 'shall' indicates a mandatory intent." (quoting United States v. Myers, 106 F.3d 936, 941 (10th Cir. 1997))); Forest Guardians v. Babbitt, 174 F.3d 1178, 1187 (10th Cir. 1999) ("The Supreme Court and this circuit have made clear that when a statute uses the word 'shall,' Congress has imposed a mandatory duty upon the subject of the command.").
99. *Jewell*, 749 F.3d at 1298–99 (distinguishing *Jewell* from Barnhart v. Peabody Coal Co., 537 U.S. 149 (2003) and Dolan v. United States, 560 U.S. 605 (2010) because the IRS had the choice to issue the summonses but was not required to do so, where in *Barnhart* that choice was not available to the Social Security Commissioner; and in *Dolan*, that choice was not available to the sentencing court).
100. *Id.* at 1299.

least twenty-three days before the date of the examination, imposes a mandatory command for the IRS to follow.[101]

After finding the twenty-three day notice requirement mandatory and an "administrative step," the Tenth Circuit applied the *Powell* factors to conclude that the IRS cannot make a prima facie showing for enforcement of the summonses in this case.[102] Because the IRS admits to not complying with the twenty-three day requirement, *Powell* prevents the enforcement of the summonses.[103] The Tenth Circuit made this decision despite five circuits finding the opposite way.[104] The Tenth Circuit stated, "[t]hough we do not lightly create a circuit split, we are obliged to follow Supreme Court precedent, even when it might be viewed as 'inequitable' or as 'form over substance.'"[105]

2. The Disintegration of "Shall"

Although the Tenth Circuit did not explore policy reasons to support the decision in *Jewell*, there are multiple concerns that further the court's argument.[106] First, the five circuit courts that refused to enforce the twenty-three day requirement as a mandatory command contributed to the confusion surrounding the meaning of "shall" in a legal context. Second, the word "shall" has been "so corrupted by misuse that it has become inherently ambiguous. It should mean 'must,' but too often it's used to mean or interpreted to mean 'should' or 'may.'"[107]

This evolved into such a problem in the legal community that in 2006, the Committee on Rules of Practice and Procedure recognized "shall" as an "inherently ambiguous word[]" and recommended restyling the Federal Rules of Civil Procedure to "replace 'shall' with

101. I.R.C. § 7609(a)(1) (2012); *Jewell*, 749 F.3d at 1299.
102. *Jewell*, 749 F.3d at 1300.
103. *Id.*
104. *Id.*
105. *Id.*
106. *See CA-6, Fed Up With IRS Arrogance, Will Do Something About It–Will Other Courts Follow Suit?*, *supra* note 60, at 2.
107. Joseph Kimble, *Lessons in Drafting from the New Federal Rules of Civil Procedure*, 12 SCRIBES J. LEGAL WRITING 25, 79 (2009).

'must,' 'may,' or 'should,' depending on which one the context and established interpretation make correct in each rule." [108] Many legislatures sent a clear message to courts regarding the interpretation of "may" and "shall" by including these words in the definition sections of codes[109] or by passing laws dictating how to construe statutes.[110] Only ten states took the time to define "may" and "shall" through legislation,[111] but no state passed a statute undermining the distinction between these two words.[112]

3. A History of IRS Irresponsibility

Courts have recognized that the IRS's powers are subject to abuse and have found it necessary to oversee the IRS to protect the taxpayer.[113] One of the ways the taxpayer is protected is by statute, but this safeguard only works if the court is willing to enforce it.[114] Another concern favoring a strict enforcement of § 7609 is the risk of

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108. *See* Advisory Comm. on Fed. Rules of Civil Procedure, Report of the Civil Rules Advisory Committee, at D-8 (2006), http://search.uscourts.gov/search?utf8=%E2%9C%93&affiliate=uscourts.gov&query=%22correct+in+each+rule%22.

109. Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 359 (2010); *see also, e.g.*, KY. REV. STAT. ANN. § 446.010(26), (39) (West 2014).

110. Scott, *supra* note 109, at 359; *see also, e.g.*, LA. STAT. ANN. § 1:3 (2014).

111. IOWA CODE ANN. § 4.1(30) (West 2014) ("a. The word 'shall' imposes a duty. b. The word 'must' states a requirement. c. The word 'may' confers a power."); KY. REV. STAT. ANN. § 446.010(39) (West 2014) ("'Shall' is mandatory"); LA. STAT. ANN. § 1:3 (2014) ("The word 'shall' is mandatory and the word 'may' is permissive."); ME. REV. STAT. ANN. tit. 1, § 71(9-A) (2014) ("'Shall' and 'must' are terms of equal weight that indicate a mandatory duty, action or requirement. 'May' indicates authorization or permission to act."); MINN. STAT. ANN. § 645.44(16) (West 2014) ("'Shall' is mandatory."); NEB. REV. STAT. ANN. § 49-802(1) (West 2014) ("When the word may appears, permissive or discretionary action is presumed. When the word shall appears, mandatory or ministerial action is presumed."); NEV. REV. STAT. ANN. § 0.025(d) (West 2014) ("'Shall' imposes a duty to act."); N.M. STAT. ANN. § 12-2A-4 (West 2014) ("A. 'Shall' and 'must' express a duty, obligation, requirement or condition precedent. B. 'May' confers a power, authority, privilege or right. C. 'May not', 'must not' and 'shall not' prohibit the exercise of a power, authority, privilege or right."); S.D. CODIFIED LAWS § 2-14-2.1 (2014) (The term shall "manifests a mandatory directive and does not confer any discretion in carrying out the action so directed."); TEX. GOV'T CODE ANN. § 311.016(2) (West 2013) ("'Shall' imposes a duty.").

112. Scott, *supra* note 109, at 359–60.

113. Holthus, *supra* note 11, at 778 ("The courts have recognized that such IRS powers are subject to abuse. Therefore, the courts have taken it upon themselves, in part, to oversee the IRS and protect the taxpayer from undue harassment.").

114. *Id.* ("The taxpayer is also protected by statute. For example, the IRS may not enforce its own summons. If a taxpayer refuses to comply with the summons, the IRS must look to the court for enforcement.").

having an IRS with broad powers and a court that refuses to restrain those powers.

Evidence suggests that the IRS's efforts to comply with deadlines continues to decline, leaving some in the legal community "fed up with IRS arrogance."[115] Even among the five circuit courts declining to enforce the twenty-three day requirement, the Sixth Circuit was "disturbed by a history of [IRS] irresponsibility in honoring and respecting filing requirements—which borders upon an expression of arrogant immunity from executive, legislative, and judicial mandates."[116]

There is a growing concern that the IRS will interpret the five circuit courts' decisions as justification or approval of the IRS's behavior.[117] Even though a few courts issued warnings to the IRS about future violations[118] or promised to "review future violations of technical legal requirements by the [IRS] and its agents and attorneys with an increasingly critical eye,"[119] there is reason to believe that the

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115. *CA-6, Fed Up With IRS Arrogance*, *supra* note 60, at 2.

116. Cook v. United States, 104 F.3d 886, 890 (6th Cir. 1997) (finding a "disconcerting pattern of inexcusable neglect by the Service and its attorneys in discharging legally mandated obligations"):

> Pursuant to a stipulation by the parties, a magistrate judge extended the time for the government's reply to the Cooks' April 18, 1995 petition to quash the summons, accompanied by the proviso that "no further extension will be granted." Although the magistrate set June 29, 1995 as the response deadline, the Service, without a timely motion for an extension, did not attempt to file its purported opposition (a Motion to Dismiss the petition) until June 30, 1995. The district court rejected this filing on July 6, 1995 because it violated Local Rule 24(c) of the United States District Court for the Western District of Michigan, which requires the submission of an original plus one copy of all filings. The [IRS] did not correct its procedural error until July 12, 1995. Although default was entered against the government on August 14, 1995, the district court on August 18, 1995 set aside that default on the rationale that the petitioners had not been prejudiced by the Service's delay. In the court of appeals, the government filed its appellee's brief one day late.

Id.

117. *Id.* ("However, this opinion must not be construed as investing the [IRS] with a license to ignore statutory deadlines or to negligently violate other legal requirements.").

118. United States v. Gertner, 65 F.3d 963, 972 n.9 (1st Cir. 1995) ("We note, too, that the Sixth Circuit explicitly warned the IRS that it was issuing a 'one-time only' free pass."); United States v. Ritchie, 15 F.3d 592, 600 (6th Cir. 1994) ("We are not suggesting that the IRS may in the future avoid going through the ex parte proceeding required by § 7609(f), for now the IRS has fair notice that if it cannot demonstrate a bona fide interest in investigating the tax liability of the party summoned, it must comply with § 7609(f).").

119. *Cook*, 104 F.3d at 890–91.

First, Second, Fifth, Sixth, and Eleventh Circuits have no intention of acting on those threats.[120]

Instead, the courts continue to only hold the IRS accountable to the Code if the court can find the IRS acted in bad faith or the taxpayer was prejudiced.[121] Even this evaluation of the "totality of the circumstances" seems to favor the IRS because the court is often willing to find a valid good faith reason for noncompliance.[122] For example, the court found a good faith reason for not complying with a statutory requirement when one IRS agent testified he was unable to fax the attachments and missed the deadline because he was out of town for training.[123] Similarly, it has proven difficult for a taxpayer to show he or she suffered prejudice. If a taxpayer is able to file the petition to quash in a timely manner, the court believes the taxpayer received every benefit due to him under § 7609(a).[124] The "totality of the circumstances" test reveals a bias for the IRS that results in the IRS getting a free pass when they fail to comply with the Code.

III. PROPOSAL

The Supreme Court, or circuit courts themselves, should reconcile this circuit split by joining the Tenth Circuit's attempt to take back the meaning of "shall." When the court comes across language that some action "shall" be dealt with in a certain way, it must be interpreted as a "language of command."[125] By restoring the mandatory requirement that "shall" carries, the court has no

120. *See* Boyd v. United States, 87 F. App'x 481, 485 (6th Cir. 2003) ("The decision in Cook sternly warned the IRS that procedural requirements should be taken seriously. . . . However, because the plaintiffs have not demonstrated any actual or even possible prejudice . . . we reject the plaintiffs' invitation to use this case to teach the IRS a lesson.").

121. Adamowicz v. United States, 531 F.3d 151, 161 (2d Cir. 2008) (noting the enforcement of the summons "depends upon the totality of the circumstances, including the seriousness of the infringement, the harm or prejudice, if any, caused thereby, and the government's good faith").

122. *Id.* at 161.

123. Azis v. U.S. IRS, 522 F. App'x 770, 777 (11th Cir. 2013).

124. Sylvestre v. United States, 978 F.2d 25, 28 (1st Cir. 1992) (finding the purpose of the notice requirement under § 7609 was complied with when the taxpayer timely moved to quash the summonses before the examination of the documents, even though the taxpayer received his notice twenty-one, rather than twenty-three, days before the date set for examination).

125. Escoe v. Zerbst, 295 U.S. 490, 493 (1935).

discretion to interpret different meanings of "shall" which have traditionally resulted in different outcomes.

Within tax law, this means that if the IRS does not comply with the twenty-three day requirement established by § 7609(a)(1), the court must find a summons unenforceable.[126] A summons should be unenforceable, regardless of whether the IRS acted in good faith or a taxpayer was prejudiced in any way. The "totality of the circumstances" does not need to be considered because if the court applies the original meaning of "shall," no other discretion or consideration is required.[127] Although this interpretation of "shall" directly affects the enforceability of summonses under § 7609(a)(1), this issue also applies to a greater picture well beyond tax law.[128]

The underlying problem bringing this tax issue before courts is the misuse and abuse of "shall" in legal writing. "Drafters use it mindlessly. Courts read it any which way . . . . *shall* has lost its modal meaning—for drafters and for courts."[129] Legal commentators are starting to wonder if "we might better try something new."[130] To further prevent the misuse of "shall," courts should always read "shall" with a strict interpretation, as a mandatory command. If the courts continue to be troubled by "shall's" mandatory intent and lack of discretion left for the court, the best action is to either clearly and uniformly define "shall" or replace it with a more appropriate term like "must," "may," or "should."[131]

A. The Problem: Must, May, or Should?

At first glance, it appears that many courts are supportive of a movement towards a broader interpretation of "shall." [132]

126. I.R.C. § 7609(a)(1) (2012).

127. Adamowicz v. United States, 531 F.3d 151, 161 (2d Cir. 2008).

128. *Entitlement to Notice*, 6 BANKR. SERVICE , LAW. ED. § 53:64 (2014) ("Use of the word 'shall' in the bankruptcy rule governing the transfer of claims indicates that Congress considered the filing of notice of transfer of claim to be mandatory; the plain and ordinary meaning of 'shall' is mandatory, not precatory.").

129. Kimble, *supra* note 5, at 71.

130. *Id.*

131. *See infra* Part III.C.

132. Lomelo v. Mayo, 204 So. 2d 550, 552 (Fla. 1967) (holding that although "shall" normally has a mandatory connotation, it may in proper cases, be construed as permissive only).

Unfortunately, this is a shift in the wrong direction and contributes to the overall problem. "It's like a disease. The word 'shall' has spread like woodworm. Its improper use has so penetrated legal documents as to make them unreliable."[133] To begin, there are too many interpretations of "shall," and the First, Second, Fifth, Sixth, and Eleventh Circuits are not the only courts involved in this confusion.[134] Accepting this as a problem is a crucial step rather than assuming the court has the discretion to determine the meaning of "shall" within the context of each case.

Whether it is "must," "may," or "should," the multiple interpretations have caused an ambiguity surrounding the word "shall" to the extent that it has arguably lost all meaning. The result is courts fail to uphold requirements that Congress may have intended to be mandatory, such as § 7609(a)(1).

B. The Importance: Beyond Tax Law

"First, *shall* is the most important word of legal drafting—contracts, wills, trusts, and the many forms of public and private legislation . . . . *Shall* is the very word that is supposed to create a legal duty. Second, shall is the most misused word in the legal vocabulary."[135] Coming to a solution in regards to the misuse of "shall" is a very important issue for many reasons.

As referenced above, multiple interpretations of "shall" are a problem because some outcomes are not consistent with the drafter's original purpose for using "shall." Further, the lack of one established meaning causes clarity and uniformity issues. By accepting "shall" as a mandatory command, the court will bring clarity and uniformity to

133. David C. Elliott, *Writing Agreements in Plain Language*, 49 DISP. RESOL. J. 73, 77 (1994).

134. People v. Adams, 99 Cal. Rptr. 122, 124 (1971) (finding "absent unusual circumstances" "shall" imports compulsory action, but in penal law, "construction which is more favorable to [the] offender will be adopted"); Hopkins v. Hamden Bd. of Ed., 289 A.2d 914, 918 (Conn. 1971) (holding a provision in a statute stating certain courses "shall" be prepared should be interpreted as the courses "may" be prepared); Bochantin v. Petroff, 198 Ill. App. 3d 369, 374 (1990) (finding although "may" usually implies discretion, it may be construed as "shall" if necessary to carry out legislative intent or when rights of third-persons are involved); Kessler v. Hunter, 280 N.Y.S.2d 474, 475 (1967) (holding "shall" is not always mandatory and may be merely directive).

135. Kimble, *supra* note 5, at 61.

the interpretation of this word. Under the current situation, a taxpayer enjoys very little predictability regarding whether a court will find the IRS's summons enforceable.

C. The Solution: Leaving No Discretion

1. Define "Shall"

Clarity and uniformity of the interpretation of "shall" is possible by removing discretion. This means that the definition of "shall" needs to be so completely clear and widely accepted that there is no reason to question whether it is a mandatory or persuasive command.[136] Many legislatures have already acknowledged the importance of this step, and are taking action to correct this issue.[137] Legislatures have attempted to guide courts in how to interpret "may" and "shall" by including these words in the definition section of Codes[138] or by passing laws dictating how to construe statutes.[139] Ten states have already defined "may" and "shall" through legislation,[140]

136. Steven S. Gensler, *Must, Should, Shall*, 43 AKRON L. REV. 1139, 1145 (2010) ("One way of solving both the 'slipperiness' and the 'promiscuity' problems would have been to give 'shall' a single meaning and then strictly confine the usage of 'shall' to that single meaning.").

137. *See* IOWA CODE ANN. § 4.1(30) (West 2014); KY. REV. STAT. ANN. § 446.010(39) (West 2014); LA. REV. STAT. ANN. § 1:3 (2014); ME. REV. STAT. ANN. tit. 1, § 71(9-A) (2014); MINN. STAT. ANN. § 645.44(16) (West 2014); NEB. REV. STAT. ANN. § 49-802(1) (West 2014); NEV. REV. STAT. ANN. § 0.025(d) (West 2014); N.M. STAT. ANN. § 12-2A-4 (West 2014); S.D. CODIFIED LAWS § 2-14-2.1 (2014); TEX. GOV'T CODE ANN. § 311.016(2) (West 2013).

138. Scott, *supra* note 109, at 359; *see also, e.g.*, KY. REV. STAT. ANN. § 446.010(20)(39) (West 2014).

139. Scott, *supra* note 109, at 359; *see also, e.g.*, LA. REV. STAT. ANN. § 1:3 (2014).

140. IOWA CODE ANN. § 4.1(30) (West 2014) ("a. The word 'shall' imposes a duty. b. The word 'must' states a requirement. c. The word 'may' confers a power."); KY. REV. STAT. ANN. § 446.010(39) (West 2014) ("'Shall' is mandatory."); LA. STAT. ANN. § 1:3 (2014) ("The word 'shall' is mandatory and the word 'may' is permissive."); ME. REV. STAT. ANN. tit. 1, § 71(9-A) (2014) ("'Shall' and 'must' are terms of equal weight that indicate a mandatory duty, action or requirement. 'May' indicates authorization or permission to act."); MINN. STAT. ANN. § 645.44(16) (West 2014) ("'Shall' is mandatory."); NEB. REV. STAT. ANN. § 49-802(1) (West 2014) ("When the word may appears, permissive or discretionary action is presumed. When the word shall appears, mandatory or ministerial action is presumed."); NEV. REV. STAT. ANN. § 0.025(d) (West 2014) ("'Shall' imposes a duty to act."); N.M. STAT. ANN. § 12-2A-4 (West 2014) ("A. 'Shall' and 'must' express a duty, obligation, requirement or condition precedent. B. 'May' confers a power, authority, privilege or right. C. 'May not', 'must not' and 'shall not' prohibit the exercise of a power, authority, privilege or right."); S.D. CODIFIED LAWS § 2-14-2.1 (2014) (The term shall "manifests a mandatory directive and does not confer any discretion in carrying out the action so directed."); TEX. GOV'T CODE ANN. § 311.016(2) (West 2013) ("'Shall' imposes a duty.").

and no state has passed a statute undermining the distinction between these two words.[141]

Even after defining "shall," uniformity can still present an issue, especially if sources allow for multiple definitions. For example, *Black's Law Dictionary* offers five different definitions for "shall."[142] Most importantly, the first definition states "[h]as a duty to; more broadly, is required to . . . . This is the mandatory sense that drafters typically intend and that courts typically uphold."[143] *Ballentine's Law Dictionary* begins by defining "shall" as "a word of mandate, the equivalent of 'must'" but also strays away from this strict interpretation by further explaining that "shall" can mean "may" or be "merely directory when no advantage is lost, when no right is destroyed, when no benefit is sacrificed, either to the public or to any individual, by giving that construction."[144] With both dictionaries, the first definition given is consistent with the traditional meaning of "shall," but the additional definitions leave room for discretion, which prevents uniformity.

2. Abolish "Shall"

An alternative to defining "shall" is to simply do away with the word completely. "The cure to addiction is abstinence. Don't use the word at all. Remove all ambiguity. Replace every 'shall' with 'must.' If the sentence does not 'read right' 'shall' was the wrong word to use."[145] There are three main arguments for banning the use of "shall" rather than defining the word. First, the use of "shall" is rare

141. Scott, *supra* note 109, at 359–60.

142. *Shall*, BLACK'S LAW DICTIONARY (9th ed. 2009).

> 1. Has a duty to; more broadly is required to . . . This is the mandatory sense that drafters typically intend and that courts typically uphold. 2. Should (as often interpreted by courts) . . . 3. May . . . When a negative word such as *not* or *no* precedes *shall* (as in the example in angle brackets), the word *shall* often means *may*. What is being negated is permission, not a requirement. 4. Will (as a future-tense verb) . . . 5. Is entitled to . . .

Id. (emphasis omitted).

143. *Id.*

144. *Shall*, BALLENTINE'S LAW DICTIONARY (3d ed. 2010).

145. Elliott, *supra* note 133, at 78.

outside of the legal community.[146] Second, the "slipperiness" of the word resulted in its extreme misuse and has been "so corrupted [] that the old usage habits would be so hard to break [] that the only effective solution [is] to stop using 'shall' altogether."[147] Lastly, some believe eliminating "shall" is the only option because they fear the court will still interpret the meaning of "shall" by the context regardless of what the definition section of codes dictate.[148]

If the legal community removes "shall" completely, there must be a word or multiple words to replace "shall." Determining the correct word to replace "shall" could be difficult in certain situations, especially when the original intent is not clear, but general categories give some direction. For example, "must" could replace "shall" when "shall" was being used for its traditional purpose to impose a mandatory obligation, duty, or direction.[149] "Will" could replace "shall" when "shall" was being used for "the simple future," and "may" when "shall" allowed discretion.[150]

In 2006, the Committee on Rules of Practice and Procedure recommended restyling the Federal Rules of Civil Procedure (FRCP) to "replace 'shall' with 'must,' 'may,' or 'should,' depending on which one the context and established interpretation make correct in each rule."[151] In total, the FRCP contained nearly 500 "shalls."[152] Of the 500, "must" replaced "shall" 375 times.[153] The Committee eliminated the remaining 125 "shalls" through "tightening of the rule language, conver[sion] to present-tense verbs, or translat[ion] to

146. Michele M. Asprey, *Shall Must Go*, 3 SCRIBES J. LEGAL WRITING 79, 79 (1992) ("Using *shall* puts lawyers out of step with the language of the general community; nonlawyers don't understand the special way lawyers use *shall* in documents and laws.").

147. Gensler, *supra* note 136, at 1145; *see also* Asprey, *supra* note 146, at 79 ("Lawyers misuse it. They confuse the imperative *shall* with the future tense and fail to distinguish between the various senses of *shall* in their documents.").

148. Asprey, *supra* note 146, at 81 ("None of these plain-language words has a meaning that is set in stone—in law, or anywhere else. The meaning will always be governed to a great extent by the context.").

149. *Id.* at 79 ("*Must* for the imperative *shall*—whether we want to impose an obligation or a duty, or make a direction, whether or not we do it by contract or statute, and regardless of what the penalty is.").

150. *Id.*

151. Gensler, *supra* note 136, at 1147 n. 43 (quoting FED. R. CIV. P. 1 advisory committee's note to 2007 amendment.)

152. Gensler, *supra* note 136, at 1147.

153. *Id.*

different modal verbs like 'will,' 'may,' or 'should.'"[154] This is a good example of the legal community taking progressive steps toward fixing a problem that affects many different areas of the law.

CONCLUSION

The IRS has summons powers to compel a taxpayer or third party to testify and produce "any books, papers, records or other data" relevant or material to an inquiry.[155] Section 7609(a)(1) of the Internal Revenue Code requires that the notice of summonses "shall be given to any person so identified within 3 days of the day on which such service is made, but no later than the 23rd day before the day fixed in the summons as the day upon which such records are to be examined."[156]

The First, Second, Fifth, Sixth, and Eleventh Circuit Court of Appeals found that a court has the discretion to excuse the IRS's failure to comply with the twenty-three day requirement if the taxpayer was not prejudiced and the IRS acted in good faith.[157] The Tenth Circuit rejected this approach in *Jewell*, and found the summons unenforceable when the IRS did not meet the twenty-three day requirement.[158] Holding that "'shall' means 'shall,'" the Tenth Circuit believed the mandatory command left no room for discretion.[159]

Jewell created a circuit split, which brought a growing problem into the spotlight; the misuse of "shall." The five circuit courts believe the broader interpretation of "shall" prevents the promotion of "form over substance," but this has resulted in ambiguity and the court's failure to uphold requirements of the IRS.[160] The Tenth

154. *Id.*
155. I.R.C. § 7602(a)(1) (2012).
156. I.R.C. § 7609(a)(1) (2012).
157. Adamowicz v. United States, 531 F.3d 151, 161 (2d Cir. 2008) (examining "totality of the circumstances, including the seriousness of the infringement, the harm or prejudice, if any, caused thereby, and the government's good faith").
158. Jewell v. United States, 749 F.3d 1295, 1301 (10th Cir. 2014).
159. *Id.* at 1299, 1301.
160. United States v. Bank of Moulton, 614 F.2d 1063, 1066 (5th Cir. 1980).

Circuit's strict interpretation of "shall" as a mandatory command promotes clarity, uniformity, and predictability.

To further prevent the misuse of "shall," courts should follow the Tenth Circuit's decision. If the courts continue to be troubled by the mandatory intent and lack of discretion associated with "shall," the best action is for legislatures to either clearly and uniformly define "shall" or replace it with a more appropriate term like "must," "may," or "should." Until then, the court should refrain from "disturb[ing] the age-old precept that 'shall' means 'shall.'"[161]

161. *Jewell*, 749 F.3d at 1299.