

DOMINATION V. DIPLOMACY: COMPARING THE EFFECTIVENESS OF
THE UNITED STATES' JOHN DOE SUMMONS WITH THE UNITED
KINGDOM'S 2011 TAX TREATY WITH SWITZERLAND

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INTRODUCTION

"In this world nothing can be said to be certain, except death and taxes."¹ While Benjamin Franklin's words certainly ring true today, time has shown that the quotation is missing a third crucial part. It should read, "In this world nothing can be said to be certain, except death, taxes, and people avoiding paying taxes."² There are many reasons why a person would resist paying taxes, from political protest to personal greed. Regardless of the reason, there have been tax evaders as long as there have been taxes. One of the earliest recorded instances of tax evasion occurred in the 1st century A.D., when many Jews in Judea refused to pay the poll taxes instituted by the Roman Empire.³ In fact, Jesus faced charges for, among other things, promoting tax resistance before his execution.⁴ Historical methods of tax resistance have ranged from the violent, such as the Whiskey Rebellion in 1789,⁵ to the colorful, like Lady Godiva's naked ride in the 11th century,⁶ to the downright bizarre, like the "Jack-a-Lents" of 1735, who dressed in women's clothing and blackface and destroyed tollbooths in Ledbury, England.⁷ Whatever their techniques, these tax resisters always received a response from their respective governments. Sometimes that response was as hoped, as in Lady Godiva's case, which ended in a cessation of taxes.⁸ Other times, however, the response was far worse than originally paying the taxes would have been, like in Danegeld in 1041, when King Harthacnut burned the entire city to the ground.⁹

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¹ BENJAMIN FRANKLIN, *THE WORKS OF BENJAMIN FRANKLIN* (1817).

² This is not actually a quotation; it is merely used for dramatic effect.

³ See DAVID M. GROSS, *WE WON'T PAY: A TAX RESISTANCE 1-2* (2008).

⁴ See *Luke 23:2* ("And they began to accuse him, saying, 'We have found this man subverting our nation. He opposes payment of taxes to Caesar and claims to be Messiah, a king'").

⁵ Saul Cornell, *Mobs, Militias and Magistrates: Popular Constitutionalism and the Whiskey Rebellion*, CHI.-KENT L. REV. 883, 894 (2006).

⁶ See DAVID F. BURG, *A WORLD HISTORY OF TAX REBELLIONS: AN ENCYCLOPEDIA OF TAX REBELS, REVOLS, AND RIOTS FROM ANTIQUITY TO THE PRESENT 77-78* (2004).

⁷ See *DAILY GAZETTEER* (Oct. 8, 1735).

⁸ See Burg, *supra* note 6, at 77-78.

⁹ *Id.* at 71-72.

For all the different reasons for evasion, tactics of evasion, and government responses to evasion that were utilized throughout history, tax evaders could generally count on the government coming after them with all the power at their disposal. In all likelihood, very few people long for the days when the government could burn down a city to punish tax evaders. Nevertheless, many feel that the United States has now gone to the opposite extreme, expending minimal effort in attempting to corral this problem, which accounts for \$100 billion in lost revenue annually.¹⁰

Part of the difficulty the United States faces in collecting taxes is that the days when all taxpayers lived, worked, and stored their money inside the same kingdom are over. Instead, globalization has led to international banks that serve clientele in many countries, meaning that they owe taxes to many countries and are subject to many countries' tax laws. Sometimes these laws are fundamentally incompatible with each other. International banking freedom has made the confrontational style of tax resistance of years past virtually unnecessary. Instead, the increased difficulty of identifying tax resisters has made the subtler act of tax evasion available to a broader, non-weapon-wielding audience.

This issue took center stage in 2009, when the United States negotiated a \$780 million deferred prosecution agreement with Swiss banking giant UBS, which was under threat of United States criminal and civil prosecution for assisting American tax evaders.¹¹ One of the settlement's conditions was that UBS turn over the identities of roughly 200-300 United States accountholders who had failed to declare themselves for taxation purposes, but UBS then renege on the deal.¹²

Immediately afterward, the United States filed for a John Doe summons against UBS. A John Doe summons is an order issued by a United States court to turn over information, based on a reasonable suspicion of wrongdoing, even though the names of the parties suspected of wrongdoing are unknown.¹³ For UBS, turning those names over to the United States would have been in clear violation of Switzerland's banking secrecy laws, which protect accountholders from the disclosure of their identities to their countries of residence.¹⁴

¹⁰ STAFF OF S. COMM. ON HOMELAND SEC. AND GOVERNMENTAL AFFAIRS, PERM. SUB. COMM. ON INVESTIGATIONS, 110TH CONG., REP. ON TAX HAVEN BANKS AND U.S. TAX COMPLIANCE 1 (2008).

¹¹ See Bruce Zagaris, *U.S. and Switzerland Settle UBS Document Request*, 25 NO. 10 INT'L ENFORCEMENT L. REP. 389 (2009); see also, Laura Szarmach, *Piercing the Veil of Bank Secrecy? Assessing the United States' Settlement in the UBS Case*, 43 CORNELL INT'L L.J. 409, 438 (2010).

¹² Szarmach, *supra* note 11.

¹³ THE UBS "JOHN DOE" SUMMONS, SP017 ALI-ABA 929, 932.

¹⁴ See Bruce Zagaris, *supra* note 11; see also, Szarmach, *supra* note 11 (The United States, via tax treaty, has negotiated an exception to these laws for when they reasonably believe a specific person is committing tax fraud; however, the treaty has been interpreted to only cover acts of concealment, and thus, does not directly cover tax evasion).

While the John Doe summons was eventually dropped, UBS would have had two choices if a United States court had ordered it to disclose its accountholders' information: first, disclose the information to the United States and be subject to criminal prosecution for violating Switzerland's banking secrecy laws, or second, refuse to disclose the information to the United States and be found to be in contempt of court.¹⁵ In addition to causing contempt charges, failing to turn over the names would have been a violation of the deferred prosecution agreement the United States had just signed with UBS.¹⁶ The United States would then have been able to bring criminal charges for the bank's participation in domestic tax evasion.¹⁷ Luckily for UBS, the Swiss legislature agreed to process the dissemination of 4,450 accountholders' information to the United States as a treaty request, in exchange for the United States withdrawing its John Doe summons.¹⁸

One result of the settlement and the subsequent actions of the Swiss legislature is that we do not know what legal weight the summons would have carried. While the legal ramifications are certainly an important aspect of the John Doe summons, the primary intention of this article is to look at the summons holistically, weighing its complete value, legal and diplomatic, and to compare it to a different strategy for recovering lost taxes: the tax treaty recently negotiated between the United Kingdom and Switzerland.¹⁹ This article intends to assess which of these recent tactics is a more feasible long-term tax recovery strategy for the United States.

The first section of analysis will start with explanations of the tax evasion problem in the United States, the John Doe summons, and the United States' use of the summons in political negotiations. Section two will focus on the tax treaty approach by explaining how tax treaties work and what makes the recent U.K. treaty with Switzerland potentially so effective. Finally, the analysis will conclude with a prediction about how effective each strategy will be at recuperating lost tax revenue, look at the potential implications both strategies may have for international business, and answer the ultimate question of whether the John Doe summons or the recuperative tax treaty is a more viable long-term strategy for the United States.²⁰

¹⁵ Beckett G. Cantley, *The UBS Case: The United States Attack on Swiss Banking Sovereignty*, 7 B.Y.U. INT'L L. & MGMT. REV. 1, 19-20 (2011).

¹⁶ *Id.* at 20.

¹⁷ *Id.* at 20-21 .

¹⁸ See Zagaris, *supra* note 11.

¹⁹ *Tax deal With the Swiss Defended by UK Minister*, BBC NEWS (Aug. 25, 2011), available at <http://www.bbc.co.uk/news/business-14662950>.

²⁰ This comment will speak extensively about tax evaders. For the purpose of this comment, "tax evaders" refers to any person who engages in illegal concealment of taxes as defined by the IRS. This comment has no intention of asserting what should be considered tax evasion and what should be considered legal tax avoidance; its goal is merely to analyze it from the legal framework already established by the United States government.

I. THE TAX-EVASION PROBLEM

Tax evasion has become a very large problem in the United States, both financially and politically. Congressional investigations indicate that the United States loses approximately \$100 billion in tax revenue annually to offshore tax havens.²¹ International banks frequently assist American taxpayers with tax evasion by structuring accounts and services to avoid disclosure to the Internal Revenue Service (“IRS”).²² To combat this practice, the IRS established the Qualified Intermediary (“QI”) program to encourage international banks to withhold taxes and report tax information on American income deposited in foreign accounts.²³ Banks are encouraged to sign a QI agreement and join the program. In exchange for upholding the terms of the QI agreement, United States law frees international financial institutions from having to disclose the names of accountholders.²⁴ Evidence suggests, however, that international financial institutions use “manipulative and deceptive” tactics to avoid compliance with the terms of the QI agreements.²⁵

These issues have become more prominent because of the financial hardship the United States has faced in recent years. Bailouts, stimulus spending and slow economic growth left the United States with massive debts, causing policymakers to seek ways to increase revenue without cutting essential spending or raising taxes.²⁶ These hardships make offshore tax recuperation a primary focus of tax authorities and the rest of the executive branch.²⁷ This shift is evident in the IRS’s August 2010 renaming and expansion of the Large and Midsize Business Division, which is now the Large Business and International Division.²⁸ The new division will allocate an additional 600 employees to focus on reining in offshore tax evasion by corporations and wealthy individuals.²⁹

Unlike in the executive branch, however, crackdowns on offshore tax evasion remain relatively unpopular within Congress.³⁰ A prime example is Congress’s handling of the Stop Tax Haven Abuse Act, which was most

²¹ STAFF OF S. COMM. ON HOMELAND SEC. AND GOVERNMENTAL AFFAIRS, PERM. SUB. COMM. ON INVESTIGATIONS, 110TH CONG., REP. ON TAX HAVEN BANKS AND U.S. TAX COMPLIANCE 1 (2008).

²² *Id.* at 3.

²³ *Id.*

²⁴ *Id.* at 4.

²⁵ *Id.*

²⁶ See President Barack Obama, Speech to Congress on Jobs (Sept. 8, 2011).

²⁷ *Id.*

²⁸ Lynnley Browning, *I.R.S. Shifts to Combat Tax Evasion*, N.Y. TIMES (Aug. 4, 2010), available at <http://www.nytimes.com/2010/08/05/business/05irs.html>.

²⁹ *Id.*

³⁰ David Cay Johnston, *Crackdown on Tax Cheats Not Working, Panel Says*, N.Y. TIMES (Oct. 20, 2003), available at <http://www.nytimes.com/2003/10/20/business/20tax.html?ex=1067668075&ei=1&en=6b03f4565758bcb4>.

recently introduced during the 112th Congress.³¹ Senator Carl Levin introduced the act five separate times, most recently in 2011, and while Congress enacted some of its provisions in other bills, the primary aspects of Sen. Levin's bill have gained little traction.³² In addition to the funding issues discussed next, this lack of Congressional support could become an issue if the United States seeks to revamp its international tax treaties because ratification requires the advice and consent of the Senate.³³

Limited Congressional support means limited resources for the IRS because Congress allocates the IRS's funding.³⁴ This limitation can make it difficult to pursue all existing leads for lost tax revenue, let alone find new ones.³⁵ After the financial scandals of the early 21st century, certain Congressional leaders were hopeful that the outcry would translate into more vigorous prosecution of offshore tax evasion.³⁶ To their chagrin, despite the myriad of changes to financial regulatory schemes in the aftermath of the scandals, the IRS received no additional funding and Congress passed no laws to combat abusive tax shelters.³⁷

The Obama administration has experienced similar difficulty, as the March 2011 budget debates substantially reduced the proposed \$1.15 billion increase in funding for the IRS.³⁸ The domestic fiscal situation of the United States could potentially play a major role in the country's recuperation tactics moving forward, as it could force the United States into larger amnesty programs and limit the tactics' effectiveness.

If the IRS does not have the finances to prosecute a large number of offshore evaders, the gap between the amount of taxes owed on offshore accounts and the amount paid on those accounts will continue to widen.³⁹ Weak IRS enforcement will lead current and future evaders to have little fear of being caught and thus be further incentivized to evade taxes.⁴⁰ Given these constraints, it is incumbent upon the IRS to utilize their most cost-efficient strategies.

³¹ See S. 1346, 112th Cong. (2011).

³² See Levin Unveils Stop Tax Haven Abuse Act, LEVIN.SENATE.GOV, (July 12, 2011) <http://levin.senate.gov/newsroom/press/release/levin-unveils-stop-tax-haven-abuse-act/?section=alltypes>; see also, Edward Tannenbaum, *The Annual Stop Tax Haven Abuse Act Show*, THE BUREAU OF INTERNATIONAL AFFAIRS (Sept. 12, 2011).

³³ UNITED STATES CONST. art. II, § 2, cl. 2 (requiring a two thirds majority for ratification).

³⁴ See Bernie Becker, *Boehner: Budget Deal Means No New IRS Funding*, THE HILL (Apr. 9, 2011), available at <http://thehill.com/blogs/on-the-money/domestic-taxes/155063-boehner-budget-deal-means-no-new-irs-funding>.

³⁵ See Johnston, *supra* note 30; see also, Becker, *supra* note 34.

³⁶ See Johnston, *supra* note 30.

³⁷ *Id.*

³⁸ Becker, *supra* note 34.

³⁹ See Jonathan Berr, 10 Worst Countries for Tax Evasion, INVESTORPLACE (Dec. 23, 2011), available at <http://www.investorplace.com/2011/12/10-worst-countries-for-tax-evasion/>.

⁴⁰ Michelle Hirsch, Tax Cheats Aren't Crying 'Uncle' This Time, THE FISCAL TIMES (Aug. 17, 2011), available at <http://www.thefiscaltimes.com/Articles/2011/08/17/Tax-Cheats-Arent-Crying-Uncle-This-Time.aspx#page1>.

One such cost-effective strategy for the IRS is to grant amnesty, thereby recuperating as much money as possible without having to go through costly prosecutions. The IRS has already employed this strategy several times in recent years, granting individuals amnesty if they come forward with unpaid taxes and pay some of the penalties owed.⁴¹ This strategy also allows the IRS to speak loudly without disclosing the size of its stick and provides a carrot in the form of lessened penalties. This carrot-and-stick method will only be successful if tax evaders believe that the IRS really has the stick to back up its talk, which seems increasingly less likely. Without increased funding for the IRS commensurate to the size of the desired increased enforcement, tax evaders will remain skeptical about whether the United States' carrot is actually a good deal. In other words, if the risks of being caught evading taxes offshore, together with the potential resulting criminal charges, are so low that they may not outweigh the value of the penalty saved, the reduced penalties become an ineffective economic incentive.

Furthermore, future incentives are likely to become even less enticing, as they are likely to come with steeper conditions. The amnesty program that ended on September 9, 2011 required the payment of all owed taxes and interest from 2003 to present and a penalty of 25% of the value of the account, measured at its highest point during that time span.⁴² IRS Commissioner Doug Shulman hinted that any future amnesty programs will be more severe, claiming that the program ending on September 9 was "the last, best chance for people to get back into the system."⁴³

The IRS claims to have received a larger-than-expected turnout, with roughly 18,000 people declaring their accounts since the previous amnesty program began in March of 2009.⁴⁴ Currently, however, only 2,000 of those accounts have seen any recuperation.⁴⁵ Despite the IRS's claimed success, the illumination of 18,000 accounts, which thus far has culminated in the recuperation of approximately \$400 million, is a drop in the bucket compared to the estimated \$800 billion in tax revenue the United States has lost to undeclared accounts in offshore tax shelters since 2003.⁴⁶ The latter figure does not even

⁴¹ See Frequently Asked Questions OVCI, IRS WEBSITE <http://www.irs.gov/businesses/international/article/0,,id=235699,00.html> (Last visited Oct. 8, 2011).

⁴² *Id.*

⁴³ See Laura Saunders, *IRS Sets Offshore Amnesty, Part II*, WALL STREET JOURNAL (Feb. 9, 2011), available at <http://online.wsj.com/article/SB10001424052748704364004576132431503110852.html>.

⁴⁴ *Id.*

⁴⁵ *See id.*

⁴⁶ *See id.*; STAFF OF S. COMM. ON HOMELAND SEC. AND GOVERNMENTAL AFFAIRS, PERM. SUB. COMM. ON INVESTIGATIONS, 110TH CONG., REP. ON TAX HAVEN BANKS AND U.S. TAX COMPLIANCE 1 (2008) (finding that approximately \$100 billion dollars in tax revenue from undeclared offshore bank accounts. The \$800 billion estimate is a cumulative estimate from 2003-2011).

include interest or penalties, which are included in the \$400 million figure.⁴⁷ A 0.0005% recuperation rate may be better for the IRS than a 0% recuperation rate, but if the IRS could afford full prosecution, it could reap a considerably larger return on its investment, both from the prosecutions themselves and from increased voluntary disclosures under future amnesty programs.⁴⁸ This same issue has stymied recuperations from the UBS settlement; to date, there have only been 29 successful prosecutions of UBS accountholders.⁴⁹ If the IRS decides to implement another amnesty program in the future, the decision will not solely be the result of underfunding, but underfunding certainly limits other options for enforcement and the IRS's collection bottom line.

II. THE JOHN DOE SUMMONS EXPLAINED

To determine whether the John Doe summons is a viable option for future United States use, we must first explore what the summons is, how it works, and whether it is likely to be enforceable in offshore tax evasion cases. As previously stated, the John Doe summons is an order issued by a United States court to turn over information, based on a reasonable suspicion of wrongdoing, even if the names of the parties suspected of wrongdoing are unknown.⁵⁰

The statutory basis for the IRS to issue summonses comes from several sections within the Internal Revenue Code.⁵¹ I.R.C. § 7601 gives the IRS the authority to investigate those who may owe taxes.⁵² I.R.C. § 7602 details the IRS's investigatory authority and outlines its ability to issue summonses to effectuate its investigatory authority under § 7601.⁵³

The United States Supreme Court authorized the use of the John Doe summons for the first time in the *United States v. Bisceglia*.⁵⁴ The Court held that the IRS's authority under I.R.C. §§ 7601, 7602 was broad enough to justify enforcing a summons, even when the IRS did not know the identity of the wrongdoer.⁵⁵ I.R.C. § 7609(f) later codified this authority, granting the IRS a statutory authorization for the John Doe summons.⁵⁶ I.R.C. § 7609(f) established three additional criteria that the IRS must meet when the summons does not identify the person to whom it seeks to attach liability. The summons must: (1)

⁴⁷ See Saunders, *supra* note 43.

⁴⁸ .0005% is a mathematical calculation of the numbers cited in note 45.

⁴⁹ *Offshore Tax Avoidance and IRS Compliance Efforts*, IRS WEBSITE <http://www.irs.gov/newsroom/article/0,,id=110092,00.html> (last visited Jan. 4, 2012).

⁵⁰ THE UBS "JOHN DOE" SUMMONS, SP017 ALI-ABA 929, 932.

⁵¹ Emily Ann Busch, Note, *To Enforce or Not to Enforce? The UBS John Doe Summons and a Framework for Policing U.S. Tax Fraud Amid Conflicting International Laws and Banking Secrecy*, 83 TEMP. L. REV. 185, 198-201 (2010).

⁵² I.R.C. § 7601.

⁵³ I.R.C. §§ 7601, 7602.

⁵⁴ 420 U.S. 141, 151 (1975).

⁵⁵ *Id.*; Busch, *supra* note 51, at 195.

⁵⁶ *Id.*; I.R.C. § 7609(f).

relate to the investigation of a “particular person,” “ascertainable group” or “class of persons;” (2) include a reasonable basis for believing the person, group or class of people have or will have failed to comply with any provision of IRS law; and (3) seek information that is not readily available elsewhere.⁵⁷

Once the government has made a *prima facie* case in support of the John Doe summons, the burden shifts to the petitioner to either rebut the IRS’s “good faith” behavior or challenge the summons on other “appropriate grounds.”⁵⁸ “Appropriate grounds” include “abuse of process,” “over broadness” and “international comity.”⁵⁹ Of these grounds, the only one that is relevant to this discussion is international comity because it could substantially influence the long-term efficacy of the John Doe summons.⁶⁰ Unlike abuse of process and over broadness, which are procedural issues of United States domestic law, international comity is a substantive issue that will continue to arise as these jurisdictions continue to issue summonses to corporations.⁶¹

United States courts have stated that when there is conflict between domestic and foreign law, courts should seek “a reasonable accommodation...that considers the foreign interests, the interests of the United States, and the mutual interests of all nations in a smoothly functioning international legal regime.”⁶² While identifying a conflict in legal regimes is easy, finding a balance can be extremely difficult and usually results in diverse and inconsistent applications of the balancing approach.⁶³

The Supreme Court has held that courts possess “wide discretion” in determining how to weigh issues of international comity.⁶⁴ The circuit courts

⁵⁷ I.R.C. § 7609(f).

⁵⁸ Busch, *supra* note 51, at 195 (citing *United States v. Powell* 379 U.S. 48, 57-58 (1964)) (concluding that Powell establishes four requirements for good faith: “(1) the investigation serves a legitimate purpose; (2) the information might be relevant to the purpose; (3) the IRS does not already possess the information summoned; and (4) the IRS complied with § 7609(f”).

⁵⁹ *Id.* (citing *United States v. LaSalle Nat’l Bank*, 437 U.S. 298, 316 (1978); *Mollison v. United States*, 481 F.3d 119, 122-23 (2d Cir. 2007) *United States v. Leventhal*, 961 F.2d 936, 939-40 (11th Cir. 1992)).

⁶⁰ The requirements established in Powell, as well as the requirements for “abuse of process” and “overbroad,” are issues that focus on individual facts of a particular summons and are not likely to broadly impede the use of the John Doe Summons in the future.

⁶¹ See *United States v. Powell* 379 U.S. 48 (1964).

⁶² *Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part). See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817-19 (1993) (explaining that jurisdiction of domestic laws should only be exercised when relating to a foreign sovereign, when that exercise would be reasonable after taking into consideration the foreign sovereign’s interest). See also *In re Maxwell Comm. Corp. plc* by Homan, 93 F.3d 1036, 1053 (2d Cir. 1996) (holding that when issues of choice of law are unclear, issues of comity must be decided by weighing the interests of the United States against “the mutual interests of all nations in a smoothly functioning legal regime”).

⁶³ Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11, 79 (2010).

⁶⁴ See *Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers*, 357 U.S. 197, 213 (1958).

have dealt with different factual scenarios and utilized different rationales to arrive at different conclusions about the weighing of priorities.⁶⁵ While trying to create a single rule to encompass all these decisions would be a fool's errand, it is important to find some commonalities in an attempt to analyze the likelihood of success for the United States in the future.

Those circuits that have generally endorsed the John Doe summons on nations with banking secrecy laws have based their opinions largely on fact-specific issues. Courts are more likely to endorse the summons if: (1) the privacy interest the foreign state seeks to protect is that of an American citizen, as opposed to a non-consenting domiciliary; (2) the venue was deliberately chosen to avoid following United States law and the conflict could have been avoided by following United States law from the onset; and (3) duress is a defense to the domestic law in conflict.⁶⁶

Of the circuits that have addressed the issue, the 11th Circuit thus far has been the staunchest supporter of the John Doe summons, and it is therefore no surprise that the United States filed the UBS John Doe summons in the Southern District of Florida in the 11th Circuit.⁶⁷ The fact that the United States can choose to invoke the forum with most favorable laws in the future means that the 11th Circuit's precedent is the most likely to be applied to future John Doe summons, as the United States will likely file cases involving similar factual scenarios in the 11th Circuit.⁶⁸ However, this choice advantage could be short-lived if the Supreme Court chooses to render a more specific judgment on the issue.

Should the Supreme Court render a decision, it could be in support of one of the circuits that have been less favorable to the John Doe summons. Those circuits that have generally declined to enforce the John Doe summons are more inclined to do so under the following conditions: (1) the information being sought through the summons is available through means that do not require the breaking of a foreign sovereign's law; (2) the foreign law's protection arose

⁶⁵ Compare *In re Grand Jury Proceedings, United States v. Bank of Nova Scotia* 740 F.2d. 817 (11th Cir. 1984) (holding that United States citizens may not rely on foreign banking secrecy laws because their duty to disclose their account information to the IRS substantially limits their right to privacy), with *United States v. First National Bank of Chicago*, 699 F.2d 341 (7th Cir. 1983) (holding that Greece's banking secrecy interests prevail over the IRS's interest in enforcing a summons when the amount due is comparatively small).

⁶⁶ See *Busch*, supra note 51, at 201-203 (citing *In re Grand Jury Proceedings, United States v. Bank of N.S.* 740 F.2d. 817, 827-29 (11th Cir. 1984) [*hereinafter Bank of Nova Scotia*]; *United States v. Hayes* 722 F.2d 723, 726 (11th Cir. 1984); *United States v. Vetco Inc.*, 691 F.2d. 1281, 1289-91 (9th Cir. 1981)); see, e.g., RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965).

⁶⁷ *Bank of Nova Scotia*, F.2d at 827-29.

⁶⁸ As will be discussed later in the text, different circuits are more favorable for certain factual scenarios.

naturally, as opposed to as a result of an attempt to evade United States law; and (3) the party being served acted in good faith.⁶⁹

Although the divergent holdings between the circuits might lead one to believe that there is a circuit split, in actuality, a closer analysis of the facts demonstrates that this may not be the case. Any review by the Supreme Court could ultimately conclude that the cases at issue are factually dissimilar enough not to qualify as a conflict of law. The appearance of a circuit split could be the result of stronger evidence of wrongdoing on the part of the foreign actor in the decisions against the John Doe summons.

While it would be impossible to predict what a Supreme Court decision would hold, as an academic exercise, crystallizing the considerations most important across the circuits may provide valuable insight into the long-term value of the John Doe summons as a tool for piercing banking secrecy and recuperating revenue lost to offshore tax havens. Comparing the different precedents of the circuits, the five factors that appear most important to the courts are: (1) the substantiality of the violation and the feasibility of accessing the information sought in the summons through another means; (2) whether the person holding the information chose the foreign state as a shield from United States law; (3) whether there truly is a conflict in law; (4) the nationality of the citizen or corporation about or from whom the information is being sought; and (5) whether either party is acting in bad faith, including an original failure to follow United States law.⁷⁰

Of the five factors, the fourth factor is likely to be the most controversial, as future examples of the John Doe summons are likely to mirror the situation present in UBS: a summons served on a company with foreign nationality and with holdings in the United States to obtain information about United States citizens.⁷¹ In this situation, there appears to be a genuine split; the 9th Circuit focuses on the party forced to turn over the information while the 11th Circuit focuses on the party with sought-after information.⁷² This uncertainty could eventually lead to a Supreme Court clarification narrowing the scope of the John Doe summons. Currently, the circuit split allows for a broad usage of the summons, as the IRS can choose the venue most sympathetic to the factual

⁶⁹ See *Busch*, supra note 51, at 203-204 (citing *Cochran Consulting, Inc. v. Uwatec USA, Inc.*, 102 F.3d 1224, 1230 (Fed. Cir. 1996); *In re Sealed Case* 825 F.2d 494, 499 (D.C. Cir. 1987); *United States v. First Nat'l Bank of Chi.*, 699 F.2d 341, 346 (7th Cir. 1983)).

⁷⁰ See *Cochran Consulting, Inc.*, 102 F.3d at 1230; *In re Sealed Case*, 825 F.2d at 499; *Bank of Nova Scotia*, 740 F.2d. at 827-29; *Hayes*, 722 F.2d at 726; *First Nat'l Bank of Chi.*, 699 F.2d at 346; *Vetco*, 691 F.2d. at 1289-91.

⁷¹ See *Cantley*, supra note 15, at 14.

⁷² See *Vetco*, 691 at 1289, 1291 (9th Cir. 1981) (holding that Switzerland's privacy interest was diminished because the summons was being served on a United States corporation, and Switzerland's privacy interests only extend to a non-consenting domiciliary); see also, *Bank of Nova Scotia*, 740 at 827, 832 (11th Cir. 1984) (holding that United States citizens may not rely on foreign banking secrecy laws because their duty to disclose their account information in an American court proceeding to the IRS substantially limits their right to privacy).

scenario of the case. If the Supreme Court does someday limit the parameters of the John Doe summons, it will be a less useful tool for the United States.

Until such a narrowing occurs, however, the IRS has shown a commitment to using the John Doe summons to the fullest extent legally allowed. The IRS has been tacitly exploiting this circuit split, as it recently filed for a John Doe summons against the Hong Kong and Shanghai Banking Corp (HSBC) Bank USA, N.A., in the United States District Court for the Northern District of California, to investigate “U.S. residents who may be using accounts at HSBC’s branches in India to evade federal income taxes.”⁷³ HSBC Bank USA, N.A., a United States corporation, fits snugly within the 9th Circuit’s precedent of supporting John Doe summonses issued to American companies operating abroad when the subjects of the investigation are American citizens.⁷⁴ This ensures that the two circuits continue to evaluate the John Doe summons under their current precedents. If the IRS were to file a case with a factual scenario not settled by the circuit’s precedent, the court could force a new decision, validating a circuit split and inviting the scrutiny of the Supreme Court.

III. THE UNITED STATES’ DIPLOMATIC APPLICATION OF THE JOHN DOE SUMMONS: TOEING THE LINE BETWEEN HARD AND SOFT POWER

The John Doe summons has become one of the most feared and divisive tools of United States foreign policy. Unlike traditional soft-power methods of diplomacy, the John Doe summons enters the discussion purporting to be binding law.⁷⁵ The summons operates as a less aggressive use of hard power, replacing military action with legal procedure.

Use of hard power during negotiations is similar to placing a gun on the negotiating table and saying pointedly to the other party, “Your cooperation would be appreciated.”⁷⁶ When international corporations face a John Doe summons, they find themselves facing a choice between violating their own

⁷³ Bruce Zagaris, Justice Department Obtains the Right to Issue John Doe Summons for HSBC India, 27 NO. 6 INT’L ENFORCEMENT L. REP. 726 (2011) (quoting Press Release, U.S. DOJ, Justice Dep’t Asks Court to Allow IRS to Seek HSBC India Bank Account Records (Apr. 7, 2011) available at <http://www.justice.gov/tax/txdv11439.htm>).

⁷⁴ HSBC BANK USA, N.A., *HSBC Bank USA, National Association Corporate Fact Sheet*, HSBC BANK USA, N.A. WEBSITE (Dec. 2012), available at http://www.us.hsbc.com/1/PA_1_083Q9FJ08A002FBP5S00000000/content/new_usshared/shared_fragments/pdf/hbus_factsheet_0912.pdf (last visited Mar. 6, 2013); see *Vetco*, 691 F.2d. 1281.

⁷⁵ See Anand Sithian, Comment, “*but the Americans Made Me Do It!*”: How United States v. UBS Makes the Case for Executive Exhaustion, 25 EMORY INT’L L. REV. 681, 687, 690–91 (2011).

⁷⁶ Compare *Hard Power Definition*, OXFORD DICTIONARIES, http://oxforddictionaries.com/definition/hard+power#DWS-m-en_gb-msdict-00002-053789 (last visited Mar. 6, 2013) (defining hard power as “a coercive approach to international political relations, especially one that involves the use of military power”) with *Soft Power Definition*, OXFORD DICTIONARIES, http://oxforddictionaries.com/definition/soft+power#DWS-m-en_gb-msdict-00002-044614 (last visited Mar. 6, 2013) (defining soft power as “a persuasive approach to international relations, typically involving the use of economic or cultural influence”).

nations' laws or dealing with enormous liabilities and possible criminal charges in the United States.⁷⁷

The John Doe summons also leverages soft power through its use as a bargaining chip. The beauty of the use of a John Doe summons as a negotiating tactic is that it is likely to bring the home nation of the financial institution's government to the negotiating table. Even though the United States has no legal leverage over foreign countries, it may have legal leverage over one of the foreign countries' corporate entities.⁷⁸ This is especially important in nations with banking secrecy laws: if the United States can compel a financial institution to violate those laws under pain of worse penalties, the future uncertainty caused by the disclosure will have a severe impact on that nation's economy.⁷⁹ This fact means that the John Doe summons is also a tool of soft power; it allows the United States to wield softer, indirect economic pressure as a tool of diplomatic leverage.

For nations that contain massive banking centers but lack a widely diversified economy, the success of the nation depends on the success of their banks. Switzerland in particular has built its economy on its banking sector, which makes up 12% of its national gross domestic product (GDP).⁸⁰ By comparison, in 2008 and 2011, the United States, which has the world's largest finance sector and an economy clearly tied to the financial sector's success, derived 7.3% and 7.7%, respectively, of its GDP from banking and insurance.⁸¹

It would be easy to presume that the United States' primary interest is in manipulating Swiss banks, but the reality is that because Swiss banking secrecy laws bar those banks from releasing client information, there is no guarantee that these foreign institutions will cooperate with the IRS's requests. As a result, the real target of the United States' soft power is the Swiss government, which has the ability to release names and end its banking secrecy regime all together. Applying pressure to Switzerland's banking sector is like applying pressure to the jugular vein of the Swiss economy; by doing this, the United States presumably hopes to force the Swiss government to cooperate with the IRS's tax agenda in the future.

Of course, this is a catch-22 for Switzerland, as its large market share of the banking industry is primarily a result of its reputation for banking secrecy.⁸²

⁷⁷ Sithian, *supra* note 75, at 682.

⁷⁸ *See id.*

⁷⁹ *See, e.g.,* Matthew Lynn, *Swiss Banks Won't Survive the Age of WikiLeaks*, MONEY WEEK (Feb. 22, 2011), available at <http://www.moneyweek.com/news-and-charts/economics/europe/swiss-banks-wil-not-survive-wikileaks-threat-52522>.

⁸⁰ *Future Financial Center Switzerland*, SWISS BANKERS ASSOCIATION, <http://www.swissbanking.org/home/dossier-zukunft.htm> (last visited Jan. 4, 2012).

⁸¹ *Interactive Access to Industry Economic Accounts Data*, BUREAU OF ECONOMIC ANALYSIS, <http://www.bea.gov/iTable/iTable.cfm?ReqID=5&step=1> (choose "GDP-by-Industry Accounts" option; then follow "Next Step" hyperlink; then follow "Value Added by Industry" hyperlink; then follow "Value Added by Industry as a Percentage of Gross Domestic Product" hyperlink).

⁸² Lynn, *supra* note 79, at para. 8.

Despite the claims of Swiss banks that their customers come to them for “excellent service” and “in-depth personalized investment advice,” it is a poorly kept secret that a history of secrecy and laws that protect it are the main reason wealthy clients go to Switzerland for their banking needs.⁸³ If customers can no longer rely on Swiss banks to keep their account information secret, they may very well take their business elsewhere.⁸⁴ UBS has already taken a hit since turning over its accounts to the United States. After reaching \$62.23 per share in 2007 before the settlement with the United States, UBS’s stock price was \$15.19 on April 19, 2013, never having recovered from the settlement.⁸⁵ Obviously, numerous factors could be responsible for the economic woes of UBS – most notably the global banking crisis – but, while other banks seem to be returning to their prior glory, Swiss banks in general seem stuck in a rut.⁸⁶

The economic value these banks provide to their home nations is so great that, in some cases, those nations are singularly reliant on the banks’ well-being for economic growth. Swiss banks have 9.1% of the world’s assets under management, totaling \$7.3 trillion, and have a GDP that amounts to less than one tenth of their assets under management.⁸⁷ Furthermore, Swiss banking relies on the offshore banking market, as Swiss banks hold 28% of the world’s assets held offshore, a global market estimated to be worth USD 11.5 trillion.⁸⁸ Many of these assets have no direct connection to tax evasion, but the instability brought to a bank by a John Doe summons could have a large effect on even legal accountholders’ willingness to bank there. Many clients do not wish to break the law, but they seek Swiss banks because of the way they aggressively interpret the United States tax code, promising to help the accountholder achieve the lowest possible tax rate. If clients face charges of tax evasion, this may spook those who seek legitimate services out of fear that the Swiss banks’ aggressive tactics could go too far.

With the Swiss economy this closely tied to the country’s banking sector, the John Doe summons presents more than an inconvenience for the Swiss government. This vulnerability is precisely why Switzerland must be responsive to the United States’ economic soft power directed at its banking sector and why the John Doe summons places the United States in a favorable diplomatic bargaining position.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ UBS AG Stock Summary, GOOGLE FINANCE, <http://www.google.com/finance?client=ob&q=NYSE:UBS> (last visited Jan. 13, 2012).

⁸⁶ Lynn, *supra* note 79, at para. 3.

⁸⁷ *Wealth Management in Switzerland*, SWISS BANKERS ASSOCIATION 4 (Jan. 2009) available at, http://www.kantonalbank.ch/pdf/d/mediocenter/publikationen/Wealthmanagement2009_sbv_g_0109.pdf.

⁸⁸ Lynn, *supra* note 79; STAFF OF S. COMM. ON HOMELAND SEC. AND GOVERNMENTAL AFFAIRS, PERM. SUB. COMM. ON INVESTIGATIONS, 110TH CONG., REP. ON TAX HAVEN BANKS AND U.S. TAX COMPLIANCE 1 (2008).

One of the potential downfalls of using hard power, or even indirect economic soft power, is that the United States' use of coercive tactics may sour future negotiations. The United States may already be seeing this unwanted fruit of the UBS settlement.⁸⁹ As of July 2011, the United States had indicted seven Credit Suisse bankers for helping wealthy Americans evade taxes.⁹⁰ These recent indictments have created a fear that a new round of John Doe summonses may be forthcoming.⁹¹ In light of the United States' handling of the UBS case, members of the Swiss parliament have vowed not to make another deal with the United States.⁹² One member of the Swiss parliament even went so far as to say, "If the U.S. is going to act in such a way Switzerland must break off negotiations for a political solution."⁹³

If that one member of the Swiss parliament ends up speaking for the majority, the United States may find itself in a position where it no longer has the ability to use the John Doe summons as a soft power tool (in this case, an economic bargaining chip for political negotiations). This would force the United States to use the John Doe summons' traditional hard power of legal enforcement, a tactic they have thus far been able to avoid. Whether the United States would be willing to endure the political and economic ramifications of a protracted legal battle with Switzerland is a question only time can answer.

IV. TAX TREATIES EXPLAINED

The John Doe summons is a powerful tool of last resort, but what it has in brute strength, it lacks in finesse. For more typical tax exchanges between nations, the tax treaty is the preferred weapon. When a citizen of one country earns income in another country, both countries may be entitled to collect taxes from that citizen.⁹⁴ As a result of this quandary, nations engage in treaty negotiations to open global commerce and alleviate the fear of having the same income taxed by two different nations.⁹⁵ Tax treaties also play a valuable role by facilitating information sharing, allowing both nations to more effectively enforce domestic tax laws.⁹⁶

Unlike the unpredictable John Doe summons, bilateral income tax treaties are nearly standardized and are usually based on one of numerous international

⁸⁹ See generally Credit Suisse Unlikely to Get Help Over U.S. Tax Probe, FOX BUSINESS (July 24, 2011), available at <http://www.foxbusiness.com/industries/2011/07/24/credit-suisse-unlikely-to-get-help-over-us-tax-probe/>.

⁹⁰ *Id.* at para. 8.

⁹¹ See *id.* at para. 14.

⁹² *Id.* at para. 1.

⁹³ *Id.* at para. 10.

⁹⁴ Michael S. Kirsch, The Limits of Administrative Guidance in the Interpretation of Tax Treaties, 87 TEX. L. REV. 1063, 1070 (2009).

⁹⁵ *Id.*

⁹⁶ *Id.*

model tax treaties.⁹⁷ The most prominent of these model treaties is the Organization for Economic Co-Operation and Development (OECD) model treaty.⁹⁸ The OECD model treaty serves as the basis for over 1,500 bilateral tax treaties worldwide, including over 60 of the United States'.⁹⁹

The origins of the OECD lie in a group formed to implement the Marshall Plan in 1947. The OECD as it exists today, however, originated in 1961.¹⁰⁰ Since then, it has grown from 20 to 34 members, including the United States, Switzerland, and the United Kingdom.¹⁰¹ Some of the most commonly adopted aspects of the model treaty are the dispute settlement provisions found in Article 25.¹⁰² They explain that dispute settlement shall be placed in the hands of a tax authority, deemed the "competent authority," in each country."¹⁰³ In the United States, the Secretary of Treasury, or his agent, is the competent authority.¹⁰⁴ The competent authorities of each country have equal credence, and as a result, the dispute settlement provisions do not provide for a solution other than maintaining open diplomatic relations when a dispute arises.¹⁰⁵ Some treaties allow for arbitration if both signatories consent.¹⁰⁶

Dispute settlement regarding tax treaties is particularly difficult when it involves nations that have banking secrecy laws because the disputes typically occur over conflicting policy objectives.¹⁰⁷ One such problem of interpretation that recently existed between the United States and Switzerland was that the United States believed that facilitation of tax evasion should be subject to disclosure under the treaty, while Switzerland believed that only known tax fraud should be subject to disclosure.¹⁰⁸ Switzerland drew a distinction between tax evasion and tax fraud, believing only tax fraud to be a crime.¹⁰⁹ The United States, as well as many other countries, does not distinguish between tax fraud

⁹⁷ *Id.* at 1071.

⁹⁸ *See id.* at 1065, 1071.

⁹⁹ *Id.* at 1071.

¹⁰⁰ History, ORG. FOR ECON. CO-OPERATION AND DEV., <http://www.oecd.org/about/history/> (last visited Mar. 6, 2013).

¹⁰¹ *Members and Partners*, ORG. FOR ECON. CO-OPERATION AND DEV., <http://www.oecd.org/about/membersandpartners/> (last visited Mar. 6, 2013).

¹⁰² Robert A. Green, *Antilegalistic Approaches to Resolving Disputes Between Governments: A Comparison of the International Tax and Trade Regimes*, 23 YALE J. INT'L L. 79, 96 (1998).

¹⁰³ *Id.*

¹⁰⁴ *Embargoed Until Delivery: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. 3 (2011) (statement of Manal Corwin, Treasury Deputy Assistant Sec'y, Dep't of Treasury), available at <http://www.treasury.gov/resource-center/tax-policy/Documents/OTPTest-2011-6-7-Corwin-SenFR.pdf>.

¹⁰⁵ Green, *supra* note 103, at 96-99.

¹⁰⁶ *Id.* at 100-101.

¹⁰⁷ *See id.* at 96-99.

¹⁰⁸ Lynnley Browning, *Switzerland Agrees to Aid in Pursuit of Tax Cheats*, N.Y. TIMES (Mar. 13, 2009), available at <http://www.nytimes.com/2009/03/14/business/worldbusiness/14tax.html>.

¹⁰⁹ *Id.*

and tax evasion.¹¹⁰ This particular difference of opinion ended in March 2009, when Switzerland adopted the OECD standards on tax evasion to remove itself from the list of “uncooperative tax havens.”¹¹¹

Even though Switzerland adopted the OECD standards on the tax evasion question, it still requires the other signatory to have the name of the person they suspect is committing tax evasion before they will provide any assistance.¹¹² This is problematic for the United States and other nations suffering from tax evasion problems because, in most cases, their citizens can open an offshore bank account without their government’s knowledge. As a result, it is nearly impossible to know which citizens have offshore accounts and, more importantly, which citizens abuse that account. Requiring foreign governments to know the identities of suspected accountholders before the Swiss government will release any information places an impossible burden on any nation that supports its citizens’ freedom to participate in international banking and does not require registration of foreign accounts at the time of opening. Despite Switzerland’s policy change, billed as a massive move towards transparency, the requirement that the foreign government know the name of the tax evader practically moots the much-ballyhooed compromise.

V. U.K. TREATY WITH SWITZERLAND EXPLAINED

On October 6, 2011, the U.K. and Switzerland formally signed a new tax treaty that took effect on January 1, 2013.¹¹³ The treaty will facilitate the collection of revenue lost to tax evasion without infringing upon Swiss banking secrecy.¹¹⁴ This treaty requires Swiss banks to disclose to the Swiss government the taxes owed on accounts held by U.K. citizens, as well as taxes owed on money earned in the U.K. by non-U.K. citizens.¹¹⁵ It also will require Switzerland to collect those taxes and forward them to the U.K.’s competent authority.¹¹⁶ In exchange for the Swiss government’s assistance in collecting taxes, the U.K. government promises not to pursue the identities of the accountholders.¹¹⁷

¹¹⁰ *Id.*

¹¹¹ *Id.* (The OECD Model Treaty takes the position that tax evasion and tax fraud are both acts that should be subject to disclosure under bi-lateral tax treaties).

¹¹² *Id.*

¹¹³ *UK-Swiss Federation Taxation Cooperation Agreement*, HM REVENUE AND CUSTOMS, <http://www.hmrc.gov.uk/taxtreaties/swiss.pdf> (last visited Mar. 6, 2013) .

¹¹⁴ *See id.*

¹¹⁵ *See id.* at art.9.

¹¹⁶ *See id.*

¹¹⁷ Gerrit Wiesmann, *Swiss Lukewarm on Tax Treaty Calls*, FINANCIAL TIMES (September 15, 2011), available at <http://www.ft.com/cms/s/0/3ba0902e-deea-11e0-913000144feabdc0.html#axzz1aOgFtsfY>.

The treaty provides for the collection of past-due taxes, as well as tax liability that accrues after the treaty takes effect.¹¹⁸ When dealing with past-due taxes, the accountholder is given the choice to either have his or her account information disclosed to the U.K. or pay a one-time sum, usually 34% of the past-due taxes, to the U.K.'s competent authority.¹¹⁹ For the collection of future earnings, the treaty allows for variable tax rates based on different tax brackets, but generally, the Swiss government will collect 48% on income and 27% on capital gains from accounts not disclosed to the U.K. government.¹²⁰ As an initial good faith gesture, the Swiss government has agreed to make a 500-million-Swiss-franc down payment.¹²¹

The treaty also contains provisions facilitating the transfer of information to help reduce tax evasion.¹²² Under the treaty, the U.K. government will have the right to request the account information of up to 500 U.K. citizens a year, the number to be determined based on the success in identifying tax evaders the year before, for further investigation of tax evasion.¹²³ The treaty also somewhat preempts what is likely to be a future method of tax evasion: moving money to other branches of Swiss banks outside of Switzerland that are in jurisdictions not subject to this treaty.¹²⁴ To combat this, the treaty provides for Switzerland to give the U.K. the "top ten destinations" of account relocations but specifies that Switzerland will not provide individual accounts or accountholders' information.¹²⁵

Article 33 of the treaty, labeled the "anti-abuse" provision, contains several sub-provisions that could undercut the effectiveness of the treaty.¹²⁶ Article 33, paragraph 1 states that the contracting parties recognize that their citizens are free to bank in whichever nation or jurisdiction they see fit.¹²⁷ By limiting the U.K.'s ability to domestically regulate where its citizens can bank, this provision provides protection to those accountholders who do move their accounts to international branches of Swiss banks to evade taxes. It limits the U.K.'s ability to regulate them *ex ante* and track them *ex post*. The U.K. will have virtually no cause to receive information about accountholders who are moving their accounts to more secure jurisdictions to continue to evade taxes absent specific information about their citizens' accounts.

Furthermore, Article 33, paragraph 2 states that Swiss bankers will not "knowingly manage or encourage the use of artificial arrangements whose sole

¹¹⁸ U.K.-Swiss Taxation Cooperation Agreement, *supra* note 114, at art. 5.

¹¹⁹ *Id.* at art. 9 (The 34% rate may change depending on the circumstances of the concealment).

¹²⁰ *Id.* at art. 9, 14..

¹²¹ *See id.* at art. 17.

¹²² *Id.* at art. 32.

¹²³ *Id.*

¹²⁴ U.K.-Swiss Taxation Cooperation Agreement, at art. 18.

¹²⁵ *Id.*

¹²⁶ *Id.* at art. 33.

¹²⁷ *Id.*

or main purpose is the avoidance of taxation.”¹²⁸ The purported purpose of this article is to prevent banks from assisting their clients in evading taxes. If banks are caught assisting in tax evasion that does not fall into one of the previously mentioned categories, they will be held financially responsible for the taxes and penalties due.¹²⁹ However, these banks will also retain a right to recover the full tax burden owed from the U.K. citizen who participated in the evasion.¹³⁰ This essentially moots the entire provision, as banks have no financial incentive to comply.

Article 38 of the treaty gives the Swiss government the ability to audit paying agents to ensure compliance with the agreement, but only a “representative group of Swiss paying agents” are subject to these audits.¹³¹ The treaty leaves the definition of this representative group unclear, shrouding the audits in secrecy. In addition, the treaty does not specify whether more audits will take place if a high proportion of the “representative group” failed to comply.¹³² If a conflict arises, Article 40 outlines the formation of a joint commission of representatives of both states to “examine the proper functioning” of the agreement.¹³³ This joint commission is simply an extension of the existing diplomacy options, and it does not have substantial investigatory or enforcement power.¹³⁴

VI. COMPARING SUCCESS OF RETURNING REVENUE

The John Doe summons and the treaty between the U.K. and Switzerland provide very different means of attacking the same problem. The John Doe summons relies on using United States law as a means of coercing assistance from a foreign nation by exercising leverage over its citizens, while the U.K. treaty uses diplomacy and compromise. The U.K. treaty cultivates international goodwill, while the John Doe summons has the potential to destroy it. Despite how much more palatable the treaty seems, the John Doe summons, though seriously flawed, will likely be more successful in recuperating offshore tax revenue and facilitating the long-term elimination of offshore tax evasion.

A. *The John Doe Summons: Strengths and Limitations*

The John Doe summons’s primary power lies in the leverage it wields over multinational corporations. Nations that are labeled as tax havens tend to be largely reliant on their banking sector for economic growth, since the secrecy of

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ U.K.-Swiss Taxation Cooperation Agreement, at art. 18..

¹³¹ *Id.* at art. 38.

¹³² *Id.*

¹³³ *Id.* at art. 40.

¹³⁴ *See id.*

their banks draws in so many customers.¹³⁵ The loss of credibility of one of these nations' major banks could be detrimental to a given country's economy.¹³⁶ This reality gives the United States two courses of action regarding the John Doe summons: (1) they can use it as leverage for political negotiations, or (2) in the event that option fails, they can pursue the summons to the fullest extent of the law. Conversely, the U.K.'s treaty essentially relies on the Swiss government's sense of moral obligation, as the U.K. retains no real oversight of the process. Furthermore, unlike the U.K.'s treaty, which has authority over one jurisdiction, the John Doe summons can have an effect on multiple jurisdictions simultaneously. It also prevents multinational banks from simply transferring assets to a different branch in another jurisdiction, something that will almost certainly be a problem under the UK's treaty.

One final advantage of the John Doe summons is that it can effectuate political negotiations through an existing treaty. This was the path the United States took during the UBS negotiations, leading to a settlement with the Swiss government negotiated through the United States' 1996 tax treaty with Switzerland.¹³⁷ Through various tax treaties, the United States and Switzerland can bilaterally negotiate through a treaty request. The John Doe summons therefore allows for a more efficient use of existing treaties and provides external leverage greater than that of the U.K.'s treaty.

However, the John Doe summons is not without its own limitations. The primary problem with the John Doe summons as a tool for international diplomacy is that it is the tax treaty equivalent of a nuclear option. Nations generally do not take kindly to foreign states asserting their domestic laws as dominant and ordering other nations to surrender their sovereignty. The John Doe summons may very well be treated in the future as it was by Switzerland, as a one-time bargaining chip that will be deemed so offensive that it will not move the needle in future discussions.¹³⁸

Knowing the displeasure the John Doe summons causes to foreign powers, it is important to question whether the United States' tax interest in these countries outweighs the other foreign policy objectives that could suffer as a result. It is possible that many of the nations colloquially referred to as tax havens are small enough and banking-focused enough that the United States is not likely to have other significant relations with them. On the other hand, the United States has significant relations with India, and recent inquiries into HSBC India's American accountholders could force the United States to choose between its tax and overall foreign policy goals.¹³⁹

¹³⁵ See Ahmed Zorome, Concept of Offshore financial Centers: In Search of an Operational Definition 6 (IMF, Working Paper No. 07/87, 2007).

¹³⁶ See Outlook for Swiss Economy Worsens, BBC NEWS (Mar. 17, 2009), available at <http://news.bbc.co.uk/2/hi/7947765.stm>.

¹³⁷ See Zagaris, *supra* note 11.

¹³⁸ See FOX BUSINESS, *supra* note 90.

¹³⁹ Zagaris, *supra* note 11.

Another potential problem with the John Doe summons is that its use as a bargaining chip for treaty negotiations may lead the United States to sacrifice it in the process. If the United States were to adopt a treaty similar to the one the U.K. adopted, using the John Doe summons as an oversight tool would likely be a direct violation of the treaty because it would not be handling the dispute through the appropriate channels outlined in Article 39.¹⁴⁰ Despite this issue, the John Doe summons would remain an option in nations the United States had not yet signed a treaty with. This allows the United States to prevent an international game of hide-and-go-seek where accountholders move their accounts to new jurisdictions to avoid falling under the authority of treaty.

B. *The U.K.-Switzerland Treaty, the QI Program and Future Prospects for Success*

While we cannot know how effective the U.K. treaty has been until there has been sufficient time to study its results, it functions in largely the same way as the United States' QI program, which does have a traceable history. Both the treaty and the QI program place tax collection in the hands of an international party in exchange for agreeing not to pursue accountholders' identities.¹⁴¹ As of 2008, more than 7,000 international banks had signed onto the QI program.¹⁴² However, the success has been highly limited.¹⁴³ Even with extremely limited oversight, more than 100 banks have left the QI program under pressure of noncompliance with the agreements.¹⁴⁴ Under the QI program, banks need to submit to audits once every three years; the auditors are not required, however, to notify the client or the IRS of fraud or other violations of the QI agreement.¹⁴⁵ The IRS has never formally reported its intake from the QI program, but "there are indications that the program brings in only a fraction of what it should, because the banks have found ways around its requirements."¹⁴⁶ The Government Accountability Office estimated that, in 2003, of the \$35 billion that was eligible for taxation, banks participating in the QI program withheld 5% for taxes; the standard tax rate for a United States citizen under these circumstances is 28%-30%.¹⁴⁷

¹⁴⁰ Agreement between the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland on cooperation in the area of taxation, UK-Switz., art. 39, Oct. 6, 2011, available at <http://www.hmrc.gov.uk/taxtreaties/ukswiss.htm>.

¹⁴¹ Lynnley Browning, *I.R.S. Aims to Give Teeth to a Program Meant to Counter Offshore Tax Avoidance*, N.Y. TIMES (July 15, 2008), available at <http://www.nytimes.com/2008/07/15/business/15tax.html>; *Tax Evasion 'Net is Tightening' After Swiss Deal*, BBC NEWS (Oct. 7, 2011), available at <http://www.bbc.co.uk/news/business-15215867>.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

1. Oversight: Potential Strengths and Weaknesses

The U.K.'s treaty lacks many of these comically ineffective provisions, but fundamental similarities between the programs render them both lacking. Both the U.K.'s treaty and the QI program place the responsibility of collecting taxes on a foreign institution in exchange for not requesting the identities of their accountholders. They operate on the fundamentally flawed premise that institutions that are incentivized to protect secrecy will voluntarily collect tax revenue and hand it over to a government without any real oversight. The failure of the QI program so far demonstrates that unless the Swiss government can exercise a degree of oversight in its enforcement of the U.K. treaty that is stronger than the United States' enforcement of the QI program, the U.K. treaty will ultimately be ineffective.

The primary difference between the two is that the QI program places the responsibility on private businesses with no oversight from their domestic governments, while the treaty places the responsibility on the Swiss government to audit the payments of the financial institutions. This can have advantages and disadvantages.

In theory, one large advantage that the treaty has over the QI program is that the Swiss government acts as a more effective guarantor of enforcement because it has the authority of domestic law to enforce the provisions of the treaty. If the Swiss government finds that a bank has not met its obligation under Article 33, it can use the power of Swiss law to pierce the veil of banking secrecy and to ensure that the U.K. receives its money.¹⁴⁸

Unfortunately, from an enforcement standpoint, forcing the banks to turn over the account information to the Swiss government could be tricky. The Swiss constitution does not explicitly state whether a statute or a treaty takes priority when there is a domestic conflict of law.¹⁴⁹ This lack of clarity could potentially lead to a lawsuit between the banks and the Swiss government over which is the higher authority, slowing the U.K.'s recovery process and potentially limiting the treaty's overall effectiveness. Despite this concern, the recent revelation of accountholder information to the United States, processed as a treaty request, is a positive indication that the Swiss parliament sees its secrecy laws as voidable in the wake of a legitimate treaty request.¹⁵⁰ On the other hand, Switzerland's agreement with the United States was the result of cooperation

¹⁴⁸ Agreement between the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland on cooperation in the area of taxation, UK-Switz., art. 33, Oct. 6, 2011, available at <http://www.hmrc.gov.uk/taxtreaties/ukswiss.htm>.

¹⁴⁹ VIRGINIA A. LEARY, INTERNATIONAL LABOUR CONVENTIONS AND NATIONAL LAW: THE EFFECTIVENESS OF THE AUTOMATIC INCORPORATION OF TREATIES IN NATIONAL LEGAL SYSTEMS 118 (1982).

¹⁵⁰ See FOX BUSINESS, *supra* note 90.

from UBS, who physically held the accounts.¹⁵¹ Should the banks protest this new treaty arrangement, the Swiss parliament may need to amend the banking secrecy law to state that the treaty supersedes its provisions. This could greatly slow initial recovery.

Another potential disadvantage of the Swiss government acting as the collector is that, unlike under the QI program, where the United States can penalize the corporation for violating United States law, the U.K. will have very little recourse if they believe Switzerland is not upholding its end of the treaty.¹⁵² The treaty outlines that disputes should be settled diplomatically and that, when they cannot be settled through diplomacy, they should be settled through the joint committee, which is made up of an inherently diplomatic body of representatives from the U.K. and Switzerland.¹⁵³ While the U.K. has recourses such as nullifying the treaty and taxing the Swiss income of U.K. residents, neither of these actions are practical solutions if Switzerland violates the treaty.¹⁵⁴ As long as Switzerland provides them with a reasonable disbursement, the U.K. will not know the extent of compliance, only that the taxes they receive are more substantial than they likely would have been otherwise.

Unfortunately, this limitation exists for both the treaty and the John Doe summons, as neither the Swiss government nor the United States government can ensure that the banks provide them with accurate information. Because neither the Swiss nor the Americans have specific information relating to accountholders (if they did, they would not need the treaty or the John Doe summons), they cannot independently verify the veracity of the bank's disclosure.

2. Pareto Efficient, But Not Without Serious Flaws

Other than the nuclear option of cancelling the treaty, the U.K. has limited recourse and will likely continue to uphold the treaty as long as the returns outweigh the opportunity cost of pursuing other tax recovery efforts. One of the brilliances of the treaty for the Swiss is that it will likely remain Pareto efficient, and thus stable, even if not upheld to the fullest extent possible. This lack of oversight incentivizes Switzerland to do just enough enforcement to ensure the U.K. does not cancel the treaty.

One positive aspect of the U.K. treaty that leads to Pareto efficiency is that it could keep more accounts in Switzerland, where the U.K. has a far greater likelihood of recovering unpaid tax revenue than in another offshore tax haven. Switzerland's concession in the UBS settlement allowed other nations to smell

¹⁵¹ *See id.*

¹⁵² Browning, *supra* note 142.

¹⁵³ *See* U.K.-Swiss Taxation Cooperation Agreement, *supra* note 114, at arts. 39-40.

¹⁵⁴ *Id.* at art. 44.

the blood in the water, and clients to see the writing on the wall, that it would soon become open season on tax evaders hiding in Switzerland.¹⁵⁵ On the other hand, the U.K. treaty may stymie the flow of U.K. accountholders taking their accounts elsewhere by setting reassuring ground rules for the distribution of information. This is, of course, beneficial for the Swiss banking industry. It also bolsters the treaty's effectiveness because more accounts in Switzerland means a greater likelihood of recovering unpaid tax revenue. Even if the treaty is only minimally effective at recovering money lost to tax evasion in Swiss banks, it presents a greater likelihood of success than trying to recover unpaid taxes from another offshore haven with no treaty in place.

Despite being Pareto efficient, there are numerous reasons the treaty may not optimize the U.K.'s revenue intake. Because of the banking freedom clause in Article 33, the Swiss government can easily claim that the low return is a result of U.K. accountholders moving their accounts to different jurisdictions. Even if this is the case, the treaty does not obligate the Swiss government to help stop the problem of account transfers unless they are the result of "artificial arrangements" with the sole or main purpose to evade taxes.¹⁵⁶

This is especially problematic given the lengthy grace period before the Swiss government begins collection. Despite the announcement in October 2011, the one-time payment that will be assessed for back taxes owed will be based on the calculated value of the account on April 1, 2013.¹⁵⁷ In contrast, United States levies penalties against accountholders based on the highest value of the account at any time during tax delinquency.¹⁵⁸ The massive, clearly delineated grace period in the U.K. treaty made it easy for accountholders to transfer their income to another jurisdiction, or even temporarily remove it until the date passed to avoid penalties.

Again, another reason it will be difficult for the Swiss government to recover all the tax revenue owed to the U.K. is that there are limited incentives for Swiss banks to follow this rule. Under Paragraph 3 of Article 33, the punishment for violating Paragraph 2 is that the bank will become responsible for the taxes owed; this is barely an incentive, however, because Paragraph 3 also preserves the right of recovery from the U.K. citizen. Furthermore, because the bank knows the identity of the evader, and knows that he or she has assets to cover the debt, they will have little trouble recovering.¹⁵⁹ In sum, this clause does not provide adequate incentives for bankers to disavow tax evasion strategies, as the only risk to the bank is losing its client and the only risk to the evader is paying the taxes he or she already owes.¹⁶⁰

¹⁵⁵ Lynn, *supra* note 79.

¹⁵⁶ U.K.-Swiss Taxation Cooperation Agreement, *supra* note 114, at art. 33.

¹⁵⁷ *Id.* at art. 39.

¹⁵⁸ Frequently Asked Questions OVCI, IRS WEBSITE, <http://www.irs.gov/businesses/international/article/0,,id=235699,00.html> (Last visited Oct. 8, 2011).

¹⁵⁹ U.K.-Swiss Taxation Cooperation Agreement, *supra* note 114, at art.33.

¹⁶⁰ *Id.*

Furthermore, there are no incentives for banks to investigate their bankers under the treaty. Paragraph 2 states that “Swiss paying agents shall not *knowingly manage* or *encourage* the use of artificial arrangements whose sole or main purpose is the avoidance of taxation (emphasis added).”¹⁶¹ This language only holds banks accountable, under this treaty, when they are aware of or are encouraging their bankers to assist in tax evasion. Furthermore, there is no requirement that banks must counsel their bankers not to engage in artificial arrangements with clients, leaving open the distinct possibility that bankers may simply continue the status quo.¹⁶²

Perhaps the most problematic aspect of this treaty is that it creates no fear. The U.K., like the United States, has been engaging in an amnesty program for those who have been hiding their wealth abroad.¹⁶³ Unlike the John Doe summons, which creates uncertainty and deterrence, the U.K.-Switzerland treaty creates an atmosphere of calm complacency that gives bankers, tax attorneys, and would-be tax evaders a new set of rules in which to find loopholes. This rigidity will ensure that the tax evaders continue to move their money faster than Her Majesty’s Revenues and Customs can find it. With the John Doe summons, bankers, tax attorneys, and accountholders never know when the United States will strike next and if their accounts are safe, and that instability will allow the United States’ amnesty program to continue to reveal new accounts. Many of these problems could theoretically be alleviated if the U.K. were to sign a similar treaty with all the major finance nations, but, even then, its recovery would still be subject to the same limitations it currently faces with this treaty. Even though the U.K. will receive revenue from its treaty with Switzerland, would it really be surprising if that value were offset by the amount the U.K. loses in voluntary amnesty disclosures worldwide?

3. Evaluating the Likely Effect of the Treaty

The treaty between the U.K. and Switzerland is a step in the right direction toward solving the global evasion problem; however, it is not without significant flaws. Both sides sacrifice a little bit of what they could have for the mutual benefit of both parties and, in that sense, it is a sound decision for both parties. Each party’s perception of success of this treaty may largely depend on the following question: how much of a crackdown on tax evasion is enough? From a strictly economic viewpoint, enough is when a government maximizes its return relative to its effort and opportunity cost. The treaty is a positive for the U.K. in that the U.K. will likely recuperate more money from the treaty than it will lose through enforcement and opportunity cost in the short term. However, signing

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Laurence Norman, Britain Extends Tax-Amnesty Deadline, WALL STREET JOURNAL (Nov. 27, 2009), available at <http://online.wsj.com/article/SB125927526335765507.html>.

the treaty came with long-term opportunity costs and sacrifices that may ultimately make it a better deal for Switzerland than the U.K. Furthermore, if a government places a moral value on punishing tax evaders, then this treaty may be found to be lacking. By agreeing not to seek the identity of the tax evaders, the U.K. is sacrificing an opportunity to prosecute tax evaders for past wrongs, in exchange for a promise of future lawfulness. Regardless of one's perspective on that question, for the Swiss, this treaty is a brilliant public relations move – it combats the criticism that Switzerland is an uncooperative tax haven, while simultaneously allowing them to continue to bank in its most economically profitable way: in secret.¹⁶⁴

C. *The John Doe Summons is a More Dynamic Tax Recovery Tool Than the U.K.-Switzerland Tax Treaty*

Despite its many flaws, the John Doe summons provides several powerful options for both hard and soft power approaches to offshore tax evasion. The U.K. treaty, on the other hand, provides several meaningful advantages, but ultimately is not as dynamic a tool for cracking down on offshore tax evasion as the John Doe summons.

From a pure tax evasion enforcement standpoint, the John Doe summons is a more powerful tool for enforcement than the treaty. It allows the United States to exercise leverage over a foreign nation through a third-party private enterprise. This leverage places the United States in a superior bargaining position to where it would have been during normal tax treaty negotiations. However, the downside to this tactic is similar to the downside of any use of hard power: it creates enemies. The United States' relationship with Switzerland has been strained as a result of the altercation involving UBS, meaning that Switzerland is already less likely to cooperate with the United States in the future. In July 2011, the United States indicted three Credit Suisse bankers for helping wealthy Americans evade taxes, a similar opening gesture to their investigation of UBS.¹⁶⁵ This time, the Swiss government has stated that there will be no deal with the United States and that Credit Suisse is on its own.¹⁶⁶ How much teeth these words have remains to be seen. If Switzerland refuses to bargain with the United States, it will be interesting to see how Credit Suisse handles the tension between the two nations' laws. We may finally see the full legal force of the John Doe summons in action.

As for the treaty approach, its primary weakness is the lack of oversight. By limiting itself to a treaty, a nation places full enforcement ability in the hand

¹⁶⁴ Browning, *supra* note 109 (explaining that before Switzerland adopted the OECD standards on tax evasion, the nation was briefly labeled an “un-cooperative tax haven” by the OECD).

¹⁶⁵ Credit Suisse Tax Evasion Probe: Bankers Unlikely to Get Help From Switzerland, HUFFINGTON POST (July 24, 2011), available at http://www.huffingtonpost.com/2011/07/24/credit-suisse-tax-evasion-switzerland_n_908020.html.

¹⁶⁶ *Id.*

of a foreign government – in particular, one that profits from tax evasion. Knowing this, it would be hard for the United States to feel completely comfortable giving full tax-collecting control to a banking secrecy nation. While it is true that the John Doe summons also has ineffective oversight over international banks that are incentivized to withhold information, the treaty requires the U.K. to go through not only the same banks as it would with a John Doe summons but also through the Swiss government, an agency over which it has no authority. At least in the case of the John Doe summons, the United States has a legal recourse on banks that have assets in the United States and, therefore, has the ability to affect real incentives. The U.K., under the treaty, must depend on the Swiss government to both create and enforce the incentives for participation on the Swiss banks.

A second key weakness is that a single treaty with a single nation could simply result in those tax evaders moving to another country that is not subject to the treaty. Treaties will only be successful if formed with every jurisdiction that protects banking secrecy. Compared to the John Doe summons, which can follow any bank with United States clients into any jurisdiction, the treaty route is likely to be highly limited in its effectiveness. Even though the John Doe summons does not have complete legal effect in foreign courts, it does give the United States two viable options for recovery. A John Doe summons gives the United States control over assets held in the United States and also, like in the UBS case, may reveal information that the United States can take to the foreign government for assistance.¹⁶⁷ For the United States to enforce the John Doe summons, it must have assets upon which to exert its authority. As a result, for regulating the smaller banks that do not hold assets in the United States or have bankers traveling to the United States, the treaty, which covers all banks in the jurisdiction, is more effective than the John Doe summons. If the market sees more banking parity in the future, the treaty could become more effective.

Finally, the treaty approach creates a complacent environment for tax evaders. Compared to the chaos the John Doe summons creates, the treaty fosters very little fear. Even though the treaty does allow for information to be requested on up to 500 persons, those requests still require the U.K. to know the identity of each accountholder and, in order to reach the maximum of 500, the U.K. will have to find violations in excess of 10,000 British pounds on more than two-thirds of all requests for many years.¹⁶⁸ The difficulty of processing treaty requests will limit the number of actual requests processed and, as a result, will lead to fewer voluntary disclosures and a less successful amnesty program in the long term.

The John Doe summons is the shotgun to the U.K.'s scalpel, capable of inflicting massive damage, but incapable of surgical precision. The United

¹⁶⁷ Once a private bank has admitted wrongdoing, it is much harder for a foreign nation to defend it than if that wrongdoing is never discovered, which is the fear with the treaty.

¹⁶⁸ U.K.-Swiss Taxation Cooperation Agreement, *supra* note 114, at art.32.

States loses over \$100 billion annually to tax evasion.¹⁶⁹ For the United States, the tax evasion problem is more like the Wild West than a sterile operating room.¹⁷⁰ Eventually, the United States will likely, and should likely, move to a treaty-based approach such as the U.K.-Switzerland treaty because it is more sustainable in the long term. Until the United States can corral what is not just a Swiss problem, but also a global problem, the treaty will not be as effective as the John Doe summons.

VII. COMPARING IMPLICATIONS FOR INTERNATIONAL BUSINESS

Recovering revenue lost to offshore tax havens is certainly an important aspect of increasing the United States government's tax intake; the government's recovery efforts do not exist in a vacuum. While it may be contrary to conceptions of justice not to pursue everyone who evades taxes, one of the United States' main objectives is to recuperate the maximum amount of revenue it can, even if that means limiting its search for offshore accounts. With this understanding, it is important to look at the implications for business, because if either the John Doe summons or the U.K. tax treaty changes the way major corporations do business, the United States could lose more in tax revenue from foreign investment than it receives discovering offshore withholdings.

A. *The John Doe Summons and International Business*

The first important question to answer is whether the use of the John Doe summons is likely to affect foreign corporations' willingness to invest and hold assets in the United States. Early indications suggest that this may be the case. Swiss Banks Sarasin and Julius Baer recently responded to the investigation of Credit Suisse by placing a moratorium on all staff visits to the United States.¹⁷¹ Based on the way the Department of Justice has handled UBS and Credit Suisse bankers, the United States has a strategy of criminally charging foreign bankers and then using that leverage to force them to disclose the identity of accountholders.¹⁷² The Swiss banks' recent moratorium is likely to prevent the United States from employing this strategy. If this strategy proves successful for Sarasin and Julius Baer, other banks may adopt similar travel moratoria. If banks

¹⁶⁹ STAFF OF S. COMM. ON HOMELAND SEC. AND GOVERNMENTAL AFFAIRS, PERM. SUB. COMM. ON INVESTIGATIONS, 110TH CONG., REP. ON TAX HAVEN BANKS AND U.S. TAX COMPLIANCE 1 (2008), available at http://hsgac.senate.gov/public/_files/071708PSIR_eport.pdf.

¹⁷⁰ See *id.*

¹⁷¹ See FOX BUSINESS, *supra* note 90.

¹⁷² The DOJ has been arresting Swiss bankers and then offering deferred prosecution agreements contingent upon the turnover of the identities of United States account holders. See Bush *supra* note 51.

become unwilling to travel to the United States, they will be unlikely to do the same level of businesses that they had previously done.

Moreover, recent events hint that the United States may be more aggressively pursuing foreign bankers who assist Americans in committing tax evasion.¹⁷³ In January 2012, three Swiss Bank A bankers faced charges for helping Americans hide more than \$1.2 billion from the United States government.¹⁷⁴ The United States is pursuing the charges even though all three bankers reside in Switzerland.¹⁷⁵ There is no word yet on whether the United States government will seek extradition.¹⁷⁶

The concern here, beyond criminal prosecution, is that the United States will use the John Doe summons to enter a default judgment against the bank should they not comply with the account disclosure. If the bank retains assets in the United States, the IRS may foreclose upon those assets without winning a civil trial. There are two ways this could happen: (1) if the United States files criminal charges and wins, any assets that were used in the crime or the result of its commission can be confiscated; and (2) if the government suspects that property or assets have been used in the commission of a crime, it can obtain *in rem* jurisdiction, allowing it to file a claim against the property or asset, and then, upon a preponderance of the evidence standard, seize the property.¹⁷⁷ Should the United States pursue a full-scale civil suit, a court may enter a judgment finding that the bank bears civil liability for the lost tax revenue, allowing the United States to foreclose on the bank's domestic assets.¹⁷⁸ The fact that the bank has domestic assets to foreclose upon alleviates the concern that a foreign court may not enforce a judgment that forces a corporation to break its domestic law.

While this may sound like a boon for the United States in terms of its enforcement capabilities, it could potentially cause more financial harm than the value of the taxes recuperated. The fear of having their assets seized in response to their employees' actions may cause so many companies to pull out of United States investments that it not only hurts the United States economy, but also causes the United States to lose out on more legitimate tax revenue than what they can recuperate.

Even though the cracking down on tax evasion may have a short-term negative impact on investment, however, allowing companies and high-net-

¹⁷³ James O'Toole, *Swiss Bankers Charged in 1.2 Billion Tax Fraud*, CNN MONEY (Jan. 4, 2012), available at http://money.cnn.com/2012/01/03/news/swiss_bankers_charged/index.htm?hpt=hp_t2.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *See* A Truck In the Dock, THE ECONOMIST (May 27, 2010), available at <http://www.economist.com/node/16219747>.

¹⁷⁸ *See* David Voreacos, *Switzerland Says it May Seize UBS Data Sought by U.S.*, BLOOMBERG (July 8, 2009), available at <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a5YQivGDnNjA>.

worth individuals to game the system and pay no taxes is not a long-term solution. If the United States does see decreased investment as a result of the crackdown on offshore tax evasion, the appropriate solution will be for the United States government to reconsider its tax rate in a way that allows for robust investment but does not reward those who break the law.

Whether or not the United States sees decreased investment, a policy that combats offshore tax evasion must be part of any long-term solution for the United States. By collecting a higher percentage of the taxes owed, the United States may be able to afford to lower its tax rates to a level that is friendlier to international investment. Attracting investment with its tax rates and growth opportunities, instead of its lax tax enforcement, should allow the United States to see more sustainable growth in the future.

As for the potential loss to the retail banking industry, there is also a legitimate concern that foreign banks will be less likely to open branches in the United States or maintain their current ones. It is worth noting, however, that foreign banks with assets in the United States make up a comparatively small percentage of the U.S banking market.¹⁷⁹ As of 2004, foreign banks with operations in the U.S accounted for only 211 of the 7,630 commercial banks in the United States, or slightly less than 3% of all banks in the United States.¹⁸⁰

Another potential concern about the United States' use of the John Doe summons relates to the way that damaged banks affect the global economy. The Swiss minister of economic affairs, Doris Leuthard, trumpeted this argument during the UBS settlement negotiations, claiming that it could not be in the best interest of the United States to create banking instability. He implied that the bankruptcy of Lehman Brothers Holdings should be a cautionary tale to the United States "not to push UBS to the brink."¹⁸¹ While there are valid economic implications to this statement the United States cannot allow foreign banks to hold its economy hostage, not just as a matter of principle, but also as a matter of long-term economic policy. Increased instability may be an unavoidable by-product of using the John Doe summons.

B. *The U.K.–Switzerland Treaty and International Business*

The U.K. treaty with Switzerland is considerably more favorable to international business, as it only minimally affects the status quo. The biggest financial impact that international banks will see as a result of this treaty is increased costs in monitoring the domiciliary status of their clients, collecting

¹⁷⁹ PRICEWATERHOUSECOOPERS, REGULATORY GUIDE FOR FOREIGN BANKS IN THE UNITED STATES (2005-2006), available at www.pwc.com/en_US/us/banking-capital.../regguide_0506.pdf.

¹⁸⁰ *Id.*

¹⁸¹ See David Voreacos, Switzerland Says it May Seize UBS Data Sought by U.S., BLOOMBERG (July 8, 2009), available at <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a5YQivGDnNjA>.

the taxes owed from their clients, and submitting to Swiss oversight.¹⁸² Compared to the strain the John Doe summons will likely place on international business, these costs are practically negligible. An additional cost of the U.K. treaty is that these banks will likely lose some revenue as those clients whose primary goal was tax evasion take their money elsewhere. However, this is not as extreme as under the John Doe summons, when banks could be subject to both loss of clients and penalties. In addition, banks allowing customers to transfer their accounts to other branches of the same bank in jurisdictions that not subject to the treaty could offset part of this loss under the U.K. treaty.¹⁸³

One distinct business advantage the treaty has over the John Doe summons is that the treaty is predictable. The risk of investing in the U.K. is measurable, while the John Doe summons regime is more difficult to quantify. The same unpredictability that makes the John Doe summons so dangerous to tax evaders also makes it difficult for businesses to evaluate the risk inherent in an investment.

In the coming years, Swiss banks will likely increase the numbers of branches they have in foreign jurisdictions; it is there they are likely to see their greatest growth. The U.K. will likely try to offset this by signing treaties with other banking secrecy nations. It remains to be seen whether the U.K. or the international banks will win the race to lock down favorable jurisdictions. One would suspect that the economic process is likely to be more efficient than the political one, at least in the near future. Another factor that may slow the treaty process is that other nations, even those actively looking to cooperate, may wish to wait to see how effective the U.K.-Switzerland treaty is before adopting a similar one.

One problem that international banks may see in the future from the U.K.-Switzerland treaty is increased regulation aimed at stopping money laundering. This increased regulation will mean less secrecy for the banks' clients. The German government, which recently agreed to a treaty with Switzerland similar to the one the U.K. signed, is considering backing out because of fear that putting collections in the hands of the Swiss will lead to uncontrolled money laundering.¹⁸⁴ If the treaty does not prove to be effective in its policing of money laundering, it could lead to future regulations that infringe upon the secrecy of accounts. Luckily for international banks, the U.K. treaty does allow the U.K. to investigate suspected instances of money laundering.¹⁸⁵ The treaty does not, however, allow fishing expeditions: investigations with no significant factual basis for inquiry.¹⁸⁶ Even though the U.K. does not need to know the names of the parties involved, it must be able to present specific evidence to the Swiss

¹⁸² See U.K.-Swiss Taxation Cooperation Agreement, *supra* note 114, at arts. 5, 8, 9, 19.

¹⁸³ See *id.* at art. 33.

¹⁸⁴ Wiesmann, *supra* note 118.

¹⁸⁵ See U.K.-Swiss Taxation Cooperation Agreement, *supra* note 114, at art. 2.

¹⁸⁶ *Id.* at art. 32.

government that money laundering is occurring for the Swiss to disclose the information.¹⁸⁷ Under this arrangement, the banks can rely on the Swiss government to weed out the fishing expeditions, thus resulting in maximum privacy for their clients.

C. *Which is Better for International Business?*

Looking at this comparison from an international bank's perspective, the treaty between the U.K. and Switzerland is clearly preferable to the John Doe summons, as it allows maximum continuity, privacy and opportunity for sustained economic growth. On the other hand, the John Doe Summons best serves the economic bottom line of the United States government. While there is no doubt a correlation between the success of international banks and the United States economy, it is not significant enough to demand a parallel outcome. The lost tax revenue and stymied economic growth from John Doe summonses' effects on direct foreign investment and sustained operations of foreign banks in the United States will most likely be less than the potential \$100 billion a year the IRS could recover through the use of the summons. The obstacle to foreign investment in the United States that the John Doe summons creates will also become less prevalent as time passes. The smaller the tax evasion problem becomes, the less likely the United States will be to use the John Doe summons, and the more likely foreign investors will feel secure holding assets in the United States.

CONCLUSION

All in all, though not without weaknesses, at this moment the John Doe summons appears to be the more effective tool for recuperating revenue lost to offshore tax evaders. The John Doe summons allows the United States to pursue evaders in many jurisdictions, while the treaty approach is limited to those nations with whom the U.K. has signed a treaty. The summons also allows the United States to exercise direct oversight over the complicit bank, rather than needing to first go through a foreign government. Finally, the John Doe summons creates fear and will allow for a robust voluntary disclosure program, unlike the treaty approach, which forecloses the use of alternate means of recovery in that jurisdiction.

Even though the John Doe summons is more effective at this moment, the United States cannot turn a blind eye to the damage the summons can do to the United States' international relationships. Because of this issue, the John Doe summons should be part of a comprehensive multi-step process. The John Doe summons' initial uses can make significant progress into offshore tax evasion, paired with an amnesty program that will allow the U.S to discover evaders

¹⁸⁷ *Id.*

while limiting the use of the summons. Once a significant reduction in tax evasion occurs, the United States should engage major nations, seeking treaties similar to the one signed by the U.K. and Switzerland, though ideally with some of the loopholes closed. Meanwhile, the United States should continue to wield the John Doe summons as a backup plan for evaders that move to other jurisdictions to avoid the treaty. All treaties will have some loopholes, which is why it is critical for the United States to first address the underlying problem. It is in the United States' best interest to remain on good terms with banking secrecy nations, and there must be concessions made to achieve that end. The United States needs to demonstrate to tax evaders, however, that evasion is a serious crime with serious punishment. Only through broadcasting this message will the United States be in a position to achieve long-term success through treaties.