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THE NEW GLOBAL ATTACK ON PERSONAL TAX EVASION USING FOREIGN INVESTMENT AND THE ROLE OF THE UNITED STATES

ROBERT T. KUDRLE*

Policy development related to international tax evasion grew substantially in the first decade of this century and has exploded in the years since. A fear that the growing ease of global financial asset movements had increased the number of persons – particularly rich persons – evading home country tax obligations provided an important impetus in the first period, although the suppression of money laundering and terrorism were at least as significant. These concerns led to almost universal acceptance of the principle of the international exchange of tax- relevant information upon request by 2009.

A second wave of activity began in 2010 with the passage of the U.S. Foreign Account Tax Compliance Act (FATCA) as part of the Obama administration's economic stimulus package. The legislation demands that foreign financial institutions provide detailed information on accounts held by U.S. persons under penalty of a thirty percent withholding tax. This quickly led to scores of bilateral agreements between the U.S. and foreign governments that gathered and transmitted the requested information. Subsequently, the Organisation for Economic Cooperation and Development's (OECD) Common Reporting Standard (CRS), modeled roughly on FATCA without its enforcement mechanism, was presented in 2014, and automatic tax-relevant information exchange was accepted by more than 100 countries by late 2017. The universal acceptance of exchange upon request would not have been predicted as late as the turn of the twenty-first century. And the automatic exchange of tax information was widely regarded as a faraway dream before the financial crisis.

This study has several purposes. First, it will briefly trace the economic, political, and legal developments that generated such huge shifts in policy over a very short period of time.

Second, it will examine the widespread claim that, whatever its justification in the abstract, FATCA—and, by extension, the CRS—are simply too resource-intensive to pass a benefit-cost analysis. Third, it will explore the arguments that such international information sharing is a violation of privacy. Fourth, the related

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issue of which countries should qualify for automatic information exchange is examined. Finally, the question of U.S. reciprocity will be explored. As matters now stand, the U.S. has successfully demanded from others what it has not been willing to provide to them.

I. THE ROAD TO FATCA AND BEYOND

One of the first highly developed arguments in favor of international cooperation to combat tax evasion was the U.S. Gordon Report of 1981.[1] Richard Gordon, at the behest of the Treasury Department, documented the abuses connected with so-called tax havens—jurisdictions that typically had no international agreements to share tax information with other states.[2] Many of these jurisdictions stressed that they levied no personal or corporate income taxes and therefore collected no information for their own purposes.[3] The sufficiency of this argument rested on the well-recognized "revenue rule" of customary international law that states had no obligation to assist other jurisdictions in collecting those states' taxes.[4]

The Gordon Report generated no important policy changes. Indeed, the Reagan Administration extended the long-standing exemption from U.S. taxation of bank interest earned by foreigners to all foreign portfolio interest in a declared effort to assist in financing the U.S. current account deficit in the balance of payments and to make foreign financing of U.S. business more attractive.[5] But this lack of taxation coupled with investor anonymity generated the same "havening" result for evasion that similar practices did for the recognized tax havens; the U.S. did not collect information that it did not need for its own purposes. This failure to collect information on foreign financial holdings also prevailed in many other countries not generally seen as tax havens, including several in Europe.

The next round of concern came nearly two decades after the Gordon Report. The European Union found certain tax practices of some of its members as well as the activities of the traditional tax havens to be "Harmful Tax Competition" (HTC), a position reflected in the

1998 OECD report of that name.[6] The Clinton Administration generally supported the ensuing OECD effort that targeted a number of practices concerning both personal income tax evasion and corporate income tax avoidance.[7] Although

1. Richard A. Gordon, Tax Havens and Their Use by United States Taxpayers: An Overview (1981).

2. *Id.* at 14-32.

3. *Id.*

4. William S. Dodge, *Breaking the Public Law Taboo*, 43 HARV. INT'L L. J. 161, 161 (2002) (this is what Dodge calls a "public law taboo").

5. Deficit Reduction Act of 1984, 26 U.S.C. § 871(h), 881 (2018).

6. Organisation for Economic Cooperation and Development, *Harmful Tax Competition: An Emerging Global Issue*, at 11, 16 (1998), https://read.oecd-ilibrary.org/taxation/harmful-tax-competition_9789264162945-en#; European Council, *Conclusions of the ECOFIN Council Meeting Concerning taxation Policy of 1 Dec. 1997* (98/C 2/01) (setting out the Code of Conduct for Business Taxation), http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/coc_en.pdf.

7. Lee A. Sheppard, *It's the Bank Secrecy, Stupid*, 91 TAX NOTES 385 (Apr. 16, 2001).

domestic law and penalties vary greatly, tax evasion is usually a crime while avoidance is not.[8] HTC shared with the Gordon Report a tendency to mix concern about personal and corporate taxes together, but it emphasized corporate tax issues more heavily.[9]

The U.S. has historically held a distinctive view of many international taxation issues that grows from its now almost unique embrace of global, as opposed to territorial, taxation. Nearly all other states have exempted its corporations operating abroad from domestic taxation if it is deemed to have paid an acceptable level of tax to the "host" country in which they operate.[10] In sharp contrast to this territorial approach, the U.S. has merely credited foreign corporate tax payments of U.S. firms against what would have been tax liability to the U.S. Treasury, although it has allowed any remaining tax obligation to be delayed until the dividends from the foreign subsidiary are repatriated, a practice known as deferral.[11] The tax bill passed in late 2017 moves U.S. corporate taxation towards the territoriality approach but retains a global approach to personal taxation. If a citizen or permanent resident of nearly all countries other than the U.S. works abroad, those personal earnings are not taxed by the home country.[12] But the U.S. allows foreign income taxes only to be credited against U.S. liability.[13] In fact, tax rates at the same income levels are typically higher in other rich countries, so there is often no residual obligation, and U.S. claims are further softened by the generous earned income exclusion extended to those working abroad: it was $102,100 in 2015.[14]

Very significantly for the policy discussion that follows, nearly all "home" countries attempt to tax the foreign investment income of those who are deemed "tax resident."[15] But again the U.S. stands apart from nearly all other states. The U.S. holds its citizens (and permanent residents) liable for U.S. income taxation no matter where they live unless they formally relinquish their citizenship.[16] Many high

8. BETHANY MCLEAN & PETER ELKIND, THE SMARTEST GUYS IN THE ROOM, (2003). The identification of evasion with personal income tax and avoidance with the corporate tax is, of course a simplification. Institutions liable for the corporate tax are often involved with evasion: the most spectacular example is perhaps the Enron Corporation, which was exposed in 2001. Personal avoidance strategies sometimes stray into evasion.

9. Joel Slemrod, *Tax Compliance and Enforcement*, 57 J. OF ECON. LITERATURE, 904 (2019).

10. Kevin S. Markle & Leslie D. Robinson, *Tax Haven Use Across International Tax Regimes*, 12 U. of Iowa and Dartmouth C. working paper 1, 6-7 (Nov. 2012), http://mba.tuck.dartmouth .edu/pages/faculty/leslie.robinson/docs/MarkleRobinson.pdf (presenting a survey of various practices).

11. *Id*. at 7.

12. An Act to Provide for Reconciliation Pursuant to Titles II and V of the Concurrent Resolution on the Budget for Fiscal Year 2018, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

13. Internal Revenue Service, *Foreign Tax Credit*, https://www.irs.gov/individuals/international-taxpayers/foreign-tax-credit (last visit November 7, 2019).

14. *See* Internal Revenue Service, Form 2555-EZ, *Foreign Earned Income Exclusion*, https://www.irs.gov/pub/irs-pdf/f2555ez.pdf (last visited Oct. 12, 2018) (the exclusion is indexed for U.S. inflation; there are also special exclusions and deductions for housing expenditures).

15. Cynthia A. Blum & Paula N. Singer, *A Coherent Policy Proposal for US Residence-Based Taxation of Individuals*, 41 VAND. J. OF TRANSNAT'L LAW 707 (2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2188443.

16. Internal Revenue Service, *Frequently Asked Questions (FAQs) About International Tax M*atters,

income countries allow citizenship to be retained without continuing tax obligation for those who are located abroad permanently or indefinitely, although many levy some kind of tax penalty for doing so.[17]

Tax havens have been employed as financial switching stations to keep U.S. corporate profits abroad, but the U.S. has historically been hesitant about restrictions on their use, based on the argument that such activity mitigated the residual home tax liability that corporations based elsewhere did not face. The George W. Bush administration insisted that the OECD HTC project drop most corporate tax concerns and focus entirely on personal tax evasion.[18] After a confrontational beginning in its dealings with the tax havens, the OECD made peace and established a Global Forum in which a model bilateral Tax Information Sharing Agreement (TIEA), upon request, was developed in 2001.

The events of September 11, 2001 greatly increased attention to illicit global financial flows on grounds far more urgent than tax evasion. Financial information demands by the Financial Action Task Force (FATF), a 1989 G-7 project established to combat global money laundering, began to eclipse the HTC's drive for TIEAs, as the FATF shifted its focus to terrorist financing.[19] But much of the desired information on account ownership, balances, and activity were quite similar.[20]

A perceived need for visible international cooperation drove a spate of new adherents to the TIEAs as well as to cooperation with the FATF, and this produced a remarkable result. By early 2009 there were only three holdouts from a declared willingness to strike bilateral TIEAS, and they were all European semi-states: Andorra, Liechtenstein, and Monaco.[21] The London G-20 conference in April 2009, focusing on the failures of the world financial system that had produced the prevailing crisis, announced unanimity—although some backsliders were called on the carpet.[22]

Despite the apparent success of global agreement on the principle of tax information exchange, most tax professionals had long doubted the efficacy of such mechanisms. Tax enforcers need to know what they are looking for before requests can be made, and this limits the usefulness of the approach to a subset of particularly egregious or accidentally discovered cases. This, in turn, drastically reduces the

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https://www.irs.gov/individuals/international-taxpayers/frequently-asked-questions-about-inter national-individual-tax-matters (last visited Nov. 7, 2019).

17. Robert T. Kudrle, *Expatriation: A Last Refuge for the Wealthy*?, 6 GLOB. POL'Y 408, 408 (2015).

18. Robert T. Kudrle, *U.S. Defection from the OECD 'Harmful Tax Competition Project: Rhetoric and Reality*, in HEGEMONY CONSTRAINED: INTERNATIONAL CHALLENGES TO AMERICAN POLICIES: EVASION, MODIFICATION, AND RESISTANCE TO AMERICAN FOREIGN POLICY 193 (Davis Bobrow ed., 2008). (There was also a multilateral version, but it was largely irrelevant). *Id*. at 195.

19. *See generally id*.

20. *Id.* at 196.

21. Robert T. Kudrle, *Did blacklisting hurt the tax havens?*, 12 J. OF MONEY LAUNDERING CONTROL 33 (2009).

22. Philip Aldrick, *Blacklisted Tax Havens Face Sanctions*, THE TELEGRAPH (Apr. 3, 2009), https://www.telegraph.co.uk/finance/g20-summit/5096348/G20-summit-Blacklisted-tax-havens-face-sanctions.html.

TIEAs' value in encouraging compliance. Moreover, the level of partner state resource commitment and timeliness in response to requests is problematic, particularly to serve a smaller and weaker inquiring partner. The OECD had clearly seen these limitations as early as the 1990s in discussions of the technical feasibility of automatic information exchange, but the political feasibility of such a massive policy innovation was much in doubt.[23] The OECD's Global Forum on Taxation became the Global Forum on Transparency and Information Exchange for Tax Purposes in 2009 with the cooperation of the G-20, just as concern about the inadequacy of anything short of automatic information exchange was almost universally acknowledged.[24]

The Obama Administration provided a great impetus towards automatic exchange with the passage of the Foreign Account Taxation Compliance Act (FATCA) of 2010, although the initiative was not taken in cooperation with other states.[25] Many in the U.S. federal tax bureaucracy shared the OECD view that automatic exchange was needed to attack the suspected trillions of dollars of secret private holdings abroad.[26] U.S. federal income tax compliance drops sharply from a high of about ninety-nine percent where withholding is practiced and ninety-three percent with direct earnings reporting to the government down to sixty-three percent when only self-reporting is involved.[27]

United States Senator Max Baucus and Representative Charles Rangel devised and shepherded FATCA as a small section of the massive Hiring Incentives to Restore Employment (HIRE) Act,[28] known as "the stimulus package," which aimed to combat the U.S. economic contraction. The Administration strongly supported FATCA; as a senator President Obama had co-sponsored anti evasion legislation in the previous Congress.[29]

II. THE U.S. POLICY WINDOW AND FOREIGN REACTION

FATCA seems an almost perfect example of political scientist John Kingdon's conditions for U.S. policy change: the confluence of a perceived policy problem, a ready policy response, and a conducive political environment.[30] There was

23. *See Model Memorandum of Understanding between the Competent Authorities of (State X) and (State Y) on the Automatic Exchange of Information for Tax Purposes,* ORG. FOR ECON. CO-OPERATION AND DEV. (OECD), at 3, https://www.oecd.org/ctp/exchange-of-tax-information /2662204.pdf.

24. *See generally* Org. for Econ. Co-operation and Dev. (OECD), *Global Forum on Transparency and Exchange of Information for Tax Purposes*, https://www.oecd.org/tax/transparency/ (last visited November 7, 2019).

25. *See generally* 26 U.S.C. §6038D (2010).

26. John A. Koskinen, Prepared Remarks of Commissioner Internal Revenue Service John A. Koskinen Before the U.S. Council for International Business-OECD International Tax Conference 2 (June 7, 2016), https://www.uscib.org/uscib-content/uploads/2016/06/OECD-Intl-Speech.pdf.

27. Internal Revenue Service*, Federal Tax Compliance Research: Tax Gap Estimates for Tax Years 2008–2010*, at 11 (2016).

28. Hiring Incentives to Restore Employment Act (HIRE), Pub. L. No. 111–147, 124 Stat. 71 §§ 501-02 (2010).

29. Stop Tax Haven Abuse Act, S. 681, 110th Cong. (2007).

30. *See generally* JOHN W. KINGDON, AGENDAS, ALTERRNATIVES, AND PUBLIC POLICIES (1984).

widespread understanding that information exchange upon request was a weak weapon against evasion. Both common sense and the hard evidence about tax compliance with and without verification pointed to need for automatic exchange. The OECD's tax experts and member state tax authorities had been discussing the automatic exchange of information, and the technical and organizational requirements for its effectuation for many years.[31] Finally, the financial crisis and U.S. Senate Hearings of 2009 on foreign bank complicity in massive evasion created a favorable political climate.[32]

While the time was ripe for a U.S. initiative, FATCA was completely unilateral and offensive. As *The Economist* later complained, FATCA was "a piece of extraterritoriality stunning even by Washington's standards."[33] U.S. power to act unilaterally with success rested on the need of virtually all foreign investment institutions for access to U.S. financial markets and the threat that, if they failed to cooperate with the IRS by providing information on their accounts held by U.S. parties, all of the institution's U.S. investment would face a thirty percent withholding tax.[34] Countries all over the world, including the closest U.S. economic and military partners, complained strenuously about such a naked exercise of American power.[35] But there was essentially no recourse other than some form of accommodation, despite the fact that many countries had laws that forbade their financial institutions from providing the information demanded by the Americans, a problem that the U.S. government treated with apparent lack of concern.

If any contemporary observers correctly forecast the ensuing chain of events, they have not yet told their stories. Automatic information exchange of some kind was widely supported, but the nationalistic focus employed by the U.S. emphatically was not.[36] Nevertheless, almost immediately, several major European states found a solution to the confidentiality problem that also seemed to promise a gain for the cooperating state. First, internal legal obstacles were overcome by the establishment of an Intergovernmental Agreement (IGA) within which the required information was provided to the domestic government and then transmitted to the Americans.[37] Second, the IGAs between the U.S. and several major states with which the U.S. had tax treaties were promised a measure of reciprocity: "The United States is committed to further improve transparency and enhance the exchange relationship with [FATCA Partner] by pursuing the adoption of regulations and advocating and supporting relevant legislation to achieve such equivalent levels of reciprocal

31. OECD Improving Access to Bank Information for Tax Purposes, Paris 2000.

32. U.S. Senate, Permanent Subcommittee on Investigations Committee on Homeland Security and Governmental Affairs, One Hundredth Eleventh Congress, First Session, March 4, 2009.

33. *Taxing America's Diaspora: FATCA's Flaws*, THE ECONOMIST, June 28, 2014.

34. Erika K. Lunder & Carol A. Pettit, Cong. Research Serv., R44616, *FATCA Reporting on U.S. Accounts: Recent Legal Developments*, 1 (2016).

35. *Taxing America's Diaspora: FACTA's Flaws, supra* note 33.

36. Koskinen, *supra* note 26.

37. *See generally* Erika K. Lunder & Carol A. Pettit, Cong, *supra* note 34.

automatic exchange."[38] This form of IGA is known as Model 1(reciprocal).[39] In addition, there are Model 1(non-reciprocal) IGAs that also do not involve the U.S. interacting directly with foreign firms and Model 2 IGAs that directly confront foreign financial firms as originally envisioned.[40]

The reciprocal Model 1 IGAs acknowledge that the U.S. Executive cannot promise but only seek reciprocity.[41] It is constrained on two fronts: the Congress and the states. Some Republicans opposed FATCA on libertarian principles,[42] and the Republican platform of 2016 promised to repeal FATCA..[43] Moreover, business formation in the U.S. is almost entirely a state matter. Bipartisan legislation mandating the tracking of balances at financial institutions as well as complete beneficial ownership information on business entities had been introduced four times by late 2017 and never got out of committee.[44] It is opposed (inter alia) by the American Chamber of Commerce and the American Bar Association, on grounds of cost and business confidentiality.[45] But it has also drawn the opposition of the National Association of Secretaries of State.[46] Republican and Democrat state officials alike resist federal intrusion and poorly funded mandates.[47] And state level special economic interests have fought federal initiatives to assist foreign tax collection. The Florida Banking Association and the entire Florida congressional

38. Model Intergovernmental Agreement to Improve Tax Compliance and to Implement FATCA, https://www.treasury.gov/press-center/press-releases/documents/reciprocal.pdf; U.S. Dep't of the Treasury, Joint Statement from the United States, France, Germany, Italy, Spain and the United Kingdom Regarding an Intergovernmental Approach to Improving International Tax Compliance and Implementing FATCA (2016), https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Joint-Statement-US-Fr-Ger-It-Sp-UK-02-07-2012.pdf.

39. *See generally* Erika K. Lunder & Carol A. Pettit, *supra* note 34, at 3.

40. *Id*. at 4.

41. *Id.*

42. *See, e.g*, Rand Paul: U.S. Senator for Kentucky, *Sen. Paul Introduces Bill to Repeal FATCA*, https://www.paul.senate.gov/news/sen-rand-paul-introduces-bill-repeal-fatca (last visited October 10, 2017) (Ron Paul is the best known).

43. Republican National Committee, Republican Platform, 2026, at 13, https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL%5B1%5D-ben_1468872234.pdf.

44. Most recently in late 2013; *See* Incorporation Transparency and Law Enforcement Assistance Act, S. 1465, 113th Cong. (2013).

45. Brian O'Shea, Statement of the U.S. Chamber of Commerce on Beneficial Ownership: Fighting Illicit International Financial Networks Through Transparency, February 6, 2018; https://www.uschamber.com/sites/default/files/020618_brian_oshea_testimony_beneficial_ownership.pdf.;
American Bar Association, ABA Opposes Legislation Imposing Beneficial Ownership Reporting on Small Businesses and Their Lawyers, November 29, 2017. americanbar.org/news/abanews/aba-news-archives/2017/11/aba_opposes_legilat/#:~:text=ABA%20opposes%20legislation%20imposing%20beneficial%20ownership%20reporting%20on%20small%20businesses,WASHINGTON%2C%20Nov.&text=The%20ABA%20support.

46. *See Report and Recommendations on Assisting Law Enforcement in Fighting the Misuse of Corporate Entities*, Nat'l Ass'n of Secretaries of State (NASS) Company Formation Task Force (Dec. 2012), http://www.nass.org/component/docman/?task=doc_download&gid=1336&Itemid=[https://perma.cc/ZQ4Q-UU99]

47. For further discussion, *see* Robert T. Kudrle, *Tax Havens and the Transparency Wave in International Tax Legalization*, 37 U. PA. J. INT'L L. 1153, 1177 (2016).

delegation publicly opposed reciprocal cooperation after FATCA.[48] This reflects the enormous financial investments in that state by Latin Americans in various levels of compliance with home countries laws.

The international sharing of information on interest earned was authorized by Treasury regulation in 2012—although only 16 countries had been actually authorized to receive such information by early 2016; this climbed to forty-five by the end of 2017.[49] The furor over the Panama Papers'[50] exposure of massive evasion, mainly by non-Americans, is thought to have provided impetus for a May 2016 Treasury regulation requiring all financial institutions to collect information on the beneficial ownership of new accounts.[51] But this did not apply to existing accounts or to all legal entities.

III. OECD ACTIVITY

As countries were signing FATCA IGAs in droves—112 jurisdictions had signed by 2014[52]—important complementary activity was taking place on another track. As early as 2010, the OECD had been urging states to sign the Convention on Mutual Administrative Assistance on Tax Matters,[53] which aimed to strengthen the regime of TIEAs (information on request) and also to lay the foundation for automatic information exchange. The Common Reporting

Standard (CRS) for automatic information exchange was promulgated in July 2014.[54] By September 2017, 100 countries had subscribed to the Convention,[55] and there were over 2000 bilateral exchange relationships activated. And more than

48. Letter from Congressman Bill Posey, et al. to President Barack Obama (March 3, 2011),https://posey.house.gov/uploadedfiles/irs-delegationletter-march3-2011.pdf.

49. U.S. INTERNAL REVENUE SERVICE, INTERNAL REVENUE BULLETIN: 2012–20, D. 9584, GUIDANCE ON REPORTING INTEREST PAID TO NONRESIDENT ALIENS (2012); U.S. INTERNAL REVENUE SERVICE, 26 CFR 601.201, RULINGS AND DETERMINATION LETTERS (ALSO PART 1, §§ 6049; 1.6049-4, 1.6049-8) SEPTEMBER 2017 SUPPLEMENT TO REV. PROC. 2014-64, IMPLEMENTATION OF NONRESIDENT ALIEN DEPOSIT INTEREST REGULATIONS, REV. PROC. 2017-46.

50. *Explore the Panama Papers Key Figures*, INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS, https://www.icij.org/investigations/panama-papers/explore-panama-papers-key-figures/ (last visited September 15, 2018).

51. Press Release, U.S. Dep't of the Treasury, Treasury Announces Key Regulations And Legislation To Counter Money Laundering And Corruption, Combat Tax Evasion (May 5, 2016), https://www.treasury.gov/press-center/press-releases/Pages/jl0451.aspx.

52. *Resource Center: Foreign Account Tax Compliance Act (FATCA)*, U.S. DEP'T OF THE TREASURY, https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx (last visited September 4, 2017).

53. Org. for Econ. Co-operation and Dev. (OECD), *Convention on Mutual Administrative Assistance in Tax Matters*, http://www.oecd.org/g20/topics/international-taxation/convention-on-mutual-administrative-assistance-in-tax-matters.htm.

54. Org. for Econ. Co-operation and Dev. [OECD], *What is the CRS?*, http://www.oecd.org/tax/automatic-exchange/common-reporting-standard/ (last visited August 8, 2017).

55. Org. for Econ. Co-operation and Dev. (OECD), *Convention on Mutual Administrative Assistance in Tax Matters*, http://www.oecd.org/tax/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm (last updated July 2018).

seventy jurisdictions had committed to automatic information exchange, with first exchanges scheduled to take place in September 2017.[56]

The OECD-G20 project is sometimes called "GATCA" because it aims at the exchange of tax-relevant information somewhat similar to that of FACTA. Moreover, FATCA necessitated the development of the expensive data collection infrastructure that the CRS adherents could work from. Nevertheless, the CRS also differs in important ways. CRS agreements are all fully reciprocal, the information to be provided is broader than FATCA, smaller investments are covered, and yet there is no enforcement mechanism corresponding to the FATCA thirty percent withholding tax.[57] The conspicuous holdout from the CRS is the United States; its failure to collect detailed information on foreign accounts including beneficial business ownership makes full compliance impossible.

IV. COSTS AND BENEFITS—AND FOR WHOM?

The collection of taxes is both expensive and highly imperfect. Slemrod and Yiztaki report that about twenty-six percent of U.S. income taxes due went uncollected and that collection costs accounted for about ten percent of revenue raised in 1996.[58] They emphasize that the single most effective means of increasing income tax compliance (beyond withholding) is third party information provided to the government.[59]

The economic approach to tax evasion began as special case of Gary Becker's theory of general crime prevention.[60] In the early 1970s Allingham and Sandmo[61] proposed an elegantly simple model in which evasion is deterred by a combination of the size of the punishment and the probably of its infliction. In the years that followed, many extensions and elaborations of the model were presented, but they all followed from the same basic premise: individuals respond only to immediate financial incentives, and the only reason they pay taxes is to avoid punishment.[62]

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56. *International Framework for the CRS*, ORG. FOR ECON. CO-OPERATION AND DEV. (OECD), *http*://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/ (last visited Sept. 15, 2018).

57. MARKUS MEINZER, *Automatic Exchange of Information as the New Global Standard: The End of (Offshore Tax Evasion) History?* Forthcoming in AUTOMATIC EXCHANGE OF INFORMATION AND PROSPECTS OF TURKISH-GERMAN COOPERATION, ISTANBUL (eds. Leyla Ates & Joachim Englisch) (Forthcoming), Presented at the 2nd Turkish-German Biennial on International Tax Law in Istanbul Conference, Mar. 3, 2016; https://ssrn.com/abstract=2924650, also at http://dx.doi.org/10.2139/ssrn.2924650.

58. Joel Slemrod & Schlomo Yitzhaki, *Tax Avoidance, Evasion, and Administration*, *in* 3 HANDBOOK OF PUBLIC ECONOMICS 1423, 1426 (Alan J. Auerbach & Martin Feldstein, eds., 2002).

59. *Id*. at 1449.

60. *See generally* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

61. Michael G. Allingham & Agnar Sandmo, *Income Tax Evasion: A Theoretical Analysis,* 1 J. PUB. ECON. 323, 330 (1972).

62. Eric Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 VA. L. REV. 1781, 1782 (2000).

Progress in many branches of economics has taken place on the basis of extreme simplification, but a glaring weakness of the Allingham-Sandmo model was evident from the beginning: the level of tax compliance in the U.S. and many other countries, however low for self-reported income, was far higher than could be plausibly explained by the modest penalties and miniscule probabilities of detection. Eric Posner observed in 2000:

> A widespread view among tax scholars holds that law enforcement does not explain why people pay taxes. The penalty for ordinary tax convictions is small; the probability of detection is trivial; so the expected sanction is small. Yet large numbers of Americans pay their taxes. This pattern contradicts the standard economic model of law enforcement, which holds that people violate a law if the benefit exceeds the expected sanction. Some scholars therefore conclude that the explanation for the tendency to pay taxes must be that people are obeying a norm—presumably a norm of tax payment or a more general norm of law-abiding behavior."[63]

Unsurprisingly, a literature on tax compliance developed outside of economics,[64] and some of the economics literature on taxation became "behavioral." Alm identifies two major strands of heterodox economics on taxation, one of which stresses group behavior based on "social norms," which may embrace "social customs, tax morale, appeals to patriotism or conscience, or feelings of altruism, morality, guilt, and alienation."[65]

An example of the complex possible causality suggested by these broader models is illustrated by a study of the impact of Margaret Thatcher's 1990 "local services charge" in the U.K. that hastened the end of her government. The new policy essentially replaced a percentage property tax with a charge not directly related to income or wealth. This was so widely regarded as unfair that it generated mass evasion and was abandoned three years later. Very significantly, the increased evasion did not immediately abate after the policy status quo was restored but instead persisted for up to a decade following the original policy change.[66] Many other less quantified examples of the importance of tax morale are presented by Luttmer and Singhal.[67] Such evidence suggests that a persuasive cost-benefit analysis of major tax initiatives must consider issues beyond the narrow analysis that is often applied.

A. Possible Revenue Gains

FATCA was added the HIRE Act without any formal cost-benefit analysis but after the exposure of wrongdoing by Americans using aggressively complicit Swiss

63. *Id*. at 1782.

64. For a review, *see* Ken Devos, FACTORS INFLUENCING INDIVIDUAL TAXPAYER COMPLIANCE BEHAVIOUR 13-62 (2014).

65. James Alm, *Measuring, Explaining, and Controlling Tax Evasion: Lessons from Theory, Experiments, and Field Studies*, 19 INT'L TAX PUB. FIN. 54, 64 (2012). The other strand employs subjective probabilities and non-expected utility theories at the level of the individual.

66. Timothy Besley, Anders Jensen, & Torsten Persson, *Norms, Enforcement, and Tax Evasion* 2,15, http://people.su.se/~tpers/papers/Draft_140302.pdf. (last visited May 23, 2017).

67. *See* Erzo F. P. Luttmer & Monica Singhal, *Tax Morale*, 28 J. ECON. PERS. 149, 155 (2014).

institutions in a general environment of post-crash disgust with the financial system.[68] Nevertheless, there were lost tax revenue estimates used to justify the initiative. One close student of FATCA[69] suggests an unverified $70 billion dollars estimate by a contract Treasury consultant in 2001 as the basis for a Senate Permanent Subcommittee Report estimate of $100 billion dollars 2008, a number that had been enlarged to $150 billion dollars four years later.[70] But the source footnotes for neither estimate includes a direct reference to that Treasury source. Moreover, the numbers clearly result in part from combining estimates of corporate tax avoidance with personal tax evasion in what the first report calls "offshore tax abuses" and the second "offshore tax schemes."[71]

The Congressional Joint Committee on Taxation in 2010 produced estimates more than two orders of magnitude smaller than the 2008 estimate—only $870 million dollars a year.[72] This number too seems to have no clear source. But whether evasion is distinguished from avoidance or not, the Director of the Internal Revenue Service cast doubt on all estimates in his 2009 testimony that there was no credible estimate of lost tax revenue from offshore tax abuse because "[i]f it is over there and we have not found it, it is hard to estimate what is there."[73]

FATCA might assist in the recovery of some corporate tax revenue, but its justification and declared major aim is to attack evasion of the personal income tax.[74] How might one estimate the potential revenue gain from an effectively functioning FATCA? Pioneering research, some it based on access to previously unobtainable data, led Gabriel Zucman to the conclusion that there was approximate $5.8 trillion of private financial wealth held offshore in 2008, of which three quarters was

68. Scott D. Michel & H. David Rosenbloom, *FACTA and Foreign Bank Accounts: Has the U.S. Overreached?*, VIEWPOINTS, May 2011, at 709.

69. William Byrnes, *Is FATCA 'Much Ado About Nothing'? Is FATCA's Tax Revenue Going to Offset Its IRS and Industry Costs?* KLUWER INT'L TAX BLOG, April 18, 2017 at http://kluwertaxblog.com (last visited July 20, 2017).

70. U.S. Senate, Permanent Subcommittee on Investigations, Staff Report on Tax Haven Banks and U.S. Tax Compliance July 17, 2008 and United States Senate, Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, Offshore Tax Evasion: The Effort to Collect Unpaid Taxes on Billions in Hidden Offshore Accounts, February 26, 2014, at http://www.hsgac.senate.gov/subcommittees/investigation (last visited August 1, 2017).

71. There is no method suggested for either the $100 billion or the $150 billion figure, but the many of sources cited for both estimates explicitly involve corporate income tax issues.

72. Joint Committee on Taxation, JCS610, Estimated Revenue Effects of the Revenue Provisions Contained in an Amendment to the Senate Amendment to the House Amendment to the Senate Amendment to H.R. 2847, the Hiring Incentives to Restore Employment Act.

73. Committee on Homeland Security and Governmental Affairs, United States Senate, *Tax Haven Banks and U.S. Tax Compliance: Obtaining the Names of U.S. Clients with Swiss Accounts*, *Hearings, March 4, 2009*, at 23 at https://www.gpoaccess.gov/congress/index.html (last visited August 14, 2017).

74. John S. Wisiackas, *Foreign Account Tax Compliance Act: What It Could Mean for the Future of Financial Privacy and International Law*, 31 EMORY INT'L. L. J. 586 (2017) (citing *Foreign Account Tax Compliance Act*, IRS (July 15, 2015)).

unrecorded.[75] This is financial wealth only and does not include real property such as land, buildings, and art.[76]

The Zucman stock estimation procedure might yet be challenged, but it seems the best available, and the global number corresponds roughly to estimates from the U.S. State Department of $4.8 trillion dollars in 2000 (based on IMF data) and an OECD 2007 estimate of $5 to $7 trillion dollars.[77] Zucman also estimated that the U.S. fraction was about twenty percent of the total. The U.S. hidden amount in 2008 would then be $870 billion dollars. Zucman's 2014 loss estimate for the U.S., which includes inheritance and estate taxes revenue foregone was $36 billion dollars.[78] One observer based in tax law regards the income and wealth taxation rates used by Zucman as unrealistic because they ignore widely used means of legally avoiding taxes on domestic investment and hence exaggerate tax losses resulting from hiding investment abroad.[79] He uses the same stock figures to estimate U.S. tax losses of from $10 to $23 billion dollars annually.[80]

Little is yet known about how much revenue has actually been raised from FATCA, in part because FATCA was only one of several measures taken by the IRS to increase tax compliance following the financial crisis. These include 1) John Doe summonses (for suspected wrongdoing without knowing the identity of the wrongdoers) 2) suspicious transaction reporting, which began in the 1990s, and 3) various voluntary disclosure programs. The later allows miscreants not yet under audit to step forward for reduced penalty. Several disclosure programs produced 60,000 non-compliant taxpayers between 2009 and 2016.[81]

Using confidential data, a team of researchers discovered that these efforts as a group had a substantial effect on U.S. tax collections through 2011, but the gains recorded were miniscule by comparison with lost revenue as calculated above.[82] Approximately 60,000 accounts with a total value of $120 billion were disclosed.[83]

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75. Gabriel Zucman, *The Missing Wealth of Nations: Are Europe and the U.S. Net Debtors or Net Creditors?* 128 QJ ECON 1321 (2013).

76. *Id*. at 1344.

77. Cited in United States Senate Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, Offshore Tax Evasion: The Effort to Collect Unpaid Taxes on Billions in Hidden Offshore Accounts, Released in Conjunction with the Permanent Subcommittee on Investigations, February 26, 2014, at 9 at http://www.hsgac.senate .gov/subcommittees/investigations (last visited July 9, 2017).

78. Gabriel Zucman, *Taxing Across Borders: Tracking Personal Wealth and Corporate Profits,* 28 J. ECON. PERSPECTIVES 121 (2014).

79. Conor Clarke, *What are Tax Havens and Why Are They Bad?* 95 TEX. L. REV. 59, 65 (2016).

80. *Id.*

81. William Byrnes & Robert J. Munro, *Background and Current Status of FATCA*, Texas A&M University School of Law, Research Paper Series, Research Paper No. 17–31, at 1- 21 at https://www.americansabroad.org/media/ files/files/8f1c0f32/SSRN-id2926119.pdf (last visited Dec. 17, 2017).

82. Niels Johannesen, Patrick Langetieg, Daniel Reck, Max Risch, & Joel Slemrod, *Taxing Hidden Wealth: The Consequences of U.S. Enforcement Initiatives on Evasive Foreign Accounts*, NBER Working Paper No. 24366.

83. *Id.*, at 4.

This translates into an increase in capital income of $2.5 to $3.8 billion and $.7 to $1 billion in tax revenue.[84]

The research just cited found the undeclared funds to be heavily skewed toward large accounts and those held in tax havens.[85] This corresponds with other recent research. Tax compliance in Scandinavia is very high; only about three percent of personal taxes are evaded overall.[86] Nevertheless, employing hacked data from "Swiss Leaks"[87] and "the Panama Papers"[88] Alstadsaeter, Johannesen, and Zucman found that thirty percent of personal taxes are evaded by those in the .01 percent of the wealth distribution[89] largely because so much of their income comes from assets that can be hidden.

The single U.S. study is suggestive, but it was conducted with data so early in the new regime that little can be concluded about FATCA's eventual impact. Moreover, the total compliance benefits of FATCA will always be difficult to assess. The main purpose is to uncover and tax hidden investment, mostly in the hands of very wealthy people. This does mean more revenue collected – ultimately perhaps $10 billion dollars or more per year. But FATCA's success should also affect tax morale and overall compliance behavior—the question is: how much? Put less positively, after nearly a decade of outrage about overseas tax evasion by the rich, what would be the impact on tax morale of an abandonment of attack on evasion using foreign investment? And there are other benefits. Many observers think that FATCA will assist in fighting money laundering and terrorism.[90] Obviously and understandably, combatting terrorism has emerged as a policy goal justifying expenditure greatly exceeding any ordinary cost-benefit calculation of life-saving measures.[91]

B. Cost Estimates

FATCA's cost has caused widespread complaint from the beginning. Much of the foreign outrage in the earliest days after passage was driven by the U.S. government's demand that foreign institutions—and later foreign governments as well—should bear heavy compliance costs while the U.S. alone enjoyed the benefits. Those costs were never estimated by the American government, but many other public and private institutions have presented a raft of figures, most of which appear as notional as many of the revenue estimates.[92] There are some exceptions. For

84. *Id.*, at 38.

85. *Id.*, at 3.

86. Annette Alstadsæter, Niels Johannesen & Gabriel Zucman, *Tax Evasion and Inequality* (Sep. 2017) https://www.nber.org/papers/w23772.pdf (last visited Nov. 14, 2017).

87. International Consortium of Investigative Journalists, *Swiss Leaks: The leaked HSBC files offer a rare glimpse inside one of the world's most private banking systems*, http://projects.icij.org/swiss-leaks (last visited December 20, 2017).

88. International Consortium of Investigative Journalists, *The Panama Papers: Exposing the Rogue Offshore Finance Industry*, https://panamapapers.icij.org (last visited December 20, 2017).

89. Annette Alstadsaeter, Niels Johannesen, & Gabriel Zucman, *supra* note 86.

90. Byrnes & Munro, *supra* note 81.

91. JOHN MUELLER & MARK G. STEWART, CHASING GHOSTS (2015).

92. *Taxing America's Diaspora: FATCA's Flaws, supra* note 33.

example, Her Majesty's Revenue and Customs (HMRC) estimated in 2013 that the initial cost of FATCA in the U.K. would be $1.4 to $2.48 billion dollars with an ongoing annual cost of $77.5 to $139.5 million dollars during the first five years of the program.[93] The German Bankers Association (*Bundesverband deutscher Banke*n) estimated initial costs of $.51 billion dollars and ongoing annual costs of $39.3 million dollars.[94] These are large figures, but they were incurred with the recognition that FATCA would be only the first phase of a web of automatic reporting arrangements that would allow for considerable economies of scope. Moreover, sunk costs are sunk; the large initial costs could be used retrospectively in evaluating overall costs and benefits of the program, but they should have no role in deciding policy now.

All of this ignores compliance costs at the taxpayer level. FATCA set off a firestorm of objections from Americans living abroad that has no analogue in the politics of the CRS, and this is easily explained. As noted, U.S. citizens and permanent residents are taxed on their total income from all sources wherever they are in the world. Many have little or no U.S. tax liability because of the generous and continually adjusted earned income exemption, but income tax forms must still be filed. Moreover, the global taxation system of the U.S. requires a recording of financial (and other) assets quite independent of earnings taxation. While the U.S. does not have a continuous wealth tax, the federal government levies an estate tax and a citizenship relinquishment tax based on wealth, and many U.S. states have either an estate or an inheritance tax or both.[95] These concerns help justify the Foreign Bank and Financial Accounts (FBAR) annual reporting, mandated by 1970 legislation, that until recently was largely ignored by Americans living abroad. FBAR compliance appears to have dropped by fifty percent over the period of 2002–2013.[96] More generally, until the post-crisis crackdown on evasion, Byrnes and Munro have suggested that most Americans abroad were *de facto* in a territorial rather than a global tax system because they simply ignored legally mandated reporting to U.S. authorities.[97] Elise Bean, a former staff member of the Permanent Subcommittee on Investigations testified at FATCA Congressional Hearings in 2017: "Essentially, FATCA leveled the playing field between U.S. taxpayers who open accounts here at home and those who open accounts abroad - subjecting both sets of accounts to equivalent disclosure obligations."[98] This parallels what the CRS does for non-Americans, but the CRS falls much less comprehensively on citizens

93. *Id.*

94. *Id.* The exchange rates used were those prevailing at the time the estimates were presented: 1 pound = 1.55 dollars and 1 euro = 1.31 dollars.

95. Center on Budget and Policy Priorities, *Policy Basics: The Federal Estate Tax* (Nov. 7, 2018), https://www.cbpp.org/research/federal-tax/policy-basics-the-federal-estate-tax (last visited Nov. 14, 2019).

96. Byrnes & Munro, *supra* note 81 at 1–61.

97. Byrnes & Munro, *supra* note 81 at 1–9.

98. Statement of Elise J. Bean before U.S. House Subcommittee on Government Operations on Reviewing the Unintended Consequences of the Foreign Account Tax Compliance Act, at 4 (April 26, 2017), https://oversight.house.gov/hearing/reviewing-unintended-consequences-foreign-account-tax-compliance-act/ (last visited July 25, 2017).

of one country who are living in another. Although countries regulations differ, a long-term sojourn abroad—a change in tax residence—usually cancels home country taxation of all income, sometimes with a departure penalty.[99]

Attacks on FATCA because of its impact on Americans abroad is usually coupled with advocacy of the kind of territorial taxation practiced by nearly all other countries. As U.S. law now stands, however, U.S. taxation paperwork can be avoided only by relinquishment of U.S. citizenship and the payment of capital gains tax on a "deemed realization" of assets evaluated the day before expatriation. Moreover, the U.S. tax obligation does not end there: the U.S. inheritors of the estate of a person relinquishing citizenship will ultimately be taxed at federal estate tax rates.[100]

There are strong arguments both for and against a U.S. shift to territorial taxation for personal income taxation, but until and if that happens, the overseas Americans' quarrel is mainly with the tax code and not FATCA, which increases and enforces their filing obligations but does not raise taxes due.[101]

C. Complicated Reporting

All Americans or resident aliens wherever they are must file form 1040,[102] the basic income tax form. In addition, Congress mandated FBAR in 1970 primarily to bolster the work of the Financial Crimes Enforcement Network (FinCen) of the Treasury although FBAR collection was transferred to the IRS in 2003.[103] FBAR requires the reporting of an enumerated set of financial assets including checking, savings and retirement accounts that reach a value of $10,000 dollars over the course of a year, and such reporting is independent of the income tax.[104] The FBAR threshold has never been modified and now obviously covers a large fraction of Americans living abroad. In addition, FATCA mandates a new report, Form 8938, that demands some of the same information; indeed some call it "shadow FBAR."[105] While IRS officials have stressed the extent to which the forms do not overlap,[106] no complete explanation has been offered for the failure to clarify and integrate asset

99. For a thorough discussion of how various countries deal with the relation among citizenship, residence, domicile (permanent home), and taxation, *see* Edward A. Zelinsky, *Citizenship and Worldwide Taxation: Citizenship as an Administrable Proxy for Domicile*, 96 IOWA L. REV. 1289 (2011).

100. Kudrle, *Expatriation*, *supra* note 17.

101. *See* Bean, *supra* note 98 at 4.

102. Non-resident aliens file Form 1040NR. FR 26,468, May 16, 2003, codified at 31 CFR § 103.56(g).

103. Allison Christians, *Paperwork or Punishment: It's Time to Fix FBAR*, 76 TAX NOTES INT'L 147 (Oct. 13, 2014).

104. Internal Revenue Service, *Comparison of Form 8938 and FBAR Requirements*, https://www.irs.gov/businesses/comparison-of-form-8938-and-fbar-requirements (last visit November 14, 2019).

105. Ajay J. Gupta, *News Analysis: The Fifth Amendment, FBARs, and Their Shadows*, 80 TAX NOTES INT'L 563 (Nov. 16, 2015).

106. Marie Saprie, *Officials Discuss Goals Of Proposed Foreign Asset Reporting Regulations*, 65 TAX NOTES INT'L 989, 992 (2012).

reporting. This has been criticized by both the IRS, Taxpayer Advocate,[107] and a report by the General Accountability Office.[108]

Organizations of Americans living abroad have pressed for a so-called "same country" exception from FATCA requirements of those living outside of the U.S. who hold those assets in the country where they reside.[109] Various proposals either modify the FBAR requirement for such persons[110] or eliminate 8938 reporting.[111] Such measures could be introduced with regulatory discretion, but the Obama administration decided against using it. Although no detailed rationale was offered, the Treasury position is apparently that it should have approximately the same information on persons living abroad as those in the U.S. This does not address the argument that the two asset reports could be better integrated to reduce confusion and redundancy while perhaps melding their major requirements more clearly with the standard 1040 form.[112] Nevertheless, the government could argue generally that additional transactions cost for those abroad, including compliance costs with the U.S. tax system, provides much of the justification for the inflation-indexed income exclusion of more than $100,000 dollars. In fact, some legislative initiatives have tried to repeal that exclusion, apparently as an undesirable "loophole."[113]

Evidence has not yet been gathered on the relative importance of various motivations for the sharp increase in relinquished U.S. citizenship following the heightened attention to foreign reporting of which FATCA is such an important part.[114] The raw number of expatriates jumped from 742 in 2009 to 5411 in 2016, a twenty-six percent increase over the previous year.[115] But this must be considered against the estimated 9 million Americans living abroad in 2016.[116] Anecdotal evidence emphasizes the inconvenience of complying with FATCA, including the refusal of some foreign financial institutions to bear the cost and liability of dealing

107. Byrne, *Is FATCA 'Much Ado About Nothing'? supra* note 69 at 3.

108. *Id*. at 2.

109. Institute on Taxation and Economic Policy, *Foreign Account Tax Compliance Act (FACTA): A Critical Anti-Tax Evasion Tool* (May 2, 2017), https://itep.org/foreign-account-tax-compliance-act-fatca-a-critical-anti-tax-evasion-tool/ (last visited Nov. 14, 2019).

110. Christians, *supra* note 103.

111. John Richardson, *FATCA's Same Country Exemption Won't Work,* TAX CONNECTIONS, 2 (May 10, 2017), https://www.taxconnections.com/taxblog/fatcas-same-country-exemption-wont-work/#.WXPR0oTyupo (last visited August 1, 2017).

112. Christians, *supra* note 103.

113. U.S. Congress, The Bipartisan Tax Fairness and Simplification Act of 2010 (The Wyden-Gregg Bill), 111th Congress, 2nd Session, http://wyden.senate.gov/issues/Legislation/Wyden-gregg/bill_draft.pdf, 11 March 2010 (last visited September 23, 2016).

114. Kudrle, *Expatriation*, *supra* note 17, at 2, suggesting government collection of information about the reasons offered for relinquishing citizenship but, to the author's knowledge, this has not been done.

115. Andrea Darling de Cortes, Alan Winston Granwell & William M. Sharp, *New IRS Procedure Provides Favorable Path for Non-Compliant Expatriates to Become Tax Compliant*, HOLLAND & KNIGHT (Sep. 11, 2019), https://www.hklaw.com/en/insights/publications/2019/09/new-irs-procedure-provides-favorable-path-for-noncompliant-expatriates (last visited Nov. 14, 2019).

116. U.S. Department of State, *Consular Affairs by the Numbers*, https://travel.state.gov/content/dam/travel/CA-By-the-Number-2020.pdf (last visited August 10, 2017).

with Americans in a post-FATCA world.[117] But the latter argument may be exaggerated. Foreign banks and other financial institutions have come to accept FATCA; U.S.-based banks abroad, which must report U.S. depositor earnings directly to the IRS, are almost ubiquitous; and complex banking services are increasingly available online. Nevertheless, as many observers have pointed out, the combination of poor IRS communication, draconian threated penalties for even minor violations, and confusing and duplicative forms, have undoubtedly lowered respect for the U.S. tax system by many Americans living abroad.[118] Among the many problems, the system for matching taxpayers' documents with those of payers has been producing massive false positives and unwarranted withholding that has been corrected only after lengthy delays.[119]

D. IRS Problems

The introduction of FATCA highlighted some very important weaknesses in the IRS. First, the service has seen a dramatic decline in its total resources in relation to assigned tasks. The IRS always faces the need to balance compliance, fairness, helpfulness, and political neutrality. Although these were reconciled with some success as late as the early twenty-first century,[120] the period since has seen an increasingly destructive spiral of declining public confidence, increasing political attack, and declining resources. The IRS budget fell by ten percent from 2010 to 2015 despite the new activity for FATCA and the daunting challenges of handling the records of the Patient Protection and Affordable Care Act (Obamacare).[121] The Trump administration then froze the IRS budget for 2017[122] although the IRS asked for about $127 million dollars in new funding to bolster support for FATCA alone.[123]

117. For an extreme example of difficulties abroad generated by FATCA, *see* Testimony of Daniel Kuettel U.S. House of Representatives Subcommittee on Government Operations, *Reviewing the Unintended Consequences of the Foreign Account Tax Compliance Act*, April 26, 2017, https://oversight.house.gov/wpcontent/uploads/2017/04/Kuettel-Statement-FATCA-4-26.pdf (last visited August 5, 2017); *see* Bean, *supra* note 98, at 5–6.

118. Christians, supra note 103; Byrnes & Munro, *supra* note 81. See also National Taxpayer Advocate, 2013 Annual Report to Congress, Volume 1 , December 31, 2013 pp. 205-247. https:// taxpayeradvocate.irs.gov/2013-Annual-Report/downloads/Volume-1.pdf.

119. Byrnes & Munro, *supra* note 81, at 1–33.

120. Joel Slemrod & Jon Bakija, TAXING OURSELVES: A CITIZEN'S GUIDE TO THE DEBATE OVER TAXES 184 (2004).

121. Byrnes & Munro, *supra* note 81, at 1–30.

122. CCH Tax Day Report, IRS Funding Maintained in 2017 Budget Bill May 3, 2017 available at http://news.cchgroup.com/2017/05/03/irs-funding-maintained-2017-budget-bill (last visited September 1, 2017).

123. Byrnes & Munro, *supra* note 81, at 1–34; Taxpayer Advocate Service, Full 2012 Annual Report to Congress, 5, https://taxpayeradvocate.irs.gov/2012-Annual-Report/FY-2012-Annual-Report-To-Congress-Full-Report.html, states "The significant and chronic underfunding of the IRS poses one of the most significant long-term risks to tax administration today. Because of funding shortages, the IRS is unable to answer millions of taxpayer telephone calls or timely process letters; the tax gap (i.e. the amount of tax due but uncollected) stands at nearly $400 billion each year; taxpayers believe the tax laws are not being fairly enforced against others; and the federal deficit is unnecessarily large." Cited in, Byrnes & Munro, *supra* note 81, at 1–49.

FATCA critics have used the challenges of the IRS as a way of attacking the program. A leading FATCA opponent, Congressman Mark Meadows of North Carolina, cites then IRS commissioner John A. Koskinen as claiming that the IRS can raise $20 dollars for every dollar spent in enforcement.[124] So shifting about $200 million to implement FATCA in the fiscal 2017 budget . . . to the general enforcement area "would increase our tax revenue by over $1 billion, and that is without spending another penny on the overall budget of the IRS."[125] This argument completely ignores tax morale and appears to assume that the social benefits of enforcement activity at every margin can be assessed by revenue raised.[126]

V. OBJECTIONS TO INFORMATION COLLECTION AND SHARING

Conflicting principles of privacy, social obligation, and sovereignty condition the estimates of costs and benefits just reviewed. In particular, from the earliest days of the HTC project, there were objections to international information sharing on grounds of cartelizing the tax collection for bloated governments and of diminishing privacy.

A. Feeding the Beast

The "tax cartel" objection, emanating largely from libertarians, seems demonstrably false. The OECD, the HTC, and both Forums have never suggested minimum personal and corporate tax rates. So U.S. Representative Dick Armey's letter to Treasury Secretary Lawrence Summers in the last days of the Clinton Administration claiming that Administration support for the OECD project threatened to "stamp out tax competition" appears to be wide of the mark.[127] It did indeed aim, as Armey claimed, to "tell other countries to dismantle their privacy laws" to allow the objecting states to collect taxes owed by their citizens and residents.[128] But the absence of an evasion alternative might actually *increase*

124. Mark Meadows, speaking at the *House Subcommittee on Government Operations Hearing: Reviewing the Unintended Consequences of the Foreign Account Tax Compliance Act* (Apr. 26, 2017), at 24:10, available at http://isaacbrocksociety.ca/2017/04/27/reviewing-the-unintended-consequences-of-the-foreign-account-tax-compliance-act-video-and-summary-of-hearing/#Meadows-Closing.

125. *Id.*

126. Michael Keen & Joel Slemrod, *Optimal Tax Administration, Working Paper* 17/8 (July 2016), available at https://www.nber.org/papers/w22408.pdf. Models relating the tax base (all or part of the state's economic activity) and tax rates to costly enforcement and compliance have also generated optimal rules for tax administration. Nevertheless, not only are some of the necessary empirical measures to implement the rules elusive or missing, but the entire framework necessarily omits broader issues of tax morale. As Keen & Slemrod conclude:" the framework here attaches no importance to horizontal equity, either as a welfare concern in itself or in potentially shaping compliance behavior a caveat that applies, however, to almost all optimal tax analysis." *Id.* at 22. Horizontal equity—similarly placed persons should pay similar taxes—would seem to be a very important component of tax morale.

127. Stanley C. Ruchelman & Susan K. Shapiro, *Exchange of Information*, delivered at Step 2002 National Conference in Toronto, Ontario (June 3-4, 2002), at 18, http://publications.ruchelaw.com/pdfs/ExchangeOfInformation11.pdf.

128. *Id.* at 19.

personal income tax competition for high earners because expatriation would be the only escape from residence tax liability.[129]

Opponents of international information sharing often also oppose government withholding on grounds that it enables tax to be collected more easily and arguably less visibly,[130] but, as data presented earlier show, the big compliance gap is not between withholding and automatic reporting but instead between both of those and unverified self-reporting. Libertarian writing fails to confront the connection between government information and tax compliance. For example, one major statement attacking international tax information from two well-known figures connected with the Cato Institute written in 2003 never uses the words "evasion" or "avoidance" at all.[131] Their response might be that government opportunism should not trump financial privacy. But just what kind of privacy claim is being made? Julie Roin wondered many years ago if Representative Dick Armey would oppose employer-based wage reporting to the U.S. government.[132] One inference is that many opposing international exchange of tax information tread lightly on such an issue because their views on *domestic* tax collection would appear extreme[133] and therefore less than compelling as a guide for foreign economic policy.

B. Varying Views on Financial and Tax Privacy

If the U.S. libertarian position on international tax exchange rests on privacy assumptions that most persons find unpersuasive, it can be juxtaposed with another position with very little appeal: that privacy does not exist as an independent right at all because it is not explicitly treated in the Constitution. Perhaps the nearest approach to a privacy right is found in the fourth amendment's strictures on searches and seizures, but the word "privacy" does not appear.

U.S. legal concern for privacy is usually traced to an 1890 article by Charles Warren and Louis Brandeis called "The Right to Privacy."[134] The core of their argument is that the privacy right is the "right to be left alone." Some of the concerns expressed by Warren and Brandeis are captured in the 1948 Universal Declaration of Human Rights: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and

129. And such behavior will likely grow considerably in the future. *See* Kudrle, *Expatriation, supra* note 17; *see also* George J. Borjas, Ilpo Kauppinen, & Panu Poutvaara, *Self-Selection of Emigrants: Theory and Evidence on Stochastic Dominance in Observable and Unobservable Characteristics*, NBER Working Paper No. 21649, http://www.nber.org/papers/w21649 (last visited October 1, 2017).

130. For the case of Veronique de Rugy, an opponent cited here, *see* Joseph J. Thorndike, *Tax Day Is a Drag. Should We Keep It That Way?* TAX ANALYSTS BLOG (March 27, 2017), http://www.taxanalysts.org/tax-analystsblog/tax-day-drag-should-we-keep-it-way/2017/03/27/195826 (last visited 4 September 2017).

131. Richard Rahn & Veronique de Rugy, *Threats to Financial Privacy and Tax Competition,* 491 POLICY ANALYSIS 1 (2003).

132. Julie Roin, *Competition and Evasion: Another View of International Tax Competition*, 89 GEO. L.J. 543 (2001) at footnote 193.

133. *See, e.g.*, Rahn & de Rugy, *supra* note 131, which appears to support the financial privacy practices of Switzerland.

134. Charles Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

reputation. Everyone has the right to the protection of the law against such interference or attacks."[135]

The history of U.S. financial privacy with respect to taxes reveals a contest between two opposing positions that Schwarz has personified as those of Benjamin Harrison and Andrew Mellon (both establishment Republicans).[136] The Harrison position on public tax information for individuals (and corporations) rested on the belief that citizens had a right to know who was paying what share for the common purposes of government and, more practically, that taxes on the well-off were being widely evaded in the gilded age when Harrison was president.[137] Moreover, social pressure against evasion by the well-off could be applied more forcefully if their fellow citizens knew how much or how little they paid. In sharp contrast, Mellon, serving as Treasury secretary a quarter of a century after Harrison was president, strongly favored privacy as what would now be called a human right and adduced evidence from tax inspectors in the field that compliance was not increased by the public availability of tax information, which had been intermittently available in previous years and was being actively debated in the twenties and again during the New Deal.[138] Mellon argued that compliance was actually enhanced by confidentiality on the analogy of the privileged lawyer-client relation.[139]

The actual course of U.S. policy has shown elements of both positions at various points. The Supreme Court position shifted sharply over ninety years. In the 1886 *Boyd* case,[140] compelling the production of business records relevant to taxation was deemed a violation of the fourth and fifth amendments. By the *Garner*[141] case in 1976 involving self-incrimination, it was accepted that such records must be produced.

This change resulted in part from what came to be called "tax exceptionalism," which includes the idea that "The notion of privacy in tax law is not as broad as in tort law or in constitutional law."[142] In *Bull v. United States* in 1935, The Supreme Court observed that ". . . taxes are the lifeblood of government, and their prompt and certain availability an imperious need."[143] *Bull* was decided during an unprecedented expansion of federal activity, but even earlier, following the Revenue of Act of 1913, there was widespread presumption of public access.[144]

The President exercised great authority over the use of federal tax information as "public records" until the Tax Reform Act of 1976 that attempted to narrow the

135. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948), http://www.un.org/en/universal-declaration-humanrights/.

136. Paul Schwarz, *The Future of Tax Privacy*, 61 NAT'L TAX J. 883 (2008).

137. *Id.* at 887.

138. *Id.* at 885.

139. *Id.* at 891.

140. *Boyd v. U.S.,* 116 U.S. 616 (1886).

141. *Gamer v. U.S.,* 424 U.S. 648 (1976).

142. Reuven S. Avi-Yonah & Gianluca Mazzoni, *Taxation and Human Rights: A Delicate Balance*, Public Law and Legal Research Series, University of Michigan Law School, Paper No. 520, September 5, 2016.

143. *Bull v. United States*, 295 U.S. 247, 259 (1935).

144. Schwarz, *supra* note 136, at 885.

range of uses for which tax information would be used and shared.[145] However, there were several acceptable intra-governmental uses at the time of the legislation, and they have grown considerably since.[146] Moreover, there is ample legal precedent for U.S. sharing of financial information with foreign countries for tax purposes. In *Yeong Yae Yun v. United States*, a California court determined that "petitioners have no legitimate expectation of privacy in their bank accounts."[147]

The situation in Europe differs from the U.S. for a number of reasons. First, the EU and associated states have had very different intra-state practices in the past concerning the privacy of financial affairs as well as definitions of and penalties for tax evasion. Second, many European states have historically experienced far more government misuse of financial information than has the U.S.[148] Privacy concerns have been recently bolstered by the growing challenge of data protection in the digital age, which has seen much more highly developed vesting of rights with individuals rather than firms in the EU than in the U.S. This has been codified in the General Data Protection Regulation (GDPR) of 2016.[149]

Europe faces the constant need to reconcile the practices of member states with each other, and this raises the level of attention on many issues that are often taken for granted or ignored in the U.S. In fact, concerns about financial and tax privacy and confidentiality in Europe seem not to have generated much parallel political interest in the U.S., although they were briefly stated in the U.S. "Taxpayers' Bill of Rights" legislated in 2015 to little fanfare.[150] After many years of public declaration of those rights prior to the legislation, the founding

Taxpayer Advocate, Nina Olson, declared her dismay at the widespread view among U.S taxpayers that they have few, if any rights, to contest the procedures or findings of the Internal Revenue Service.[151] Nevertheless, confidentiality *within* the IRS is widely recognized and respected.[152]

A leading European student of the relation of taxation to human rights, Philip Baker, notes: "Although rights-based challenges to [international] information exchange are unlikely to succeed, tax authorities within the Council of Europe must respect fundamental rights when legislating and implementing measures for such practices."[153] Elements of that respect include informing the subject that data will be transmitted with sufficient lead time for the subject to examine those data and correct inaccuracies, and that the data may not be retained for longer than is necessary to

145. Tax Policy Center, *Major Enacted Tax Legislation, 1970-1979*, https://www.taxpolicycenter.org/laws-proposals/major-enacted-tax-legislation-1970-1979 (last visit Nov. 19, 2019).

146. Schwarz, *supra* note 136, at 893.

147. *Yeong Yae Yun v. United States*, 2000 WL 33267334, at *1 (C.D. Cal. Nov. 21, 2000).

148. Commission Regulation, 2016/679 O.J. (L. 119) (2016).

149. *Id*.

150. H.R. 1058, 114th Cong., (2015–2016): Taxpayer Bill of Rights Act, https://www.congress.gov/bill/114thcongress/house-bill/1058

151. Nina Olsen & Philip Baker, *The View from Vienna: Conversations with Jeffrey Owens*, 81 TAX NOTES INT'L 595 (2016).

152. *Id.* at 595.

153. Philip Baker, *Privacy Rights in an Age of Transparency: A European Perspective*, 82 TAX NOTES INT'L 583 (2016).

accomplish the objective of transmittal.[154] In addition, "foreign tax authorities that have inadequate provisions for guaranteeing the confidentiality of data, and which are prone to data leaks, are clearly providing inadequate data protection and cannot possibly receive data whilst these inadequate safeguards exist."[155]

A working party charged to monitor the European Commission's Directive 95/46/EC (the "Data Protection Directive"), concluded in 2016 that "the practical roll-out of CRS in Europe based on existing FATCA IT solutions currently lacks adequate data protection safeguards, notwithstanding the EU proposal to amend the Directive 2011/16/EU regarding [i.e. allowing] mandatory automatic exchange of information in the field of taxation. This Directive—which could be considered as transposition of the US FATCA and CRS into EU law—so far falls short of data protection safeguards."[156] Overall, Baker concludes: "The CJEU [Court of Justice of the European Union] has struck down entire legislative arrangements on information processing due to inadequate protections therein. Large parts of the edifice being erected for AEI [automatic information exchange] could be struck down because the authorities concerned have, in their haste to establish a system for exchange, failed to respect taxpayers' rights."[157] All of this implies that reciprocity in automatic reporting will be watched with great care by EU states; the OECD is very specific that CRS states can demand higher standards for data control in partners than those partners would typically employ for internal purposes.[158]

C. Privacy: Contested Norms

Two major dimensions of data privacy issues need to be distinguished, and FATCA involves both. One relates to the breach of what is understood to be data privacy; the other concerns what information should be private. The European concerns discussed earlier implied that even intra-European financial information exchange could raise questions. Most governments, however, appear to take the position that the current level of tax-relevant information gathering and exchange *within* most high-income countries can be defended, and the major open question is how much international exchange can meet a sufficient standard of confidentiality. Nevertheless, national problems remain, and the U.S. is a prime example.

A GAO Report released in March of 2016 stated:

> Until IRS takes additional steps to (1) address unresolved and newly identified control deficiencies and (2) effectively implement elements of its information

154. *Id.* at 585.

155. Taxpayer Rights Conference, *The Right to Confidentiality and Privacy in an Age of Transparency: A European Perspective*, (August 2019), https://taxpayerrightsconference.com/wp-content/uploads/2016/08/Baker_Final_Paper.pdf.

156. European Union, Article 29 Data Protection Working Party, OECD Common Reporting Standard, Ref. Ares (2014) 3066381 18/09/2014, http://ec.europa.eu/justice_home/fsj/privacy/index_en.htm (last visited 12 October 2017).

157. Baker, *supra* note 153, at 6.

158. Organisation for Economic Cooperation and Development (OECD), Standard for the Automatic Exchange of Financial Information in Tax Matters: The CRS Implementation Handbook (2016), https://www.oecd.org/tax/exchange-of-tax-information/implementationhandbook-standard-for-automatic-exchange-of-financial-information-in-tax-matters.pdf (last visited October 10, 2017).

> security program, including, among other things, updating policies, test and evaluation procedures, and remedial action procedures, its financial and taxpayer data will remain unnecessarily vulnerable to inappropriate and undetected use, modification, or disclosure. These shortcomings were the basis for GAO's determination that IRS had a significant deficiency in internal control over financial reporting systems for fiscal year 2015.[159]

These problems, of course, are much broader than FATCA, but they strongly relate to the European misgivings already recounted. They highlight that confidentiality of data is a problem of utmost urgency within the developed countries, and one that will only increase in complexity as more data are shared among them. To this must be added the challenges posed by the transmission of data to countries with lower technical competence and generally lower probity. Some observers apparently do not regard financial privacy as a very serious concern at all and see the current policy challenges of evasion (and avoidance) as sufficient reason to greatly diminish the levels of financial privacy that currently prevail within many countries, including the U.S. Zucman, for example, suggests a public registry of world financial wealth with amounts and beneficial owners, although he concedes that there would likely be political objection.[160] He writes "there might be a case for starting such a world financial registry only with those countries sharing similar attitudes toward transparency, or to initially keep the information confidentially in the hands of tax and regulatory authorities."[161]

Much OECD activity now aims at gathering data on major firms by country to assist in the collection of the corporate income tax, but there is considerable dispute about how much of that information—if any—should be made public.[162] And many observers draw a sharp distinction between public disclosure for large firms and that for individuals,[163] noting that disclosure for the latter threatens "the right to be left alone" Consistent with this view, the EU is contemplating much more public disclosure of financial information on corporations while public disclosure of financial information linked to individuals would appear to violate the European norm that applies the test of necessity for the intended goal.[164] Given that both FATCA and CRS are in their incipient phases, and their sufficiency when coupled with more conventional measures against evasion remains to be seen, increased public personal information disclosure would be widely regarded as at best premature. And, of course, the U.S. still faces the challenge of fully implementing the reciprocity sought by its FACTA IGA partners.

159. General Accountability Office, *Information Security: IRS Needs to Further Improve Controls Over Financial and Taxpayer Data*, 16–398 (March 2016).

160. Zucman, *supra* note 78.

161. *Id.* at 145.

162. Organisation for Economic Co-operation and Development (OECD), *OECD Work on Taxation*, (2018-2019) https://www.oecd.org/tax/centre-for-tax-policy-and-administration-brochure.pdf.

163. Avi-Yonah & Mazzoni, *supra* note 142.

164. Baker, *supra* note 153.

D. Data Control beyond the U.S. and the EU

The G-20 has now replaced the G-7 (or 8) as the central steering committee of global economic governance, and the OECD has smoothly shifted from its role as a secretariat of the latter to the former group.[165] But the new members of the larger group are very different in many dimensions relevant to international tax cooperation. For example, Transparency International's Corruption Perception Index[166] yields an average score for the G-7 in 2016 of 72.3 (out of 100), while the non-G7 members of the G-20 had an average of 42.1.[167] In fact, Australia at 77 was the only country in the larger group with a score above 46.[168]

The precise meaning of the Transparency Index (or any other) can be debated, but the point is still broadly true that the level of probity is generally much lower among the G-20 newcomers. Moreover, most of the lower income countries are concerned not only with tax matters but also with the violation of exchange controls. For example, using complete absence of controls as "1," the G-7 in recent years has been at that value, as are Canada and Australia, but group also includes Mexico at .70, Russia at .59, Turkey at .45, Brazil at .41, and South Africa at .16.[169] And the figures behind Zucman's average of 8 percent of total financial wealth held offshore reveal enormous variation: the U.S. figure is four percent, as is Asia; Europe is ten percent. But Latin America is twenty-two percent, Africa is thirty percent, and Russia is fifty percent.[170] The sharply contrasting measures on corruption, exchange control, and estimated financial wealth held offshore suggest that many of the states most eager for automatic information exchange are also those with whom such exchange may prove most problematic.

VI. CONCLUSION: U.S. CHOICES IN A RADICALLY CHANGED ENVIRONMENT

At least three broad American positions concerning policy towards international personal tax evasion can be discerned. First, there are those who believe that for reasons of privacy or the efficient deployment of enforcement resources, the modest estimated revenue foregone by comparison with GDP or total federal revenue, imply that rather minor attention should be directed to the evasion

165. The members of the G-20 are Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, the Russian Federation, Saudi Arabia, South Africa, South Korea, Turkey, the United Kingdom, the United States, and the European Union. For more detail on the governance shift, *see* Robert T. Kudrle, *International Tax Cooperation: Different Taxes Imply Different Policy Logics*, prepared for presentation at the 57nd Annual Convention of the International Studies Association Atlanta, March 16–19, 2016 (on file with author).

166. Transparency International, Corruption Perception Index, https://www.transparency.org /research/cpi/overview (last visited December 29, 2017).

167. Byrnes and Munro have noted that of the 167 countries ranked in this index, 117 scored 50 or lower; Byrnes & Munro, *supra* note 81, at 1–119.

168. Transparency International, *supra* note 166.

169. The score is from the Chinn-Ito Index, http://web.pdx.edu/~ito/Chinn-Ito_website.htm (last visited September 23, 2017).

170. Zucman, *Taxing across Borders*, *supra* note 78, at 140.

of tax by Americans using secret overseas investments;[171] this view completely ignores the value of assisting other states. Second, there are those such as the tax law scholar Reuven Avi-Yonah who join the critics of FATCA as intrusive and inefficient, but accept the urgency of addressing tax evasion through foreign investment.[172] He suggests a variant of an approach that was considered some years ago: the small group of modern countries where most of the world's economic activity and real investment take place—the U.S., the EU, and Japan— should revive a thirty percent withholding tax on all payments to tax havens.[173] But such a focus on traditional tax havens does not solve major problems for low income countries, and, in particular, it leaves the aspirations of most of the newer members of the G-20 unfulfilled. The third position is that the U.S. should move towards automatic information exchange on all legal entities, in line the CRS position, and this view seems almost certain to prevail eventually. Within the limits of regulatory authority, the Obama administration did move in that direction, first with the collection of bank interest information for highly restricted sharing and later with the mandate for beneficial ownership information on new financial accounts. The later was introduced with draft legislation mandating the collection of beneficial ownership information on all "legal entities,"[174] a prerequisite for full reciprocity. This clearly fell outside regulatory discretion, and, so far, has gotten no further than the Congressional initiatives discussed earlier. If the U.S. fully implements the current beneficial ownership information on financial accounts mandated by FinCen, the level of reciprocally provided information will likely avoid international censure despite its shortfall from the requirements of the CRS. Perhaps unsurprisingly, given the centrality of the U.S. to both OECD activity and funding, OECD automatic exchange documents now simply explain the U.S. position without condemning it.[175] Should there be backsliding, however, the situation could change.

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171. Tim Worstall, *Gabriel Zucman Shows How Irrelevant Offshore Tax Evasion Is, How Trivial*, FORBES (April 10, 2016), https://www.forbes.com/sites/timworstall/2016/04/10/gabriel-zucman-shows-how-irrelevant-offshoretax-evasion-is-how-trivial/#7da7d6e46764 (last visited August 1, 2017).

172. Avi-Yonah and Mazzoni, *supra* note 142.

173. When this scheme is married to automatic information exchange within the tax-levying groups, it resembles earlier policy suggestions by Hufbauer and Assa and by Kudrle. GARY CLYDE HUFBAUER & ARIEL ASSA, US TAXATION OF FOREIGN INCOME (Peterson Institute for International Economics, 2007); Robert T. Kudrle, *Ending the Tax Haven Scandals,* 9 GLOBAL ECONOMY J. (2009). The Kudrle proposal involves three groups of countries rather than two: automatic exchangers, fully cooperative countries with TIEAs but lacking the probity for automatic information sharing, and non-cooperative states. Both of the last two categories would face 30 percent withholding, but those investors affiliated with the second set could get the withholding released if they could demonstrate that taxes were paid to their home governments. The third category would be comprised of states resistant to information sharing: they would face full non-fundable withholding.

174. *See* U.S. Department of the Treasury, *Amending the Bank Secrecy Act to Require Reporting and Recordkeeping on Beneficial Ownership of Legal Entities* (May 6, 2016), https://www.treasury.gov/press-center/pressreleases/Documents/20160506%20BO%20Legislation.pdf (last visited October 12, 2017).

175. Organisation for Economic Co-operation and Development (OECD), *AEOI Status of Commitments*, https://www.oecd.org/tax/transparency/AEOI-commitments.pdf (last visited October 15, 2017).

The Trump administration will almost certainly not act to strengthen reciprocity because the implementation of FATCA met a narrow nationalist goal. There can be scant confidence that the IRS will be provided with adequate resources and direction to enforce FATCA fairly and efficiently by an unprecedentedly chaotic administration. Still more doubtful would be a substantial closing of the current cooperation gap with nearly all other states. Progress here will probably persist until there is a change in the U.S. executive and legislative branches. But this not certain. Some of those in power now must realize that the prevailing policy asymmetry does more than withhold benefit from others. Tightening the grip on global evasion employing the U.S. would reduce some evasion by Americans, but it would also play a role in diminishing international crime and terrorism. This suggests that the current policy stasis is unlikely to precede a serious reversal of U.S. policy and almost certainly not to one that is long-lasting. The U.S., with the U.K., was slow to concede the need for automatic information exchange, largely out of concern for discouraging financial investment activity. FATCA and developments since have spoken volumes about the urgency and ubiquity of that perceived need. Notwithstanding its highly nationalist introduction, FATCA served as a critical accelerant[176] for a very rapid shift to widespread automatic exchange. The Director of the Internal Revenue Service, John Koskinen, observed in a 2016 speech:

> I had braced for a great deal of negative feedback on FATCA, since we were requiring financial institutions in FTA [Federation of Tax Administrators] countries, at some cost, to provide us information about U.S. taxpayers. But instead, I found uniform enthusiasm among the FTA member countries for the system of reporting that FATCA calls for.[177]

The contagion of CRS suggests that the current trend towards automatic information exchange is irreversible, regardless of immediate impact on tax revenues or evasion estimates. The CRS stands as a visible symbol of commitment that, having been embraced, is vanishingly unlikely to be abandoned. And what foreigners want is almost exactly what the U.S. sought with FATCA but so far has been reluctant to give.

Gaining fully reciprocity from the U.S. for tax-relevant information challenges the global tax community. But that community also faces the need to restrict information to authorities that will use it responsibly. Some of the most corrupt governments are also the most *dirigiste* in economic policy, including international transactions. Bad decisions about automatic exchange—or even about compliance with requests under TIEAs—will almost certainly lead to extortion and other crimes. Striking the right balance between supporting a foreign state's fiscal system and

176. Robert Stack, former Treasury deputy assistant secretary (international tax affairs), declared in late 2017: ". . . without FATCA, there would be no CRS. And not only without FATCA, but without the United States putting a withholding tax on institutions that were not going to give us the information on FATCA, CRS would be nothing. Because no bank in the world would have and no country in the world would have forced their banks to get this information and exchange it if they hadn't already been required to do it under FATCA." *Conversations: Jeffrey Owens and Robert Stack*, 87 TAX NOTES INT'L 715 (Doc 2017–61520).

177. Koskinen, *supra* note 26.

protecting its citizens will challenge policymakers for the indefinite future. More immediately, visible failures with the CRS could provide both a pretext and a reason for delaying a U.S. embrace of greater reciprocity with a larger number of states. Nevertheless, automatic reporting of the kind embodied in FATCA and the CRS will remain permanent parts of the global institutional architecture.