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TREATY EXCHANGE OF INFORMATION PROVISIONS AND SUMMONS ENFORCEMENT: CAN BAD FAITH BE IGNORED IN GOOD FAITH?

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I. Overview

To quash, or not to quash, that is the question.[2] The question arises whether requests from treaty partners issued under administrative summonses are subject to the same rigor as when the Internal Revenue Service (the "IRS") pursues information for its own investigations. Such requests for information are initiated by a country that is a party to a tax treaty with an information exchange provision or tax information exchange agreement ("TIEA")[3] that allows it to seek information needed in its tax investigation of a citizen or resident. When such foreign government makes a request of the U.S. government through a treaty, the IRS Office of the Competent Authority on the U.S. side handles the request.[4] If the taxpayer does not comply with the IRS request for information made by the foreign government (typically in the form of an "Information Document Request"), the IRS can use its administrative summons power to enforce

[1] The author would like to thank Angela Eiref, associate in the New York office of Steptoe LLP, and Santiago E. Gomez, associate in the Washington, DC office of Steptoe LLP, for their contribution in the preparation of this article.

[2] "To be or not to be, that is the question," from William Shakespeare's play, *Hamlet,* Act 3, Scene 1.

[3] This article specifically focuses on information exchange under U.S. tax treaties, though many of the same issues arise under TIEAs.

[4] *See e.g.*, IRM 4.60.1.2.2.4 (February 23, 2023).

the summons in court. Litigation arising from a summons issued on behalf of a treaty partner is handled in much the same way as it would be with respect to an IRS summons issued for a domestic tax investigation.[5] In making a *prima facie* showing for enforcement, the IRS provides a declaration including the Competent Authority's duties and responsibilities of administering exchange of information programs under tax treaties, and the identification and description of the foreign request.[6]

To conduct its investigative and tax collection functions, the IRS requires information from taxpayers and third parties. The IRS has broad authority to "examine any books, papers, records, or other data" that may be relevant to determine or collect a liability for tax, interest, or penalties.[7] The IRS can issue a summons to compel the taxpayer or third party to provide the

[5] *See* Department of Justice, Tax Division, *Summons Enforcement Manual*, (updated July 2011).

[6] *See Id.* at 71. In general, the Competent Authority should aver that: (1) the summons was issued and served in response to a request by a foreign government; (2) the Competent Authority personally reviewed the request; (3) the Competent Authority determined that the request is properly within the scope of the tax treaty in question; (4) the Competent Authority determined that it is appropriate for the United States to give assistance to the foreign country in question pursuant to the request; (5) the foreign tax authorities have reason to believe that the subject of the foreign tax inquiry may have failed to comply with the foreign country's tax laws during the periods covered by the summons; (6) the requested information is not within the possession of the IRS or the foreign authorities; (7) the requested information may be relevant to determination of the foreign subject's tax liability; (8) the same type of information can be obtained by the foreign tax authorities under the foreign country's tax laws; (9) it is the understanding of the parties to the tax treaty in question that information exchanged will be used by the applicant State only for the purposes identified in the tax treaty; (10) exchanged information may be disclosed only as required in the normal administrative or judicial process operative in the administration of the tax system of the applicant State; and (11) improper use of the information would be protested, and if continued, would lead to recommendations to terminate the tax treaty.

[7] Section 7602(a)(1).

requested information.[8] These summonses may be issued directly to a taxpayer, to witnesses, and to third-party recordkeepers.[9]

The IRS is not constrained by the relevance standards used in deciding admissibility of evidence in federal court. Rather, the IRS may issue a summons for items of even potential relevance to an ongoing investigation.[10]

A taxpayer who objects to a third-party recordkeeper summons may seek to quash the summons and prevent the recordkeeper from producing the records sought in the summons. It should be noted a taxpayer can only seek to quash if the taxpayer was entitled to notice of the third-party recordkeeper summons.[11] A proceeding to quash a third-party recordkeeper summons must be commenced no later than the 20th day after the day notice is given by the IRS to the taxpayer.[12] The taxpayer must send a copy of the petition to quash the summons to the third-party recordkeeper and the IRS agent who issued the summons during such 20 day period.[13]

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[8] Section 7602(a)(2).

[9] Third-party recordkeepers are banks, consumer reporting agencies, lenders (including credit card companies), brokers, attorneys, accountants, barter exchange, regulated investment company, enrolled agents, and owners and developers of computer software source code. *See* Section 7603(b)(2).

[10] *U.S. v. Arthur Young*, 465 U.S. 805 (1984).

[11] Section 7609(b)(2)(A).

[12] Section 7609(b)(2)(A).

[13] Section 7609(b)(2)(B); Treas. Reg. §301.7609(b)(2).

II. The Standard for Summons Enforcement

In *United States v. Powell,*[14] the Supreme Court established the four requirements that must be met for an IRS summons to be valid: (1) the investigation must be pursuant to a legitimate purpose; (2) the inquiry must be relevant to that purpose; (3) the information sought must not already be in possession of the IRS; and (4) all administrative steps must be followed. Once the IRS satisfies these requirements, the burden shifts to the petitioner to show the government issued the summons in bad faith.

After the *Powell* decision, subsequent cases before the Supreme Court have made it even more challenging for taxpayers to show the IRS used its summons power in bad faith. The *LaSalle Bank*[15] case held that if the IRS issues a summons for a legitimate purpose, for relevant information, not already within its possession, and prior to a recommendation for criminal prosecution, it has met requirements for enforcement. The court held that the party claiming an impermissible use of a summons for criminal purposes "bears the burden to disprove the actual existence of a valid civil tax determination or collection purpose by the [IRS]."[16]

[14] *United States v. Powell,* 379 U.S. 48 (1964).

[15] *United States, et. al. v. LaSalle Bank,* 437 U.S. 298 (1978).

[16] *Id.* at 316.

In *United States v. Stuart,*[17] the taxpayer petitioned to quash summonses issued at the request of the Canadian government under the U.S.-Canada Tax Treaty. The Supreme Court ruled the IRS was not required to determine that the Canadian tax investigation had not reached a stage analogous to a DOJ criminal prosecution prior to issuing the administrative summonses. The court held, "So long as the IRS itself acts in good faith, as that term was explicated in *United States v. Powell,* and complies with the applicable statutes, it is entitled to enforcement of its summons."[18] Citing *Powell,* the court opined that the IRS is entitled to enforcement unless the taxpayer can show the IRS is attempting to abuse the court's process. "Such an abuse would take place," SCOTUS said, "if the summons had been used for an improper purpose, such as to harass the taxpayer or put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation."[19] The court goes on to say the respondents nowhere allege in their petitions to quash that the IRS was trying to use the District Court's process for some improper purpose, such as harassment or the acquisition of bargaining power in connection with a collateral dispute.

The Supreme Court later held that a summoned party's bare allegation that the IRS issued a summons in bad faith does not entitle the summoned party to examine IRS officials during the

[17] *United States v. Stuart,* 489 U.S. 353 (1989).

[18] *Id.*

[19] *Id.*

summons enforcement proceeding to determine if the summons was issued in bad faith.[20] A summoned party could examine the IRS officials only upon pointing to specific facts or circumstances plausibly raising an inference of bad faith. "Naked allegations of improper purpose are not enough: the taxpayer must offer some credible evidence supporting his charge."[21]

The Supreme Court held the IRS has broad power to issue summonses to third parties to aid in the collection of a tax debt without giving notice to account holders in *Polselli v. United States.*[22] The Sixth Circuit historically allowed the IRS to issue a summons for an account holder's records without notice. The Ninth Circuit held that the notice exception could only apply if the delinquent taxpayer had a legal interest in the targeted account. The Supreme Court sided with the Sixth Circuit's interpretation. The court declined to determine what "in aid of collection" of an assessment or judgment means.

[20] *United States v. Clarke*, 573 U.S. 248 (2014).

[21] *Id.*

[22] *Polselli v. United States*, 598 U.S. 432 (2023).

III. Tax Treaty Exchange of Information Provisions

The United States has income tax treaties with a number of foreign countries.[23] These bilateral agreements prevent double taxation of the same income for individuals and businesses engaging in cross-border activities. Tax treaties also provide for the exchange of information between tax authorities to help enforce compliance and prevent taxpayers from hiding income or assets.

The exchange of information provision in tax treaties is exemplified by the following scenario. Taxpayer X is under investigation in Spain, a country with which the United States has a tax treaty containing an exchange of information provision. The Spanish tax authority (the treaty partner) requests that the United States IRS produce bank records and brokerage account records located in the United States related to Taxpayer X (who may or may not be a U.S. citizen). The IRS then issues a summons for the records to the U.S. banks and brokerage firms (the third-party summonses) based on the treaty request. The U.S. banks and brokerage firms are legally obligated to comply with the summonses unless the summonses are successfully

[23] The United States currently has tax treaties with Armenia, Australia, Austria, Azerbaijan, Bangladesh, Barbados, Belarus (partially suspended), Belgium, Bulgaria, Canada, Chile, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Georgia, Germany, Greece, Iceland, India, Indonesia, Ireland, Israel, Italy, Jamaica, Japan, Kazakhstan, Korea, Kyrgyzstan, Latvia, Lithuania, Luxembourg, Malta, Mexico, Moldova, Morocco, Netherlands, New Zealand, Norway, Pakistan, Philippines, Poland, Portugal, Romania, Russia (partially suspended), Slovak Republic, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Tajikistan, Thailand, Trinidad, Tunisia, Turkey, Turkmenistan, Ukraine, Union of Soviet Socialist Republics (USSR) (treaty partially suspended for Belarus), United Kingdom, Uzbekistan, and Venezuela. *See https://www.irs.gov/businesses/international-businesses/united-states-income-tax-treaties-a-to-z.*

challenged in a U.S. court. If Taxpayer X does not challenge summons enforcement, or if his challenge fails, the IRS uses the summonses to gather the records from the banks and brokerage houses and sends them to Spain per the treaty agreement. Sounds simple, doesn't it? Well, maybe not.

Tax treaties allow non-U.S. tax authorities to use the IRS as an agent of their investigation and extend their investigative reach into the United States. However, both U.S. and non-U.S. taxpayers may be surprised to learn that the IRS has served a summons on a U.S. entity (*e.g.*, a U.S. bank or brokerage firm) to obtain information that will assist a non-U.S. tax authority's investigation.

IV. Practical Issues with the Enforcement of the Exchange of Information

The United States is required to respond to a request under a bilateral tax treaty by obtaining the requested information in the same manner and to the same extent as if a U.S. tax were involved.[24] However, enforcement of summonses issued under Tax Treaty Exchange of Information provisions can present a challenging situation. If the treaty partner, for example: systemically acts in bad faith; awards tax examiners incentive bonuses based upon the amount of tax assessed; makes exchange of information requests to harass taxpayers; requires taxpayers to pay disputed tax amounts and exorbitant penalties before judicial review; and, threatens criminal

[24] 2016 U.S. Model Treaty, art. 26(4). *See also* I.R.M. §4.60.1.2.2.4 (October 15, 2018).

prosecution to exact civil settlements--how does that play out? *Stuart* imposes significant obstacles to overcome, in such a situation, given that it stands for the broad proposition that only bad faith on the part of the IRS is disqualifying. Surely, systemic bad faith on the part of the treaty partner should not be immunized.

In *Barquero v. United States,*[25] the Fifth Circuit held the IRS has power to issue summonses on behalf of a foreign government. Summonses issued to the taxpayer's bank under the U.S.-Mexico Treaty were enforced. The taxpayer's bad faith argument was rejected because he failed to present any facts showing the IRS was using the district court's process for some improper purpose "such as harassment or the acquisition of bargaining power in connection with some collateral dispute."[26]

In the companion cases, *Caruso v. United States*[27] and *Tirelli v. United States*[28], a federal district court upheld administrative summonses seeking phone records and data from Apple under the U.S. – Switzerland Tax Treaty. The court found that the IRS met the *Powell* requirements. The petitioners had argued that the summonses were issued in bad faith because the Swiss authorities were investigating a potential crime, the summonses were issued to aid that

[25] *Barquero v. United States,* (5th Cir. 1994).

[26] *Id.* citing *Powell* and *Stuart.*

[27] *Caruso v. United States,* 136 AFTR 2d 2025-5731 (N.D. Cal. Aug. 28, 2025).

[28] *Tirelli v. United States,* 136 AFTR 2d 2025-5734 (N.D. Cal. Aug. 28, 2025).

criminal investigation, and Section 7602(d)[29] limits the IRS's summons authority if a case has been referred to the U.S. Department of Justice (the "DOJ") for criminal prosecution. The court disagreed and concluded that Section 7602(d) cannot be used to imply bad faith on the part of the IRS due to a foreign criminal investigation.

The court in *Caruso* and *Tirelli* denied an evidentiary hearing citing *Puri v. United States,*[30] for the proposition that, absent bad faith on the part of the IRS, looking "beyond a facially proper request to determine the true motivations of the requesting foreign government…would run counter to what the Supreme Court said in *Stuart.*"

In *Puri*[31], the Ninth Circuit affirmed the district court's ruling to dismiss third-party summonses that the IRS used to obtain bank records under the U.S.-India Treaty. The IRS made a *prima facie* case for enforcement, which the taxpayer failed to rebut when she made a generalized assertion that the Indian tax authorities' true purpose was to harass her family and members of political opposition. In rendering its decision, the court cited *Stuart, Lidas, Mazurek* and *Villareal,* with one concurring judge stating, "I have serious separation-of-powers concerns for even raising the prospect that courts can look through the Executive branch's decision to

[29] Section 7602(d) generally prohibits the IRS form using administrative summons authority to aid in an investigation if a DOJ referral is already in effect for that same taxpayer and tax period.

[30] *Puri v. United States,* 2022 WL 3585664 at 1 (9th Cir. Aug. 22, 2022).

[31] *Id.*

comply with an international treaty and surmise the motives of a foreign government."[32] The Supreme Court denied a writ of *certiorari.* It thus did not take up petitioner's argument that the Ninth Circuit's holding was based on too narrow a reading of *Stuart's dicta* and that *Stuart* did not immunize summonses issued pursuant to treaty requests from being scrutinized under "other components of bad faith"[33] And the separation of powers concern, at this point, remains an academic issue.

In *Lidas*[34]*,* foreign taxpayers filed a motion to quash summonses issued under the U.S.-France Treaty, and the court rejected the taxpayer's argument that the summons was improper because it was related to a "foreign" rather than an "internal" tax liability. The court held that the *Powell* test also applies when the IRS issues a summons at the request of a treaty partner: "The IRS is thereby bound by law to employ the same procedures to obtain information requested by

[32] *Id.*

[33] *Id. cert. denied* June 30, 2023.

[34] *Lidas Inc. v. United States,* 238 F.3d 1076 (9th Cir. 2001). *See also Zhang v. United States* 130 AFTR 2d 2022-6282 (9th Cir. 2022) (The Ninth Circuit rejected the taxpayer's argument that Canada's bad faith is relevant to determining if summonses issued under the U.S.-Canada Treaty were valid under *Powell's* second step. The court stated it was "not this Court's job to interpret Canadian law."); *United States v. Manufacturers and Traders Trust Company,*51 AFTR 2d 83-1125 (2nd Cir 1983) (The Second Circuit held summonses issued for bank records under the U.S.-Canada Treaty were enforceable even though the information would be used for criminal investigators and prosecutors in Canada. The court stated Canada might consider it a failure to commit to enforcement if the summonses were refused and further mentioned international relations might be damaged.); *Mazuek v. United States,* 88 AFTR 2d 2001-6718 (5th Cir. 2001) (The Fifth Circuit rejected the taxpayer's argument that the French Taxing Authority was trying to obtain information under the U.S.-France Treaty that it would not otherwise be able to obtain while he continued to appeal the French determination of his residency. The court held that it was unnecessary to determine what would be allowed or disallowed under a foreign law. "As long as the IRS acts in good faith, it need not also attest to – much lest prove – the good faith of the requesting nation.")

France pursuant to the Treaty as it would employ in the investigation of a domestic tax liability."[35]

V. Architecture of Treaty-Based Exchange of Information

Modern income tax treaties treat the Exchange of Information (EoI) as both an enforcement tool, but also place constraints on how far tax administrations may go when they enlist each other's administrative cooperation. Both the OECD Model Tax Convention and the 2016 U.S. Model Tax Treaty place EoI in Article 26.[36] These articles, together with parallel provisions on assistance in collection, supplement the *Powell* framework, incorporating confidentiality and public policy concepts.

Both the OECD and U.S. model conventions frame Article 26 as a broad grant of authority to exchange information relevant to tax enforcement. These instruments speak of information "as is foreseeably relevant," with the U.S. model using the standard derived from I.R.C. § 7602.[37] Moreover, in most cases, the authority to exchange information is not restricted by the general scope provisions. Article 26(1) of the 2016 U.S. Model explicitly provides that the

[35] *Id.*

[36] Organisation for Economic Co-operation and Development, Model Tax Convention on Income and on Capital: Condensed Version 2017 [OECD Model], art. 26 (OECD, 2017), https://doi.org/10.1787/mtc_cond-2017-en
U.S. Dep't of the Treasury, United States Model Income Tax Convention art. 26 (2016), https://home.treasury.gov/system/files/131/Treaty-US-Model-2016_1.pdf

[37] OECD Model, Art.26(1)

restriction in Article 1 or Article 2 does not apply for information exchange purposes.[38] In other words, EoI can be used to gather information on taxes other than income taxes including information on non-residents.

The U.S.-Spain Treaty, Article 27(4)/(5), and the OECD Model 26(4)/(5), require a State, in response to an EoI request, to use all domestic enforcement tools, even in the absence of direct tax interests or in the face of secrecy restrictions. These provisions reflect more modern language in light of prior disputes about the scope of information exchange provisions, with the most well-known case being a disagreement between the United States and Switzerland about the interpretation of the language of an older treaty provision, with the Swiss authorities declining to exchange information due to bank secrecy laws and a lack of domestic interest.[39]

Because Article 26 mandates that a requested State cannot refuse to provide information merely because it has no domestic interest, the IRS may compel U.S. banks and brokers to produce records it doesn't need, only to satisfy a treaty partner's Article 26 request.[40] Under IRS

[38] U.S. Model, Art. 26(1) ("…The exchange of information is not restricted by paragraph 1 of Article 1 (General Scope) or Article 2 (Taxes Covered)")

[39] *See* U.S. Senate Committee on Foreign Relations, Full Committee Hearing: Treaties (Feb. 26, 2014), https://www.foreign.senate.gov/hearings/treaties-02-26-2014; Bruce Zagaris, U.S. Senate Committee on Foreign Relations Focuses on Information Exchange and Enforcement Aspects of Pending Tax Treaties, 30 No. 5 Int'l Enforcement L. Rep. 161 (May 2014). ("The proposed 2009 protocol with Switzerland eliminates the present treaty requirement that the requesting treaty country establish tax fraud or fraudulent conduct or the like as a basis for exchange of information and provides that domestic bank secrecy laws and lack of domestic interest in the requested information are not possible grounds for refusing to provide requested information")

[40] U.S. Model, Art. 26(1) *et seq.*

guidance, the case analyst determines whether the EoI request meets both the treaty and *Powell* standards.[41]

a. The U.S.–Spain Treaty: A Case Study

Article 27 of the U.S.–Spain income tax treaty, amended by the 2013 Protocol, also adopts the standard of exchange as "foreseeably relevant." Article 27(1) mandates that each State exchange information that is *foreseeably relevant* for implementing the treaty or the domestic laws of either State, specifically "concerning taxes of every kind imposed at the national level," including U.S. estate and gift taxes, not just income taxes covered by Article 2 of the treaty. [42] The Technical Explanation (TE) underscores that information exchange is allowed even where the underlying transaction is purely domestic from the requesting State's perspective. It also makes clear that the *foreseeably relevant* standard is intended to enable EoI to the broadest possible extent. [43] It expressly aligns that standard with the familiar U.S. "may be relevant"

[41] I.R.S. Internal Revenue Manual, pt. 4.60.1.2.2.4(2) (Feb. 23, 2023) ("Upon receiving an EOI request from a foreign partner, the EOI analyst assigned to the request will determine whether the request falls within the EOI provisions of the applicable international exchange agreement, and whether the service of a summons for the requested information satisfies the four *"Powell"* requirements")

[42] Convention Between the United States of America and the Kingdom of Spain for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, U.S.–Spain, Feb. 22, 1990, S. Treaty Doc. No. 101-16, as amended by Protocol signed Jan. 14, 2013, S. Treaty Doc. No. 113-4. (US-Spain 2013 DTT) (Article 27… shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed by a Contracting State to the extent that the taxation thereunder is not contrary to the Convention") (Emphasis added).

[43] Technical Explanation of the Protocol Amending the Convention Between the United States of America and the Kingdom of Spain for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes

language in I.R.C. § 7602 and, taking it even one step further, in line with the Supreme Court's articulation of "potential relevance" in *Arthur Young.*[44] In addition, the TE emphasizes that the standard is not a license for "fishing expeditions".[45]

Recent cases have addressed motions to quash third-party recordkeeper summonses issued pursuant to the U.S.-Spain Treaty. In *Rabassa*, the 11th Circuit relied on the U.S.–Spain Treaty's TE to justify that the information exchange "is not restricted" by the residence rule in Article 1.[46] Article 27 thus allows requests for and the sharing of information about persons who are not residents of either Contracting State. In *Rabassa*, the court reaffirmed that a good faith review is focused exclusively on the IRS, not on Spain. After relying on *Powell's* four-factor test and the limited scope of judicial oversight described in *Clarke*, the panel stated that the court's "focus is

on Income and Its Protocol 46–47 (June 19, 2014). ("Thus, the language of paragraph 1 is intended to provide for exchange of information in tax matters to the widest extent possible, while clarifying that Contracting States are not at liberty to engage in "fishing expeditions" or otherwise to request information that is unlikely to be relevant to the tax affairs of a given taxpayer.").

United States v. Arthur Young & Co., *supra* note 10. ("The District Court and the Court of Appeals determined that the tax accrual workpapers at issue in this case satisfied the relevance requirement of § 7602, because they "might have thrown light upon" the correctness of Amerada's tax return); Id. at 465 ("The language "may be" reflects Congress' intention to allow the IRS to obtain items of even potential relevance to the ongoing investigation, without reference to its admissibility.")

[45] Technical Explanation of the Protocol at 47 ("the language "may be" would not support a request in which a Contracting State simply asked for information regarding all bank accounts maintained by residents of that Contracting State in the other Contracting State, or even all accounts maintained by its residents with respect to a particular bank.")

[46] *Rabassa v. United States*, No. 23-12445 (11th Cir. Apr. 3, 2024).

on the IRS's good faith in issuing the summons, not the treaty partner's good faith in requesting the information," citing *Mazurek* and *Stuart*.[47]

In another recent case examining the validity of third-party summonses issued under the U.S.-Spain Treaty, the taxpayer argued Spanish tax authorities were pursuing the case in bad faith or for an illegitimate purpose and there was no determination the petitioners were residents under Spanish law.[48] The court cited *Mazurek* in determining the IRS summons was issued for a legitimate purpose, "Assisting the investigation of a foreign tax authority has been held to be a legitimate purpose by itself."[49] The court held the taxpayer did not meet its heavy burden to disprove the first *Powell* factor because the purpose or propriety of the Spanish tax authorities is not relevant.

In the September 2025 case of *Alvarez,*[50] the Spanish tax authority asserted the petitioners were Spanish tax residents and as such should be taxed by Spain on their worldwide income and issued summonses for assets held in U.S. financial institutions. The petitioners argued the summonses should be quashed because the information may be improperly used in a criminal

[47] *Id.* at 6 ("Our focus is on the IRS's good faith in issuing the summons, not the treaty partner's good faith in requesting the information"); *supra* note 17.

[48] *See Verges v. United States*, 121 AFTR 2d 2018-2287 (SD Fl. 2018).

[49] *Id.*

[50] *Alvarez, et al., v. United States*, 136 AFTR 2d 2025 (ND Cal. 2025).

prosecution by the Spanish tax authorities. The court rejected the argument because the petitioners were not subject to a referral to the Justice Department as contemplated by Section 7602(d) and cited *Stuart*, "So long as the summons meets statutory requirements and is issued in good faith, as we defined that term in *Powell*, compliance is required, whether or not the [foreign] tax investigation is directed toward criminal prosecution under [foreign] law."[51]

Embedded in Article 27 of the U.S.-Spain Treaty is a confidentiality and public policy safeguard. Paragraph 2 requires that information exchanged be treated as secret and subject to the same disclosure constraints as information obtained under the receiving State's domestic law. Confidentiality under Article 27(2) of the treaty operates on the basis of the principle of equivalence of treatment.[52] This confidentiality obligation explicitly covers Competent Authority correspondence, not just taxpayer data, and limits disclosure to persons involved in tax administration, enforcement, or oversight, including judicial proceedings and legislative oversight bodies. Paragraph 2 tacitly implies that the *requested* State may suspend assistance where it determines that the requesting State is not complying with its confidentiality duties and

[51] *Id.* Citing *Stuart, supra* note 17 at 356.

[52] U.S.-Spain Treaty, Article 27(2) ("treated as secret, subject to the same disclosure constraints as information obtained under the laws of the requesting State").

authorizes the Competent Authorities to adopt specific arrangements or memoranda of understanding on confidentiality.[53]

Paragraph 3 closely mirrors the OECD Model by carving out a public policy and trade secrets exception: neither state is required to: 1) carry out administrative measures at variance with its own or the other State's law or administrative practice, 2) supply information not obtainable under the laws or administrative practice of either state, or 3) disclose trade, business, industrial, or professional secrets, or other information whose disclosure would be contrary to public policy.[54]

Paragraph 4 further confirms that there is no domestic "tax interest" requirement. That is, when information is properly requested, the requested state must use its information-gathering powers "as if" the tax in question were its own, even when it has no direct tax stake.[55] Paragraph

[53] Technical Explanation of the Protocol at 49 (Paragraph 2 of New Article 27 notes that "in situations in which the requested State determines that the requesting State does not comply with its duties regarding the confidentiality of the information exchanged under this Article, the requested State may suspend assistance under this Article until such time as proper assurance is given by the requesting State that those duties will indeed be respected. If necessary, the competent authorities may enter into specific arrangements or memoranda of understanding regarding the confidentiality of the information exchanged under this Article.")

[54] Technical Explanation of the Protocol at 50 (Paragraph 3 of New Article 27 notes that "the obligations undertaken in paragraphs 1 and 2 to exchange information do not require a Contracting State to carry out administrative measures that are at variance with the laws or administrative practice of either State. Nor is a Contracting State required to supply information not obtainable under the laws or administrative practice of either State, or to disclose trade secrets or other information, the disclosure of which would be contrary to public policy.")

[55] US-Spain 2013 DTT, Article 27(4). ("If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes."); *See also.* Rhoades & Langer, U.S. Int'l Tax'n & Tax Treaties Par. 4 Spain-1 (Thomson Reuters, current through 2025).

5 then removes bank secrecy as a defense by making clear that the obligation to provide information extends to information held by banks and other financial institutions, as well as to beneficial ownership information.[56]

b. Ambulatory Interpretation, Confidentiality, and Public Policy under Article 27.

The *Rabassa, Verges and Alvarez* cases addressing enforcement of third-party summonses under the U.S.-Spain Treaty align with the existing body of case law addressing summons enforcement under tax treaties including *Stuart, Barquero, Lidas, Mazurek, Puri, and Zhang*. Courts generally will not scrutinize the foreign authority's investigation request or its subsequent handling of the information. An issue the judiciary has not yet addressed is the Spanish treaty's ambulatory interpretation provision, as per the OECD Commentary, in relation to the confidentiality and public policy safeguards.[57] Read against the backdrop of the Spain treaty's ambulatory interpretation requirement, the confidentiality regime of Article 27 is not frozen at the time of signature. On the contrary, it incorporates the evolving OECD understanding of

[56] Note that Paragraph 7 deals with collections, not directly with EoI, so it's not directly relevant to this analysis.However, it preserves the fundamental limitation that no State is required to undertake collection measures that would conflict with its domestic law, established administrative practice, or its sovereignty, security, or public policy.

[57] Technical Explanation of the Protocol at 53, Article XIV ("Paragraph 9 deletes paragraph 19 of the Protocol of 1990. The deletion of prior paragraph 19 permits the Contracting States to interpret Article 27 (Exchange of Information and Administrative Assistance) of the Convention as amended by Article XIII, in an ambulatory manner and consistently with the prevailing Commentaries of the OECD Model")

Article 26. For instance, the OECD Commentary 2025 update offered additional guidance on the treatment of "reflective" information and on taxpayer access to EoI materials.[58]

The *Rabassa* opinion referenced the TE to justify Spain's capacity to request information about non-residents. However, it did not consider the TE's confidentiality standard or suspension of EoI language under Paragraph 2, nor its public policy exception under Paragraph 3.[59]

Several features of the OECD Commentary deepen or extend the confidentiality standard beyond what the Spain Protocol and its Technical Explanation provide. Commentary 26(12) instructs that EoI data should not be disclosed to persons or authorities not mentioned in paragraph 2, regardless of domestic information disclosure laws, including legislation that allows greater access to governmental documents (FOIA-type laws), a stronger constraint than anything

[58] OECD, the 2025 Update to the OECD Model Tax Convention on Income and on Capital, OECD Publishing (Nov. 19, 2025), https://www.oecd.org/content/dam/oecd/en/publications/reports/2025/11/the-2025-update-to-the-oecd-model-tax-convention_c7031e1b/5798080f-en.pdf . ("Changes to the Commentary on Article 26 to: (i) expressly indicate that information received through exchange of information can be used for tax matters concerning persons other than those in respect of which the information was initially received; and (ii) reflect agreed interpretative guidance on taxpayer access to exchanged information and the disclosure of reflective non- taxpayer specific information about or generated on the basis of exchanged information.") ("The confidentiality rules also apply to reflective non-taxpayer specific information (i.e. information about or generated on the basis of the information that was received by a Contracting State through the exchange of information such as, statistical data, as well as non-taxpayer specific notes, summaries, and memoranda incorporating exchanged information). (Clarifying that information received through exchange may be used for tax enforcement involving other taxpayers, and the receiving State need not notify or seek approval from the sending State for that use, subject only to the special confidentiality rule in paragraph 11).

[59] Technical Explanation of the Protocol, supra note 53; Supra note 54.

articulated in the TE. This aligns with U.S. Internal Revenue Manual guidance, which states that disclosure restrictions apply to information from EoI agreements, and that IRS offices must contact the EOI Program before releasing such information in response to FOIA requests.[60]

The OECD Commentary 26(12.2) also adds an explicit bar on disclosure to third countries absent an express treaty provision.[61] Moreover, Commentary 26(19.1) directs the requested State, in applying secrecy rules, to "take into account the confidentiality rules of Paragraph 2," and to supply information where there is "no reasonable basis for assuming that a taxpayer involved may suffer any adverse consequences incompatible with information exchange."[62]

[60] OECD, Model Tax Convention on Income and on Capital 2017 (Full Version), Commentary on Article 26 para. 12, at C(26)-14 (2019; (Suggesting that freedom of information regimes cannot be used to pry open treaty secrets); I.R.S. Internal Revenue Manual, pt. 4.60.1.1.2.1(3) (Feb. 23, 2023) ("Strict disclosure restrictions extend to the treatment of information received from a foreign jurisdiction under an international exchange agreement via the U.S. Competent Authority. Any IRS office in possession of such information must first contact the EOI Program for approval to disclose the information to any person outside the Internal Revenue Service, including to other U.S. government agencies where such disclosure is not expressly provided in the use and disclosure provisions of the international exchange agreement. Moreover, if any IRS office in possession of information originally received from foreign tax officials under an international exchange agreement is requested to disclose any such information and/or wishes to consult the foreign officials prior to releasing such information in response to court orders, subpoenas, or Freedom of Information Act (FOIA) requests in the U.S., that office must consult the EOI Program, which will in turn consult with the foreign tax officials as appropriate…")

[61] OECD, Model Tax Convention on Income and on Capital 2017 (Full Version), Commentary on Article 26 para. 12.2, at C (26)-15 (2019). ("12.2 The information received by a Contracting State may not be disclosed to a third country unless there is an express provision in the bilateral treaty between the Contracting States allowing such disclosure.")

[62] Id. Para. 19.1, at C (26)-20 (2019). ("Contracting State may decide to supply the information where it finds that there is no reasonable basis for assuming that a taxpayer involved may suffer any adverse consequences incompatible with information exchange.")

OECD Commentary on Article 26 explains that the public policy exception protects only the vital interests of the requested State and is triggered only in exceptional circumstances. The Commentary provides that Contracting States are not required to supply information "in extreme cases," such as politically, racially, or religiously motivated investigations or where disclosure of "State secret" materials would compromise the requested State's vital interests. Under Commentary 26(19.5), these public policy issues "rarely arise" in treaty-based exchange so as not to render the mechanism ineffective.[63]

The result is a doctrinal framework in which the treaty itself recognizes the possibility of serious confidentiality or public policy concerns on the requesting State's side and provides tools to address them (suspension, consultation, termination). At the same time, judicial review of domestic summonses remains too indifferent to these concerns.

VI. Application to the Taxpayer X Scenario under the U.S.-Spain Treaty

In the hypothetical, Taxpayer X was under investigation in Spain, with the Spanish tax authority requesting U.S. bank and brokerage records and the IRS issuing third-party summonses

[63] OECD, Model Tax Convention on Income and on Capital 2017 (Full Version), Commentary on Article 26 para. 19.5, at C(26)-21 (2019), https://doi.org/10.1787/g2g972ee-en ("19.5 Paragraph 3 also includes a limitation with regard to information which concerns the vital interests of the State itself. To this end, it is stipulated that Contracting States do not have to supply information the disclosure of which would be contrary to public policy (order public). However, this limitation should only become relevant in extreme cases…Thus, issues of public policy … rarely arise in the context of information exchange between treaty partners.")

to U.S. financial institutions. A court confronted with Taxpayer X's petition to quash would begin with an analysis under *Powell* and *Stuart*.

Initially, the IRS EoI analyst must determine whether the request falls within the EOI provisions of the applicable international exchange agreement and whether serving a summons for the requested information satisfies the four *Powell* requirements.

On the first layer, the government's *prima facie* case is predictable:

1) **A legitimate purpose.** The IRS will point to the U.S.–Spain treaty and the Technical Explanation. Under present caselaw, a facially valid Article 27 request carries a legitimate investigative purpose, even in the absence of any U.S. tax interest.

2) **Relevance.** The Spain TE equates "foreseeably relevant" with the familiar § 7602 "may be relevant or material" and *Arthur Young* "potential relevance" standards, while contending that the treaty does not license fishing expeditions. A declaration that Spain is examining Taxpayer X's Spanish tax liabilities for defined years, that the requested account data bears a reasonable connection to that inquiry, and that the IRS has screened the request for foreseeable relevance will generally be deemed sufficient at this layer.

3) **Non-availability of data and procedural regularity.** The IRS will likely aver that it does not already possess the records and that it has complied with I.R.C. § § 7602,

7203 *et seq.*, in issuing the summonses, including by giving notice to the taxpayer of any contacts with third parties under § 7602(c)(1) and properly serving the summons under §7603.

After determining the summons request satisfies the *Powell* factors, the request and analysis of the IRS' good faith should take into account an analysis of treaty principles, including Article 27 of the U.S.-Spain Treaty, the U.S.-Spain TE, the U.S. Model Treaty and Commentary, and the OECD Model Treaty and Commentary. In the Taxpayer X fact pattern:

- **Foreseeable relevance in treaty terms**. The IRS likely reviewed the U.S–Spain Treaty's TE regarding what is foreseeably relevant, including the requirement that broad or class-based requests must be grounded in a specific factual context, and that general demands such as "all accounts of all residents" are regarded as fishing expeditions before issuing a summons to a U.S. bank or broker for Taxpayer X's data.[64] In the case of Taxpayer X, if Spain requests statements, transaction details, and beneficial ownership information, the declaration should elucidate how these categories pertain to the Spanish issues.

[64] Technical Explanation of the Protocol at 47. (Paragraph 1 of New Article 27 … Thus, the language of paragraph 1 is intended to provide for exchange of information in tax matters to the widest extent possible, while clarifying that Contracting States are not at liberty to engage in "fishing expeditions" or otherwise to request information that is unlikely to be relevant to the tax affairs of a given taxpayer.")

- **Confidentiality risk assessment.** In making this assessment, the IRS should assess Spain's current confidentiality record, including Global Forum peer review outcomes and EU cooperation reports.[65] It should also consider the TE and the OECD Commentary's clear guidance that a requested state may suspend assistance if the requesting state does not adequately uphold treaty secrecy.[66] In cases like Taxpayer X, where Spanish penalties are severe, and there have been mounting recent reports raising concerns about leaks or politicized enforcement, the Courts should not abandon their duty to apply the treaty as approved by the Senate. They should instead require a clear showing that the Treaty standards have been met.[67] Similarly, the IRS should be vigilant not to prematurely validate

[65] Global Forum on Transparency and Exchange of Information for Tax Purposes, Spain 2019 (Second Round): Peer Review Report on the Exchange of Information on Request (OECD Publ. 2019), https://doi.org/10.1787/997a7b23-en. (Even if rating Spain overall as Largely Compliant on confidentiality, it explicitly flags concerns that a "large number of inactive companies that maintain legal personality and do not comply with their filing obligations raises concerns that beneficial ownership and accounting records might not be available in all cases); European Court of Auditors, Special Report No. 03/2021, Exchanging Tax Information in the EU: Solid Foundation, Cracks in the Implementation (2021), https://op.europa.eu/webpub/eca/special-reports/tax-03-2021/en/. (Concluding that while the legal framework is in place, the information they exchange is of limited quality and is not widely used, and that they do little to monitor the system's effectiveness, and addresses recommendations directly to Spain to improve data quality, use, and monitoring of exchanged information")

[66] Technical Explanation of the Protocol at 49 (Paragraph 2 of New Article 27 ("In situations in which the requested State determines that the requesting State does not comply with its duties regarding the confidentiality of the information exchanged under this Article, the requested State may suspend assistance under this Article until such time as proper assurance is given by the requesting State that those duties will indeed be respected. If necessary, the competent authorities may enter into specific arrangements or memoranda of understanding regarding the confidentiality of the information exchanged under this Article"); OECD, Model Tax Convention on Income and on Capital 2017 (Full Version)

[67] *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195–97 (2012) (rejecting a political question objection in a foreign affairs case and holding that courts must decide the legality of executive implementation of a statute even

a request when the public record raises serious concerns about these privacy risks, in the absence of Spain's assurances or even entrance into specific agreements to implement proper confidentiality practices, rather than overlooking them.[68]

where recognition and foreign relations are implicated, because *Marbury*'s duty to say what the law is cannot be avoided for political reasons); *Edye v. Robertson*, 112 U.S. 580, 598–99 (1884) (describing a treaty made by the President and Senate as "a law of the land as an act of Congress is" whenever it prescribes a rule for private rights, and instructing that in such cases a court "resorts to the treaty for a rule of decision" just as it would to a statute); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (reaffirming that "it is emphatically the province and duty of the judicial department to say what the law is," including when reviewing the legality of actions by the political branches); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (treating a newly ratified treaty as controlling law in an ongoing case and holding that, where a treaty is "law of the land," it "as much binds" the rights of litigants and must be applied by courts just as an act of Congress, notwithstanding executive control over foreign relations).

[68] Baylos, La Agencia Española de protección de datos impone una sanción de apercibimiento a la agencia estatal de administración tributaria, BAYLOS (Oct. 13, 2023), https://baylos.com/en/blog/2022/la-agencia-espanola-de-proteccion-de-datos-impone-una-sancion-de-apercibimiento-a-la-agencia-estatal-de-administracion-tributari.(reporting the Data Protection Agency reprimand of the Tax Authority over misdirecting a taxpayer notice to an unauthorized relative and finding serious confidentiality and security failures, with only an admonition available as sanction for a public body); Manolo Perezagua Naharro, Ciberataque a la Agencia Tributaria: lo que sabemos hasta ahora, AUDIDAT (Dec. 9, 2024), https://www.audidat.com/blog/noticias/ciberataque-a-la-agencia-tributaria-lo-que-sabemos-hasta-ahora (summarizing the a ransomware incident targeting the Spanish Tax Authority, including publication of screenshots on the dark web and a 38 million dollar ransom demand, and characterizing the episode as revealing serious cybersecurity gaps in Spain's public sector). J. Sérvulo González, Malestar en España por el uso político de datos fiscales, EL PAÍS, Feb. 11, 2015, https://srv00.epimg.net/pdf/elpais/1aPagina/2015/02/epAmerica-20150211.pdf (Reporting allegations by ministry technicians and inspectors that Finance Minister Montoro used or hinted at confidential tax data of political opponents and public figures, skirting rules that make fiscal information reserved); Los cortafuegos de la Agencia Tributaria para evitar una filtración: «Todo queda registrado y puede acabar con una carrera», Gestha (Mar. 16, 2024) https://www.gestha.es/index.php?num=1468&seccion=actualidad. (discussing safeguards and audit trails within AEAT, while recalling prior episodes in which Montoro publicly alluded to "dossiers" on taxpayers, which union commentators describe as political use of tax information); José Manuel Romero, Aguirre, contra Montoro por filtrar su declaración de la renta en 2015: "Han accedido a mis datos en cuatro ocasiones", EL PAÍS (July 18, 2025), https://elpais.com/espana/2025-07-18/aguirre-contra-montoro-por-filtrar-su-declaracion-de-la-renta-en-2015-han-accedido-a-mis-datos-en-cuatro-ocasiones.html (describing criminal investigation of alleged leaking of former Madrid president Esperanza Aguirre's detailed income tax return, including internal AEAT emails transmitting confidential reports to Montoro and prosecutorial concerns about misuse of fiscal data); Mercedes Serraller, Alarma entre los fiscalistas: 571 personas en Fiscalía tienen acceso a los datos del novio de Ayuso, VOZPÓPULI (Nov. 14, 2025), https://www.vozpopuli.com/espana/alarma-entre-los-fiscalistas-571-personas-en-fiscalia-tienen-acceso-a-los-datos-del-novio-de-ayuso.html. (reporting that hundreds of prosecutors and staff had access to the tax file of the

- **Public policy.** Public policy considerations should warrant an inquiry as to Spain's possible treatment of taxpayers and whether honoring a particular EoI request would be contrary to the public policy reservation in Article 27(3) of the OECD Commentary on "extreme" cases. For example, systematic data security concerns, politically driven tax investigations, structurally confiscatory penalties, or procedures that deny any realistic judicial review.[69] In our hypothetical, Taxpayer X is potentially "politically exposed" or otherwise vulnerable. A U.S. court need not rule on Spanish law to ask whether the IRS, in good faith, should have treated those features as triggering at least a more thorough internal review. For instance, a concrete public policy concern could arise if, as some reports suggest, Spain's tax administration systematically stores taxpayer data on unreliable servers.[70] U.S. law, Congress, and the Executive treat certain cloud storage and infrastructure service providers as inconsistent with baseline security expectations for sensitive government information: § 889 of the 2019 National

Madrid regional president's partner before leaks to the press, and noting concerns that ministerial comments and access practices may violate Spanish tax confidentiality rules and criminal provisions on revelation of secrets).

[69] *Id.;* The 2025 Update to the OECD Model Tax Convention, *supra* note 44.

[70] Letter from Sens. Tom Cotton & Rick Crawford to Tulsi Gabbard, Dir. of Nat'l Intel. 1–2 (July 16, 2025) (raising concerns that Spain's Ministry of the Interior awarded €12.3 million in contracts to provide specified "servers and consulting services for Spain's wiretap systems"); Letter from Chairs of the H. Comm. on Energy & Commerce to Howard Lutnick, Sec'y of Commerce 1 (Aug. 8, 2025) (raising similar concerns.).

> Defense Authorization Act and its implementing FAR rules bar federal agencies from contracting with entities that use certain telecommunications equipment as a substantial or essential component of their systems.[71] As discussed earlier, OECD Commentary 26(12.2) adds an explicit bar on disclosure to third countries absent an express treaty provision.[72] Arguably, indirect disclosure, or even negligent disclosure, could be encapsulated in this concept. In that light, routing U.S. taxpayer information into a system built on unreliable data infrastructure could plausibly be viewed as an "administrative measure" that is "at variance with [U.S.] laws and administrative practice" or "contrary to public policy" within the meaning of Article 27(3)(a) and (c), and, at a minimum, as a factor that should trigger more searching internal review by the competent authority.

The Spanish Treaty Article 27 ambulatory reading under its TE, and the OECD Model Commentary, including its 2025 updates, reinforce this analysis. When the IRS asserts to a U.S. court that it has fulfilled its treaty obligations in a Spanish EoI case, merely citing the 2013 text of Article 27 should be insufficient. The "treaty" that the United States applies to Taxpayer X

[71] John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 889, 132 Stat. 1636, 1917–26; Federal Acquisition Regulation: Prohibition on Contracting with Entities Using Certain Telecommunications and Video Surveillance Services or Equipment, 85 Fed. Reg. 42,665 (July 14, 2020) (to be codified at 48 C.F.R. pts. 1, 4, 13, 39, 52) https://www.federalregister.gov/documents/2020/07/14/2020-15293/federal-acquisition-regulation-prohibition-on-contracting-with-entities-using-certain. Additionally, the FCC has formally designated some of these providers as national security threats and prohibited the use of certain public funds on their equipment.

[72] The OECD Model Tax Convention, *supr*a note 61.

incorporates the OECD standards on confidentiality and public policy. A court adopting this framework does not need to sidestep *Stuart*. It simply requires the IRS, when invoking EoI in a case involving Spain, to show that it has thoroughly complied with the provisions of the U.S.–Spain treaty, understanding its dynamic interpretation.

VII. U.S. International Law Considerations

In the analysis above, we underscore that, when the IRS invokes judicial process to enforce a treaty-based summons, courts should view their task as ensuring fidelity to both the treaty and the Constitution. Under *Reid v. Covert*, treaties cannot authorize what the Constitution forbids, and under *Charming Betsy*, statutes should be construed, where fairly possible, in harmony with international obligations rather than in conflict with them.[73] Applied here, those principles suggest that I.R.C §§ 7602 and 7609 should be construed, in the treaty context, in a manner that respects the confidentiality, public policy, and foreseeably relevant constraints that the Executive has accepted in treaties and in OECD interpretive instruments, and that when serious questions arise about systemic misuse, courts may insist that the IRS demonstrate how its

[73] *Reid v. Covert*, 354 U.S. 1, 16–17 (1957) (plurality opinion) (stating that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution," and holding that civilian dependents of U.S. servicemembers overseas could not be tried by court martial pursuant to an executive agreement; stands for the proposition that treaties and executive agreements are subject to constitutional limits and cannot be executed in a way that circumvents due process protections); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (articulating the canon that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"; establishes that, where fairly possible, statutes should be interpreted in harmony with international law and treaty commitments, supporting an interpretation of §§ 7602 and 7609 that respects treaty based confidentiality and public policy limits).

enforcement request is consistent with those constraints. That approach respects the Executive's primacy in treaty-making and foreign policy by holding it to its own commitments.

Moreover, the due process dimension is likewise better grounded in treaty text than in an attempt to constitutionalize foreign tax procedure directly. Many of the suspect foreign practices highlighted in our case study violate the fair and equitable behaviors expected from treaty partners. Thus, under certain circumstances, further cooperation may be contrary to both public policy the treaty's confidentiality provisions.[74] When such practices are pervasive and specifically implicate the use of information obtained through treaty channels, a court could reasonably deny enforcement, not because U.S. due process standards apply directly to the foreign proceeding, but because the treaty itself presupposes a minimum level of protection for exchanged information.[75]

[74] Producing a violation of constitutional individual due process rights which a treaty cannot allow. *See. Boos v. Barry*, 485 U.S. 312, 324 (1988) (quoting Reid for the proposition that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution"; suggesting that as a matter of settled doctrine that treaty or agreement obligations do not displace individual constitutional rights).

[75] *See*. Michael J. Martin & David P. Bettge, U.S. International Taxation: Practice and Procedure Par. 9.03[1], at 9-3 to 9-4 (Thomson Reuters July 2025) (explaining that under exchange-of-information provisions modeled on the U.S. Model Treaty, a requested state is not required "to carry out administrative measures at variance with the laws and administrative practice" of either state, is not required "to supply information that is not obtainable under the laws or in the normal course of the administration" of either state, and may refuse to supply information "the disclosure of which would be contrary to public policy," while requiring exchanged information to be kept secret and used only for treaty tax purposes); *See also*. Boris I. Bittker & Lawrence Lokken, Federal Taxation of Income, Estates and Gifts Par. 65.4.8, at 65-20 to 65-21 (Thomson Reuters Nov. 2025) (summarizing standard exchange-of-information clauses in U.S. treaties as allowing a requested state to "withhold" information that would disclose trade or business secrets or "would be contrary to public policy," while also requiring the requested state to "use its information gathering measures to obtain the requested information" and to treat exchanged information as secret and usable only for tax purposes).

Courts should focus on whether the IRS complied with its own standards when seeking enforcement of summons in Article III courts. The IRM guidelines, applying the treaty standards of foreseeable relevance, confidentiality and use restrictions, public policy exceptions, and the requirement to use domestic tools even without a U.S. tax interest, serve as the Service's criteria for EoI.[76] If the record demonstrates adherence to these standards, the government's *Powell* argument could be more compelling. If not, a court should find that the government has failed to sustain its burden.

VIII. Conclusion

So long as the *Powell* requirements are met by the IRS, the courts have not meaningfully considered the bad behavior of the requesting treaty partner. Such a restrictive reading of the law allows for potential abuse and manipulation of the EoI provisions and for violation of treaty principles. There are clearly foreign taxing authorities that lack transparency and behave in a manner antithetical to our system of justice. Some of these jurisdictions impose disproportionate penalties and use other draconian procedural mechanisms, designed to compel taxpayers into

[76] Internal Revenue Service, Internal Revenue Manual 4.60.1, Exchange of Information, at §§ 4.60.1.1.1(2)(a), 4.60.1.2(5), IRM 4.60.1.1.1(2)(b), 4.60.1.1.2.1(1)-(4), 4.60.1.2(7), 4.60.1.1.1(2)(c), 4.60.1.1.2.2(1)–(4), 4.60.1.1.1(2)(d), IRM 4.60.1.2(2)-(3), IRM 4.60.1.2.2.1(2)–(3), 4.60.1.2.2.4(1)–(5) (Feb. 23, 2023), https://www.irs.gov/irm/part4/irm_04-060-001

paying wrongfully assessed taxes. Moreover, there are foreign jurisdictions that have "pay-to-appeal" systems that require immediate payment of an assessment and leave a taxpayer open to having their assets frozen, seized or confiscated, before judicial review. In certain jurisdictions the presumption of innocence is non-existent, with the burden of proof residing with the taxpayer. Additionally, some foreign taxing authorities, such as the Spanish Tax Authority, offer bonus schemes where tax inspectors receive incentive payments for commencing taxpayer audits.[77] In Spain, the inspectors are allowed to keep their bonuses even if the taxpayers succeed on appeal, inviting conflicts of interest and resulting in the appearance of impropriety. These draconian tax systems result in unconscionable financial and emotional burdens on taxpayers and are contrary to notions of due process and fair play.

Our analysis suggests Article 27 EoI mechanisms depend on broad cooperation and institutional safeguards that the IRS should adhere to. The treaty system views information exchange as vital to enforcement, allowing requesting countries to rely on treaty partners' powers even in the absence of domestic tax interests or when barriers such as bank secrecy exist. In the case of Article 27 of the U.S.-Spain Treaty, Article 26 of the OECD Model Treaty, and the U.S. Model Treaty, confidentiality and public policy should be interpreted in light of the OECD Commentary. When combined with the *Powell* framework, this strongly suggests that the IRS's

[77] *See* "Hacienda vs. The People: An Initial Report on Spain and the Beckham Law," Amsterdam & Partners LLP (May 2025). (Financial rewards received through this bonus scheme appear to have totaled over €2 billion over ten years as a reward for facilitating the collection of additional taxes."

good-faith obligations extend beyond mere technical compliance. It, therefore, is incumbent upon the IRS to review relevance, confidentiality risks, and public policy concerns judiciously. While Courts do not judge foreign investigations or override foreign policy, they should ensure that summonses are not used in ways that are contrary to the terms of ratified treaties.

The test applied in *Stuart* is insufficient. It is too restrictive because it fails to address cases where there is compelling evidence of systemic bad faith on the part of a treaty partner. While a reliable method of exchanging information between sovereign states is necessary for global relations, it is critical to balance this reality with the rights, protection, and privacy concerns of taxpayers.

The easiest and most appropriate solution would be for the U.S. government to engage in greater scrutiny of EoI requests when there is credible evidence of systemic bad faith on the part of the Treaty partner. Where cardinal treaty principles of good faith and confidentiality are being violated and public policy is contravened the executive branch must step up. If it fails to do so adequately, the courts retain the Constitutional prerogative of judicial review. Since the Courts are clearly permitted to review whether the IRS is acting with an improper purpose, it follows that they should be permitted to review whether the systemic bad faith of the foreign actor violates U.S. law as set forth in the provisions of the treaty .