

Adiós, Uncle Sam

Renouncing U.S. Citizenship



During the 2012 election year, the issue of U.S. citizenship made its periodic return to public debate. Much of the discussion centered around the American policy—*jus soli*—that grants citizenship to nearly all persons born on American soil.¹ Tempers flare around the issue of perceived “birth tourism,”² while proponents of *jus soli* point to the advantages of the status quo.³

Meanwhile, there has been a quiet swell in the number of U.S. citizens voluntarily relinquishing their citizenship—and the swell threatens to turn into a tsunami. During 2011, at least 1,781 U.S. citizens or long-term lawful permanent residents (“green card” holders) chose to expatriate themselves. During 2008 the number was 231.⁴ Granted, it is not much, compared with the number of people who naturalize in the United States—694,193 in 2011⁵—but the increase is striking.

For most Americans, the idea of giving up their citizenship is as unthinkable

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All cited Internet materials were accessible as of October 18, 2012.

as cutting off an arm. It is safe to say that the most common reaction to such an idea would be “Why on earth would you want to give up something that so many people would give almost anything to have?” In our experience, it is *not* primarily a matter of political protest or disaffection, as some might think. It is often not even directly related to taxes owed, as most might think. In many cases, though, it does come down to something as simple (or as confusing) as paperwork—and most of that paperwork is tax-related.



Toxic Liabilities, Economic Lepers

In her 2011 Report to Congress, the IRS’s National Taxpayer Advocate informed Congress, “For some U.S. taxpayers abroad, the tax requirements are so confusing and the compliance burden so great that they give up their U.S. citizenship.”⁶ This is true even though approximately 91 percent of Americans living abroad owed no U.S. taxes for tax year 2009 after application of the foreign earned income exclusion and the foreign tax credit.⁷

Two of the requirements criticized most frequently are known as “FBAR” and “FATCA.” An FBAR—“Report of Foreign Bank and Financial Accounts”—must be filed annually by any U.S. “person” having an interest (including signature authority) in financial accounts outside the United States if the aggregate amount in the accounts exceeds \$10,000 at any time during the calendar year.⁸ Penalties for wilful failure to file can include the greater of \$100,000 or 50 percent of the balance of the foreign account; non-wilful violations can result in penalties of \$10,000 per violation.⁹

FATCA, the “Foreign Account Tax Compliance Act” enacted in 2010, affects not only U.S. persons, but foreign financial institutions, as well.¹⁰ With the stated goal of reducing tax avoidance, FATCA contemplates that foreign financial institutions

will enter into disclosure agreements with the U.S. Treasury, agreeing to provide the IRS information about the accounts of U.S. taxpayers and some foreign entities with significant U.S. investments.¹¹ If an institution chooses not to comply, the IRS will require other financial institutions to withhold 30 percent of dividends, income and sale proceeds from all U.S. assets owed to the non-complying institution.¹²

For affected individual U.S. taxpayers, the reporting requirements under FATCA have already begun.¹³ For financial institutions, FATCA will be phased in beginning January 1, 2013.¹⁴ Some financial institutions outside the United States have begun to cleanse their customer lists of U.S. tax persons (citizens and lawful permanent residents).¹⁵ As the CEO of the Luxembourg

Bankers’ Association bluntly put it, FATCA is turning U.S. persons into “toxic liabilities,”¹⁶ and in the *Wall Street Journal’s* phrasing, “economic lepers.”¹⁷

The combination of paperwork and the perceived intrusiveness of the reporting requirements has resulted in vociferous complaints by many Americans affected by the requirements.¹⁸ Some have chosen to vote with their feet and become ex-citizens. One of our clients decided to renounce his U.S. citizenship when his stockbroker told him that after 40 years, the firm had to fire him as a client, because it did not want to comply with FATCA.

Another client, who moved to the United States as a child, naturalized along with her parents and later married a British citizen, told us (and the consular officer)

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that she wanted to renounce her U.S. citizenship so that she could have a joint bank account with her husband. Although they had been married for 10 years and had two children, her husband was unwilling to share an account with her if the account details would be disclosed to the U.S. government.



Less-Frequently Cited Reasons

Although a disinclination to fill out tax returns in multiple jurisdictions or be an “economic leper” appears to be the primary motive for expatriation among persons living in the United Kingdom, other reasons exist.

Some U.S. citizens, particularly those who have no emotional ties to the country or who have long lived abroad, may find onerous other requirements imposed by their U.S. citizenship, such as the potential for Selective Service obligations and the requirement that they travel to the United States only on a U.S. passport. One high-profile example is Boris Johnson, now London’s mayor, who renounced some years ago the U.S. citizenship he had acquired through birth in New York.

The precipitating event for him was apparently the refusal of U.S. immigration officials to allow him to transit the United States while en route to Mexico with his family; immigration officers insisted that he must use a U.S. passport (which he did not have) to enter the country. He later proclaimed, “What I want is the right not to have an American passport.”¹⁹ One can also imagine that a politician would be concerned about dual citizenship, not wanting to raise any suspicion that he or she might have divided loyalties.²⁰

One of our clients, a naturalized citizen, gave up his U.S. citizenship as a result of what he believed to have been an unfair conviction and imprisonment. He was convicted under the Lacey Act²¹ on a charge that he knew, or should have known, that he was participating in the sale of fish in the United States that had been caught in violation of the fishing quota laws of a foreign country. He appended the following statement to his renunciation paperwork (emphasis in the original):



The combination of paperwork and the perceived intrusiveness of the reporting requirements has resulted in vociferous complaints by many Americans abroad.

I was prosecuted under the Lacey Act, a technical regulatory violation involving the sale of seafood caught illegally in *another* country. I pled guilty to a misdemeanor and was given a 1 year prison sentence, the most available for a misdemeanor! All this because, “*I should have known*”.

After this experience, my view of life in America is tainted. I am disillusioned. I cannot live in a country where citizens are exposed to being taken from their homes and families over “*I should have known*”. Within my community, my and my family’s reputation was destroyed. How can I let my daughter go to school being the child of the father who went to prison?

I was naturalized a U.S. citizen with hope and dreams. Now, I’m afraid to live there. What if I get caught for speeding, or am in the wrong place at the wrong time? I will not live under this pressure.



The Process

Assuming one has made the decision after appropriate consultation and consideration of the consequences, how does one give up U.S. citizenship?

Strictly from an immigration law perspective, relinquishing citizenship is in many cases quite straightforward—although it may be preceded by months of work to straighten out the prospective ex-citizen’s tax affairs.²² Under Section 349(a) of the Immigration and Nationality Act (“INA”), a U.S. citizen may relinquish citizenship by voluntarily performing any of a number of enumerated acts “with the intention of relinquishing United States nationality.”²³ The two that we see most frequently are (1) naturalizing in another country and (2) formal renunciation of U.S. citizenship before a U.S. consular officer.

The U.S. Department of State since 1990 has applied an administrative pre-

sumption that a U.S. citizen intends to retain citizenship when she performs some of the acts listed in INA Section 349, such as naturalizing in a foreign state, accepting non-policy-level employment with a foreign state, or subscribing to a routine oath of allegiance to a foreign state.²⁴

If the U.S. citizen has performed any of the potentially expatriating acts, such as acquiring another citizenship, and in doing so intended to relinquish citizenship, she may appear before a U.S. consular officer to document this fact. The former citizen will fill out a form and sign a voluntary relinquishment statement.²⁵ If the Department of State approves the finding that the former U.S. citizen had relinquished citizenship, the Department issues a Certificate of Loss of Nationality (“CLN”), which is sent to the former U.S. citizen, together with that person’s cancelled U.S. passport.²⁶ The CLN will state that citizenship was lost at the time the expatriating act was performed.

U.S. authorities do not always let the citizen leave easily, as demonstrated by one of our recent cases. Our client was born in the United States while his parents, both British, were in graduate school. He left the United States at the age of 5 months and returned with his parents to Britain. As an adult, he never renewed the U.S. passport his parents had obtained for him.

While studying at Cambridge, he joined the University’s Royal Naval Reserve unit as a midshipman—the lowest commissioned officer post. (Serving as a commissioned or non-commissioned officer in the armed forces of a foreign state is one of the acts specified in INA § 349(a) as a potentially expatriating act. Notably, it is not one of the acts as to which the administrative presumption of intent to retain citizenship applies.) Believing that he had thereby abandoned his U.S. citizenship, he thereafter behaved consistently with the belief that he was no longer a U.S. citizen. He did not file U.S. tax returns, never voted in a U.S. election, did not hold a U.S. passport, and in fact travelled a total of 22 times to the United States on his U.K. passport.²⁷ In 2011, fearing that the United States might still consider him a citizen, he applied to formalize his relinquishment of U.S. citizenship as of the date more than

10 years earlier on which he joined the Royal Naval Reserve.

After a brief telephone interview, the consular officer denied his application to document his expatriation, stating that midshipman was not an officer position. We challenged this administratively and finally, several months later, received the following e-mail from the Department of State, which sets out the Department’s method for analyzing these cases:

It appears that you have documentation from the British Navy confirming that [] was in fact a non-commissioned officer. Service as such is a threshold statutory act of expatriation (INA Section 349(a)(3)(B)). Section 349(b) of the INA presumes that he acted voluntarily. The only issue that must be addressed is one of intent. According to [State Department records], []’s last passport expired in 1990 [more than 20 years from the date of the e-mail].

Given the fact that he has not voted

in the United States and assuming that you can confirm his use of a UK passport to enter the United States, he has established by the preponderance of the evidence, as required by INA Section 349(b), that he has expatriated himself by virtue of his service as a non-commissioned officer in the British Navy. In sum, it appears that [] has voluntarily committed a statutory act of expatriation with the intention of relinquishing his U.S. citizenship.

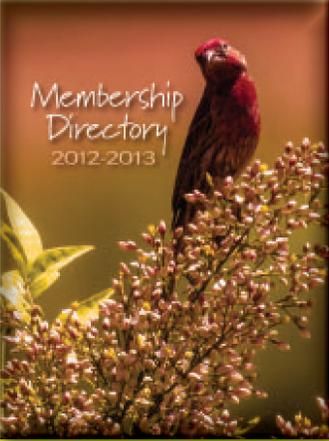
He was then allowed to go to the Embassy in early 2012 and document that he had relinquished his citizenship as of the date almost 14 years earlier when he had joined the Royal Naval Reserve.

As suggested earlier, U.S. citizenship may also be relinquished through a formal renunciation witnessed by a U.S. diplomatic or consular officer outside the United States. The U.S. citizen wishing to renounce must appear in person before such a U.S. official, who will question the

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renunciant to ensure that he understands the gravity of renunciation and that he is acting voluntarily. The U.S. citizen is required to read and sign a “Statement of Understanding Concerning the Consequences and Ramifications of Relinquishment or Renunciation of U.S. Citizenship.”²⁸ Once that is accomplished, he swears an Oath of Renunciation.²⁹ Upon approval by the Department of State, a CLN is issued and sent to the former U.S. citizen, together with that person’s cancelled U.S. passport.³⁰ The CLN will show that the former U.S. citizen gave up his citizenship on the date he appeared at the Embassy and took the Oath.

U.S. citizens cannot renounce citizenship while in the United States (except in time of war), nor can parents renounce citizenship on behalf of their children.³¹ Although renunciation is theoretically possible for persons under the age of 18, consular officers are rarely willing to believe that a minor understands the consequences of renunciation and that she is renouncing voluntarily.

Generally, renunciation is irrevocable and cannot be set aside without administra-

tive or judicial appeal. One exception: A U.S. citizen who formally renounces citizenship while a minor is able to have citizenship reinstated by applying to the Department of State within six months after attaining the age of 18.³²



Suspicious Minds—Back to Taxes

Renouncing one’s citizenship is made more difficult by governmental suspicion that persons are renouncing their U.S. citizenship to avoid paying U.S. taxes. As part of the “Reed Amendment” to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, any U.S. citizen who officially renounces U.S. citizenship on or after September 30, 1996, and who is determined by the Attorney General to have renounced for the purpose of avoiding U.S. taxation is inadmissible to the United States and ineligible for a visa.³³

In 2008, Congress imposed an “exit tax” on certain persons who relinquish or renounce their citizenship, mandating that the property of such persons “shall be treated as sold on the day before the expatria-

tion date for its fair market value” and gains over \$600,000 taxed accordingly.³⁴ Both the exit tax and the Reed Amendment became subjects of great media interest earlier this year when it became known that billionaire Eduardo Saverin, co-founder of Facebook, had renounced his U.S. citizenship shortly before the company’s initial public offering.³⁵ A bill was quickly introduced in the Senate to penalize further such relinquishments of citizenship.³⁶



Conclusion

The existence of the Reed Amendment and the exit tax make it more important than ever that all persons desiring to relinquish or renounce their U.S. citizenship obtain U.S. tax advice before doing so. Immigration advice is equally vital because once a person has expatriated, she will be subject to U.S. immigration laws, including those governing grounds of ineligibility for visas and inadmissibility. The ex-citizen who wishes to return to the United States must then join other aliens in mastering the intricacies of U.S. visa law. **AT**

endnotes

1. The Fourteenth Amendment to the Constitution provides that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” Children of foreign diplomats do not acquire citizenship even if born in the U.S. because they are not “subject to the jurisdiction” of the United States. *United States v. Wong Kim Ark*, 169 U.S. 649, 682 (1898).
2. See, e.g., Ching-Ching Ni, ‘Birthing Tourism’ Center in San Gabriel Shut Down, L.A. TIMES, Mar. 25, 2011, <http://articles.latimes.com/2011/mar/25/local/la-me-birthing-center-20110325>.
3. See, e.g., Margaret Stock, *The Cost to Americans and America of Ending Birthright Citizenship*, Mar. 2011, www.nfap.com/pdf/NFAPPolicyBrief.BirthingCitizenship.March2012.pdf.
4. These numbers are compiled from quarterly reports the IRS publishes in the *Federal Register* of those persons who expatriated themselves in the previous calendar quarter. This requirement was imposed by Section 512 of the Health Insurance Portability and Accountability Act (HIPAA) of 1996, P.L. 104-191, and now includes those persons relinquishing long-term permanent residency. Based on the authors’ experience, backed up by chatter on tax and expatriate blogs, this number underreports the number of persons who have renounced citizenship or otherwise expatriated themselves.
5. DHS Office of Immigration Statistics, *Annual Flow Report: U.S. Naturalizations: 2011*, www.dhs.gov/xlibrary/assets/statistics/publications/natz_fr_2011.pdf.
6. *National Taxpayer Advocate’s 2011 Annual Report to Congress* (hereafter *Tax Advocate’s 2011 Report*), www.irs.gov/uac/National-Taxpayer-Advocate’s-2011-Annual-Report-to-Congress, at 129 and n.5, citing National Taxpayer Advocate meeting with the U.S. Ambassador to Switzerland (Feb. 4, 2011); Brian Knowlton, *More American Expatriates Give Up Citizenship*, N.Y. TIMES, Apr. 25, 2010; and Helena Bachmann, *Why More U.S. Expatriates Are Turning In Their Passports*, TIME WORLD, Apr. 20, 2010.
7. *Tax Advocate’s 2011 Report*, *supra* note 6, at 155-56.
8. Treasury Form TD F 90-22.1. 31 U.S.C. § 5314(a); see general information from the IRS available at www.irs.gov/businesses/small/article/0,,id=210244,00.html#FRI.
9. 31 U.S.C. § 5321(a)(5)(A)-(D).
10. 26 U.S.C. §§ 6038D, 1471.
11. 26 U.S.C. §§ 1471(b). See *Treasury, IRS Issue Proposed Regulations for FATCA Implementation*, Feb. 8, 2012, www.irs.gov/uac/Treasury,-IRS-Issue-Proposed-Regulations-for-FATCA-Implementation (hereafter “*IRS FATCA Press Release*”).
12. 26 U.S.C. § 1471(b)(1)(D). See *IRS FATCA Press Release*, *supra* note 11, www.irs.gov/uac/Treasury,-IRS-Issue-Proposed-Regulations-for-FATCA-Implementation.
13. IRS, *Summary of Key FATCA Provisions*, www.irs.gov/Businesses/Corporations/Summary-of-Key-FATCA-Provisions.
14. *Treasury and IRS Issue Guidance Outlining Phased Implementation of FATCA Beginning in 2013*, www.irs.gov/uac/Treasury-and-IRS-Issue-Guidance-Outlining-Phased-Implementation-of-FATCA-Beginning-in-2013.
15. Sanat Vallikappen, *U.S. Millionaires Told ‘Go Away,’* BLOOMBERG, May 9, 2012, www.bloomberg.com/news/2012-05-08/u-s-millionaires-told-go-away-as-tax-evasion-rule-looms.html.
16. *FATCA: Turning U.S. persons into toxic liabilities*, Luxembourg Bankers’ Association, Dec. 14, 2011, www.abbl.lu/news-publications/

news-archive/abbl-news/fatca-turning-us-persons-toxic-liabilities.

17. William McGurn, *What's U.S. Citizenship Worth?* WALL STREET JOURNAL, April 23, 2012, <http://online.wsj.com/article/SB10001424052702303592404577362050670738024.html>. See also *Amerikanischer Fiskus kontrolliert deutsche Banken*, FRANKFURTER ALLGEMEINE ZEITUNG, April 17, 2012 (German banks closing accounts held by U.S. tax persons), www.faz.net/aktuell/finanzen/fonds-mehr/steuerflucht-amerikanischer-fiskus-kontrolliert-deutsche-banken-11721011.html.
18. Both Republicans and Democrats living abroad have focused on FBAR and FATCA and are lobbying to have FATCA changed or eliminated. The organization Democrats Abroad is soliciting 'Tax Stories' at www.expattaxstory.us/. See, e.g., Danish resident whose income requires no payment of U.S. taxes but who faces hiring both U.S. and Danish accountants to address reporting requirements, including information about accounts owned with Danish husband; story from long-time Canadian resident who received letter from "criminal investigation" unit of the IRS referring to requirements listed in document not enclosed and that he cannot find on Internet, who closes with "I feel that should they wish for me to file documents that until last fall I've never heard of, surely they could send them to me." See also Republicans Abroad Europe "FATCA-Sign the Petition to Repeal Below," at www.republicansabroadeurope.org/fatca_petition, including excerpts from stories reported in *Why Obama's FATCA is a Threat to Business Growth*, FORBES, June 20, 2011, www.forbes.com/sites/beltway/2011/06/20/why-obamas-fatca-law-is-a-threat-to-business-growth/ (Saudi Arabian resident twice rejected as a customer on the basis of U.S. citizenship for "increased administrative and compliance burdens imposed by U.S. authorities" that have led the banks to reject securities accounts for U.S. citizens; Japanese resident reports being allowed only the most basic account because of bank reluctance to incur the cost of reporting income of U.S. clients).
19. An account of the incident, written in Johnson's trademark amusing style, can be found in the article *American Passport*, THE SPECTATOR, Aug. 29, 2006, available at www.boris-johnson.com/2006/08/29/american-passport/.
20. See e.g., the statement by Rep. Michele Bachmann upon withdrawing her Swiss citizenship: "I took this action because I want to make it perfectly clear: I was born in America and I am a proud American citizen. I am, and always have been, 100 per cent committed to our U.S. Constitution and the United States of

America." *Michele Bachmann withdraws Swiss citizenship*, THE TELEGRAPH, May 11, 2012, www.telegraph.co.uk/news/worldnews/us-politics/9259035/Michele-Bachmann-withdraws-Swiss-citizenship.html.

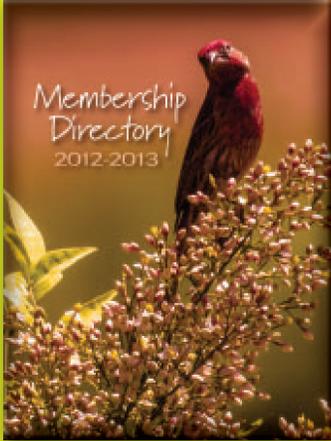
21. 18 U.S.C §§ 3371-3378. See also *Rough Justice: America Locks Up Too Many People, Some for Acts That Should Not Even Be Criminal*, THE ECONOMIST, July 24, 2010 at 9, available at www.economist.com/node/16640389?story_id=16640389, citing the Lacey Act as one particularly draconian law.
22. The labyrinth of tax law is, blessedly, outside the scope of this article. An outline of the hurdles to be overcome can be found on the IRS' website, *Expatriation Tax*, www.irs.gov/Individuals/International-Taxpayers/Expatriation-Tax.
23. INA § 349(a) (codified at 8 U.S.C §1481(a)).
24. 22 CFR § 50.40(a).
25. *Id.*
26. 22 CFR § 50.40(e).
27. INA § 215(b) (subject to limited exceptions, it is illegal for a U.S. citizen to enter or leave the U.S. without a valid U.S. passport); see also 22 CFR § 53.1-2.

28. 7 Foreign Affairs Manual ("FAM") 1261(a) and 1262.4(b); see Form DS-4081 (Statement of Understanding Concerning the Consequences and Ramifications of Relinquishment or Renunciation of U.S. Citizenship).
29. 22 CFR § 50.50(a) and FAM 1262.4(c); see Form DS-4080 (Oath/Affirmation of Renunciation of the Nationality of the United States).
30. 22 CFR § 50.50.
31. 7 FAM 1292(e).
32. 8 U.S.C § 1483 (b).
33. INA § 212(a)(10)(E), as codified in 8 U.S.C § 1182 (a) (10) (E).
34. 26 U.S.C § 877A.
35. Quentin Hardy, *A Facebook Co-Founder Reflects on the Path Forward*, N.Y. TIMES, May 16, 2012, www.nytimes.com/2012/05/17/technology/a-facebook-cofounder-reflects-on-the-path-forward.html?_r=1&nl=todaysheadlines&emc=edit_th_20120517.
36. S. 3205, titled Ex-PATRIOT Act ("Expatriation Prevention by Abolishing Tax-Related Incentives for Offshore Tenancy"), www.washingtonwatch.com/bills/show/112_SN_3205.html.

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