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FATCA: The Well-Intentioned, Yet Misguided and Unconstitutional, Tax Law

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I. Introduction

Many people today are familiar with offshore bank accounts and tax havens thanks to the news media and Hollywood. [n1] It is estimated that Americans stash some $ 100 billion of lost tax revenue overseas each year. [n2] This revelation was the impetus for Congress to create FATCA. [n3] In 2010, Congress enacted the Foreign Account Tax Compliance Act (FATCA) into law under section 501(a) of the Hiring Incentives to Restore Employments Act (HIRE). [n4]

The general purpose of the HIRE Act is to give tax breaks to small businesses that hire unemployed workers. [n5] FATCA was designed to allow the Internal Revenue Service (IRS) to collect taxes on American foreign income hidden overseas. [n6] However, instead of punishing shifty taxpayers and corporations with FATCA, the IRS misguidedly placed almost the entire burden on Americans residing abroad and on the foreign financial institutions (FFIs) where Americans invest and keep their money. [n7] FATCA affects all [*214] Americans who own a foreign financial account, including banking and investment accounts, regardless of where they live. [n8]

The substantial cost associated with complying with FATCA has proven too much for many FFIs, and, as a result, honest taxpaying Americans residing within the United States (U.S.) and abroad have had their foreign bank and investment accounts closed and have had trouble finding foreign banks that are willing to take in new American clients. [n9] Moreover, the mechanism the IRS uses to implement and enforce FATCA - Intergovernmental Agreements (IGAs) with foreign countries [n10] - may actually be unconstitutional. [n11]

This paper will examine FATCA in five parts: Part II will provide the pertinent background that gave rise to the law, [n12] Part III will present the essential elements of FATCA, [n13] Part IV will offer pertinent liberty and constitutional arguments against FATCA, [n14] and Part V will analyze each argument's possibility of succeeding. [n15]

II. Background

The federal government has clearly expressed that the impetus for FATCA was the revelation that each year there is an estimated $ 100 billion of lost tax revenue for the United States government due to unreported income being stashed overseas. [n16] Congress deemed FATCA necessary, in large part, to obviate bank secrecy laws in [*215] foreign countries that have enabled U.S. citizens to store income overseas unbeknownst to the IRS. [n17]

In essence, bank secrecy laws require banks and bank employees to keep account holder information confidential or face serious criminal prosecution in their country, which precludes the IRS from being notified by foreign banks of any potential American taxpayer wrongdoing. [n18] Switzerland is perhaps the most well-known country with strong bank secrecy laws. [n19]

In 2008, the U.S. Congress' Permanent Subcommittee on Investigations investigated the Swiss bank UBS, which admitted to defrauding the U.S. government and agreed to pay a steep $ 750 million fine as restitution; additionally, UBS promised to disclose all future U.S. accounts to the IRS, to the extent allowed under Swiss law. [n20] During the hearing, a bank document revealed that some 52,000 U.S. citizens had bank accounts with UBS, totaling over $ 18 billion that had not been disclosed to the IRS. [n21] The bank explained that Switzerland's bank secrecy laws prevented it from disclosing much of the information to the IRS, and, even after the hearing, the majority of the accounts were still protected by bank secrecy laws and would thus continue to go undisclosed. [n22]

In 1970, Congress enacted the Bank Secrecy Act (BSA), which, despite its name, was enacted with the purpose of forcing banks to reveal confidential bank account information so that the IRS could [*216] more effectively collect taxes. [n23] The Act required U.S. banks to keep records and notify the IRS of account holder information, interest payments, large transactions, and anything that could suggest tax evasion or fraud. [n24] In 1978, the BSA was limited by the Right to Financial Privacy Act (RFPA), which required customer authorization or a valid legal order to view the information. [n25] Regardless of the RFPA's restrictions, the similarities between the BSA and FATCA indicate that the domestic BSA likely provided a model for the international application of FATCA.

In addition to bank secrecy laws making it harder for the IRS to collect on income stashed overseas, previous IRS regulations allowed FFIs to treat foreign corporations as foreign entities, regardless of the nationality of their beneficial owner. [n26] This meant that if a U.S. citizen owned a foreign shell corporation, all profits were deemed to belong to a foreign accountholder. [n27] While such a regulation certainly increased expediency of cash flow, it could easily - and likely did - lead to a high amount of lost tax revenue for the U.S. government.

Most recently, the IRS tried to cut down on tax evasion by instituting Form 114, also known as the Report of Foreign Bank and Financial Accounts (FBAR). [n28] FBAR requires any U.S. citizen with a total of $ 10,000 or more in all of his or her overseas accounts, at any time during the calendar year, to file Form 114 with the IRS. [n29] To encourage U.S. citizens to report their foreign accounts, the IRS threatened hefty criminal fines and prison penalties for [*217] noncompliance. [n30] However, with bank secrecy laws still in place, the IRS was not able to effectively collect on the majority of hidden foreign income, and billions of U.S. tax dollars remained overseas. [n31]

Congress' solution was FATCA, which Senator Levin described as giving FFIs the choice of "either paying a 30 percent withholding tax on their investment earnings, or disclosing any and all accounts held by U.S. persons." [n32] He further asserted that FATCA tears down the veil of bank secrecy laws and forces FFIs to investigate and determine whom the true beneficial owners of accounts are, rather than quickly labeling them foreign accountholders. [n33] But in reality, FATCA is not so simple, and furthermore, its collateral damage is likely much worse than its potential benefit. [n34]

III. FATCA

FATCA amended the Internal Revenue Code of 1986 by adding a new Chapter Four. [n35] In order to more easily enforce FATCA, the U.S. entered into several IGAs, whereby foreign governments agreed to collect the required reporting information from financial institutions located in their countries and disclose that information to the IRS on an annual basis. [n36] While the law has several focuses, perhaps the most pertinent facet of FATCA concerns FFIs. Part A below outlines the new law in relation to the FFI reporting requirements, [n37] and Part B describes the various IGAs the IRS has entered into with foreign countries. [n38]

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A. FATCA Text

Perhaps the most alarming aspect of FATCA for FFIs is the possibility of facing the severe penalty associated with a violation. [n39] Any FFI subject to FATCA that fails to meet the reporting requirements of the law will be subject to a stringent 30% withholding tax on all payments of U.S. source income. [n40] To avoid this penalty, an FFI must fall into one of two categories: (1) it has an agreement with the Secretary of the U.S. Treasury (Treasury), or (2) it meets certain criteria ensuring that it does not maintain financial accounts owned by one or more U.S. persons or U.S.-owned foreign entity (U.S. accounts). [n41]

Under the first category, FFIs who have an agreement with the Treasury are known as participating FFIs and are subject to increased due diligence, withholding, reporting, and disclosure obligations. [n42] First, the FFI must obtain necessary information from each holder of each account maintained by the FFI to determine if any are U.S. accounts, meaning the beneficial owner of the account is a U.S. person. [n43] This means FFIs' due diligence and information collection extends not only to U.S. accounts, but to all accounts. Second, the FFI must comply with any verification and due diligence procedures the Treasury requires to identify U.S. accounts. [n44] Third, the FFI must report to the Treasury all required information regarding U.S. accounts on an annual basis. [n45] Fourth, the FFI must deduct and [*219] withhold a 30% tax on any withholdable payment, or any other payment attributable to a withholdable payment, made by the FFI to any recalcitrant account holder or to any non-participating FFI. [n46] Fifth, the FFI must provide any additional requested information to the Treasury with respect to any maintained U.S. accounts. [n47] And sixth, the FFI must attempt to waive any bank secrecy law preventing it from complying with the above reporting requirement, or, if waiver is not possible for a U.S. account, to close the account. [n48]

In order to withhold upon payments, FFIs can either deposit amounts withheld pursuant to Treasury Regulation ß 1.1474-1(b), or elect to keep amounts withheld in escrow until such time as it can be determined whether withholding is necessary. [n49] FFIs must deposit the amounts by electronic funds transfer on a monthly, quarterly, or annual basis as determined by Treasury Regulation ß 1.6302-2(a). [n50] [*220] If the amount to be withheld in one month is more than $ 200 per each U.S. account, it must be deposited on a monthly basis; if it is more than $ 2,000 at the end of a quarter, it must be deposited every quarter; and if it is less than $ 200 per year, it must be deposited annually. [n51] If a participating FFI fails to withhold the required payments, it will be liable to the Treasury for the entire amount not withheld, along with any applicable interest, additions, and penalties. [n52]

Alternatively, these participating FFIs may elect "to be withheld upon rather than withhold on payments to recalcitrant account holders and nonparticipating" FFIs themselves. [n53] If an FFI elects this alternate option, the IRS will only withhold 30% of all withholdable payments to the FFI that are directly attributable to the recalcitrant account holder and nonparticipating FFI. [n54] Any FFI that elects to be withheld upon must notify the IRS of each such election, and must provide all information necessary to determine the appropriate withholding amount. [n55] However, an FFI that elects this option relinquishes any rights it may have under any treaty with the United States with respect to any amount withheld as a result of such election, which could result in a loss of potential earnings for the FFI. [n56]

The FFIs under the first category [n57] may also elect to be subject to the same reporting requirements as U.S. financial institutions, rather than the FATCA reporting requirements. [n58] If an FFI elects to do so, it must report all U.S. account information required under U.S. Treasury Code sections 6041, 6042, 6045, and 6049 as if it were a U.S. person, and as if each holder of such accounts are also natural persons and citizens of the United States. [n59]

[*221] Under the second category, [n60] FFIs are deemed to meet the requirements of FATCA if they fall under one of two subcategories [n61]: (1) an FFI can comply with any procedures the Treasury prescribes to ensure that the FFI does not maintain U.S. accounts, and the FFI must meet the Treasury's requirements regarding maintained accounts of other FFIs; [n62] or (2) the Treasury has predetermined that the FFI does not need to comply with the reporting requirements because the FFI, based on its operating structure, inherently does not maintain any U.S. financial accounts. [n63]

However, under FATCA, an FFI does not have to report - unless it voluntarily elects to do so - any depository accounts it maintains belonging to U.S. beneficiaries when the aggregate value of all accounts the FFI (and any institution in its expanded affiliated group) maintains is less than $ 50,000. [n64] Nor does an FFI have to report any account held by another participating FFI that is in compliance with the reporting requirements. [n65] Additionally, the Treasury has chosen not to withhold 30% of payments from a small percentage of FFIs, specifically, if the beneficial owner is any of the following: (1) part of a foreign government, (2) part of an international agency, (3) a foreign central bank, or (4) anyone else whom the Treasury has determined poses a low risk of tax evasion. [n66]

B. Intergovernmental Agreements (IGAs)

In 2012, in order to more effectively enforce FATCA, the Treasury entered into reciprocal agreements with several foreign [*222] countries whereby the United States and the foreign countries agreed to collect and exchange information regarding taxpayers in their respective countries. [n67] Initially, the Treasury formed agreements with the United Kingdom (UK), France, Germany, Italy, and Spain. [n68] Soon thereafter, Switzerland, Japan, and South Africa formed agreements with the Treasury. [n69] Since then, the Treasury has created two main models under which a foreign country can form an agreement with the United States and comply with FATCA: Model 1 and Model 2. [n70]

1. Model 1

Generally speaking, countries that enter into a Model 1 agreement with the Treasury agree to collect the required reporting information from financial institutions within their own countries and exchange that information with the IRS on an annual basis. [n71] However, there are two forms of Model 1 agreements, Model 1A and Model 1B. [n72]

Model 1A agreements are reciprocal in nature, meaning that the IRS agrees to exchange information regarding the foreign country's taxpayers that have accounts in U.S. financial institutions. [n73] Countries that opt for Model 1A agreements must complete a data safeguarding workbook, which is designed to "facilitate the evaluation of safeguards and provisions regarding confidentiality, use, and infrastructure effectiveness prior to exchanging information." n74

[*223] Model 1B agreements have the same structure as Model 1A agreements - foreign governments collecting the required information and providing it to the IRS - but without reciprocity requiring the IRS to provide account information from U.S. financial institutions to foreign governments. n75

2. Model 2

IGAs under the Model 2 structure differ most significantly from Model 1 agreements in that they place fewer requirements on foreign governments. n76 Under Model 2 IGAs, foreign governments allow FFIs to report the required information directly to the IRS, so as to avoid any arguments from financial institutions that domestic laws prohibit disclosure of such information. n77 Thus, under the Model 2 IGA, foreign governments essentially free themselves of any obligation after signing the agreement and directing FFIs to report to the IRS. n78

Currently, the vast majority of countries have opted for Model 1 IGAs, with less than fifteen percent of countries opting for Model 2. n79 In addition to countries that have formally signed an IGA, the Treasury has decided to recognize countries that have agreed in substance to an IGA - essentially those countries with a pending IGA - as having an IGA in effect until the terms of the agreement are finalized. n80

Regardless of which Model IGA a country agrees to, the FFI reporting requirements and deadlines are outlined in Annex I of the [*224] country's agreement. n81 FFIs reporting directly to the IRS must complete a Form W-8 or W-9, and electronically submit all documentation to the IRS via its International Data Exchange Service (IDES). n82 These data submissions are sent electronically, and, given the recent increase in the number of hacking attacks on financial information, n83 the IRS could potentially entice criminals to attack a centralized depository of the sensitive financial information of millions of Americans.

Currently, the exact reporting method to various governments under Model 1 IGAs, and the exchange process between foreign governments and the United States have yet to be officially determined, although these agreements will likely also utilize the IDES system. n84 Scholars have suggested that if FFIs in foreign countries, like the UK, are able to use their respective country's reporting forms in place of the United States' W-8 and W-9 forms, it could lead to confusion for the IRS, as definitions for various terms on foreign forms surely differ from those on the IRS's W-8 and W-9 forms. n85

As a result, IRS agents would likely be forced to execute unwarranted withholding on compliant FFIs until the confusion is sorted out. n86 Such a threat should be of concern to FFIs that currently hold American accounts, and the increased risk and cost associated with FATCA compliance may result in even more FFIs turning away Americans who try to invest with them. n87

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IV. Issues with FATCA

The withholding schemes FATCA implements will only bring an estimated $ 1 billion of lost taxes back to the United States. n88 While $ 1 billion sounds like a substantial amount, it pales in comparison to the estimated $ 99 billion of American taxes that will remain lost each year n89 and the staggeringly high cost of FATCA compliance to FFIs. n90 The estimated cost of implementing FATCA is $ 100 million per financial institution. n91

Industry experts estimate that about 900,000 FFIs are subject to FATCA, which means the total cost of FATCA implementation drastically overshadows its potential tax savings; the cost of FATCA will be approximately $ 90 billion, while the potential benefit to the U.S. government will only be approximately $ 1 billion. n92 With an estimated success rate of 1%, n93 a hefty implementation cost placed on FFIs, and Americans having their foreign bank accounts closed as a result of the law, the motive behind FATCA and its effectiveness must be called into question.

A. Increased Burdens on U.S. Citizens

Even though the stated goal of FATCA is to bring back U.S. taxes by having FFIs report on U.S. accounts, the clever side effect of FATCA is that it substantially increases the required level of due diligence and costs to FFIs holding U.S. accounts, which is causing FFIs to drop and deny U.S. accounts rather than comply. n94 FATCA as a whole has been met with outcry that ranges from claims of unfair [*226] treatment, to claims of human rights abuse, to constitutional issues - both from within the United States and abroad. [n95]

1. Unfair Treatment

Organizations such as American Citizens Abroad have vehemently spoken out against FATCA since its inception because they feel it results in unfair treatment of U.S. citizens residing overseas. [n96] American Citizens Abroad is a nonprofit, nonpartisan, volunteer association with a caucus within Congress; its mission is to defend the rights of Americans living overseas. [n97] In a letter to the Congressional Ways and Means Committee, American Citizens Abroad stated that it has "received multiple testimonies of Americans residing overseas who have had bank accounts in their country of residence closed, who have been denied entry into foreign pension plans and insurance contracts, who have had mortgages cancelled, who have been pushed off of joint-bank accounts held with foreign spouses," and more. [n98]

Additionally, American Citizens Abroad asserts that Americans residing abroad cannot easily take their money from the closed foreign account and reinvest it with U.S. financial institutions because the Patriot Act discourages U.S. financial institutions from taking on clients living overseas. [n99] Thus, "the average American abroad is shut off from all avenues for personal investment." [n100]

In addition to being shut out from financial institutions, Americans may find it increasingly difficult to become owners in new overseas business ventures due to FATCA's requirement that such ventures be reported to the IRS if at least 10% of the venture is owned by one or more Americans. [n101]

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2. Human Rights Abuse

Implementing FATCA calls for the singling out of Americans residing abroad, which may be seen as discriminating against Americans on the basis of their national origin. [n102] American Citizens Abroad and other organizations certainly believe FATCA forces FFIs and foreign governments to discriminate against Americans, and the government of New Zealand, among others, agrees. [n103]

New Zealand is a country known for vehemently upholding human rights; however, its government officials acknowledged that they agreed to intentionally displace human rights to comply with FATCA. [n104] In a letter published by Internal Revenue, New Zealand's tax authority, it discusses the need for enabling legislation to ensure FFIs can comply with FATCA. [n105] Internal Revenue acknowledges the argument that Americans are unfairly singled out, noting that the domestic legislation required to comply with FATCA "will enable discrimination against this group." [n106] The letter determines, however, that violating the rights of U.S. persons was necessary, given the risk under FATCA of either being cut out of the U.S. investment market, or facing the steep 30% withholding penalty associated with noncompliance. [n107] The New Zealand government decided to enact "domestic legislation [that] can over-ride the Privacy Act, Human Rights Act and New Zealand Bill of Rights Act to the extent [they are] inconsistent with those Acts [required to comply with FATCA]." [n108]

Assuming FATCA does indeed discriminate against Americans, it is in clear violation of the Universal Declaration of Human Rights (UDHR), which was adopted by the United Nations General [*228] Assembly in 1948. [n109] The UDHR clearly states that no person shall be discriminated against on the basis of national origin, nor any distinction made because of the country a person comes from. [n110]

Given that the State Department estimates 7.6 million Americans live and work abroad, [n111] FATCA adversely affects the lives of a substantial number of Americans. Additionally, FATCA not only affects Americans living abroad, but any American who owns a foreign financial account, even if he or she lives in the United States. [n112] Thus, the character of FATCA inherently discriminates on the basis of national origin, as it singles out Americans regardless of their country of residence.

According to American Citizens Abroad, FFIs that have decided to keep their U.S. accounts are threatening to close individual accounts unless the U.S. account holders sign a form releasing the FFI from the legal obligations it agreed to upon opening the U.S. account holder's account, as well as from all national banking secrecy laws. [n113] Here is an example of the language included on such a release form from a reputable FFI:

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By signing this declaration, the client formally agrees to the Bank's communicating the client's personal information to the American tax authority (IRS) as well as information on assets held at the Bank and income generated by those assets. Consequently, the client hereby explicitly frees the Bank from the obligation to maintain banking secrecy. [n114]

Conversely, U.S. persons who open an account in a U.S. financial institution garner much more privacy than do those who now try to open an account overseas. [n115] Under the BSA (discussed above in Part II), U.S. financial institutions only report to the IRS if an individual engages in a transaction that might indicate fraud, [n116] if the individual had capital gains, or if the individual was paid $ 10 or more in interest during the year by the U.S. financial institution. [n117]

While some FFIs have forced U.S. account holders to sign releases, other FFIs are taking an even more extreme measure: closing all U.S. accounts and selling off all American investments owned by the FFI simply to avoid being affected by FATCA. [n118] An example of one such FFI is the reputable banking giant Deutsche Bank; the bank expressly stated that it is regretfully closing its U.S. accounts as a "consequence of FATCA implementation." [n119]

[*230] While FFIs and governments like New Zealand are the institutions actually forcing U.S. account holders to relinquish their rights in the country in which they reside, the true culprit behind these actions is FATCA, which is forcing the hand of the FFIs and governments with the threat of a harsh 30% withholding penalty. [n120] By forcing FFIs to cut off the legal rights of U.S. account holders, FATCA violates Article 6 of the UDHR, which states, "Everyone has the right to recognition everywhere as a person before the law." [n121] Americans with foreign financial accounts, and especially those residing overseas, no longer have this right in regard to being protected by foreign banking laws. [n122]

Americans living overseas now have to face a cruel dilemma: have no bank account or investments and attempt to survive in a solely cash economy, or attempt to find an FFI that is willing to maintain a U.S. account, but give up the legal protections associated with the account that every other non-American enjoys. [n123] Given this dilemma, it is no surprise then that the number of Americans renouncing their citizenship has rapidly increased since the passage of FATCA. [n124] Prior to FATCA becoming law, the total number of American expatriations had never exceeded 800 in a year. [n125] However, since FATCA has become law, the number of expatriations has spiked, with 932 expatriations in 2012 and over 1,500 expatriations in every other year since 2010. [n126] In 2013, there were a record 2,999 expatriations, [n127] but the record did not last long. In [*231] 2014, nearly 3,500 Americans expatriated. [n128] These growing numbers of expatriations speak to FATCA's negative pervasive effect on the lives of Americans.

B. Constitutional Issues with FATCA

FATCA has generated various constitutional arguments from both within the United States and abroad. [n129] In terms of United States constitutional law, there are two main arguments; one argument centers on the Treasury's right to sign IGAs that bind the United States, and the other raises three separate constitutional concerns. [n130]

1. The Constitutionality of IGAs in United States

The Treasury began implementing IGAs with foreign countries when confronted with the difficulty of implementing FATCA overseas. [n131] Because the Treasury is an administrative agency under the Executive branch, these IGAs are considered executive agreements. [n132] Furthermore, executive agreements in the United States are limited in scope, "according to the Restatement of Foreign Relations Law of the United States, the President may validly conclude executive agreements that (1) cover matters that are solely within his executive power, or (2) are made pursuant to a treaty, or (3) are made pursuant to a legitimate act of Congress". [n133]

IGAs were never mentioned as a provision of the HIRE Act, so arguably, the President has no power to form IGAs through executive agreements, rather, they must go through the Senate treaty making [*232] process to validly bind the United States. [n134] However, the IGAs related to FACTA were never brought to the Senate, so there is no statutory pre-authorization under which the IRS may enter into them, nor are they treaty-based amendments. [n135] Therefore, IGAs arguably have no congressional authorization. [n136] If there is no congressional authorization for IGAs, then they must be sole executive agreements, entered into under the power of the Executive branch. [n137] The problem with IGAs being sole executive agreements is that, according to constitutional scholars, the Executive branch does not have the power to enter into such agreements if they bind the United States internationally: [n138]

Sole executive agreements are extremely controversial in U.S. law. Constitutional scholars either reject them outright as a viable alternative to treaties and congressional-executive agreements, or begrudgingly allow that they might be viable for administrative or routine matters. Louis Henkin, a leading U.S. scholar of international law and foreign policy, characterized sole executive agreements as constitutionally suspect. Other constitutional scholars agree, stating that the Framers of the constitution did not grant the president exclusive power to make treaties committing the nation internationally, and if the president was to exercise such authority, it would have to be only for minor, short-term agreements. The consensus is that short of those that deal with minor, routine, and noncontroversial matters, international obligations undertaken by the president without any congressional oversight lack the status of law in the U.S. [n139]

[*233] To combat the argument against sole executive agreements, the Treasury claimed that IGAs are analogous to treaty-based agreements because they interpret information exchange provisions found in existing tax treaties. [n140] However, such an argument must fall short of the truth, as FATCA clearly imposes new reporting requirements, rather than merely interpreting existing treaties.

In response to FATCA, Congressman Bill Posey sent a letter to the Treasury Department inquiring as to the statutory authority that allowed the Treasury to enter into IGAs. [n141] The response from the Treasury states, "The United States relies, among other things, on the following authorities to enter into and implement the IGAs: 22 [U.S.C. ß] 2656; [I.R.C.ßß] 1471, 1474(f), 6011, and 6103(k)(4) and Subtitle F, Chapter 61, Subchapter A, Part III, Subpart B (Information Concerning Transactions with Other Persons)." [n142] While this statement from the Treasury elicits an air of legitimacy concerning IGAs, it is demonstrably false. [n143]

In truth, none of these statutes provides the Treasury the authority to enter into IGAs. [n144] Rather, these statutes grant the Treasury the authority to engage in agreements with individual FFIs; there is nothing regarding authority to enter into IGAs with foreign countries. [n145] The conclusion of this constitutional argument is that, regardless of what their status is in foreign countries, IGAs require congressional authorization to have legitimate legal effect in the United States, which they do not, and as such, they are invalid. [n146]

[*234] Tax scholar Allison Christians raises the theory that if the IGAs are indeed invalid in the U.S., FFIs in countries with IGAs would almost always be incompliant with the reporting requirements of FATCA. [n147] This is because the reporting requirements for FFIs would increase without the IGAs in place, so even if the FFIs are compliant with the IGAs, they would not be compliant with the increased reporting requirements FATCA would demand. [n148] As such, the IRS would be required to withhold almost all United States source income from FFIs around the world. [n149] Undoubtedly, such wide-sweeping required withholding of United States source income creates even more potential constitutional challenges for FATCA. [n150]

2. FATCA Violates the United States Constitution on Three Fronts

The second constitutional argument against FATCA was recently formed by Jim Bopp, a renowned constitutional lawyer who has won nine out of thirteen cases before the Supreme Court, and is most well-known for his work on the Citizens United case. [n151] Bopp's position is that FATCA is in violation of the United States Constitution on three fronts: the Senate's treaty-making power, the Eighth Amendment, and the Fourth Amendment. [n152]

Bopp's argument that FATCA violates the Senate's treaty-making power essentially reflects the arguments outlined above, [n153] however he further proclaimed that by forming the IGAs, the Treasury blatantly usurped the Senate's role in the treaty-making process. [n154] Bopp asserted that "the U.S. Constitution protects every citizen's liberty and freedom, while FATCA undermines both... . This astonishingly bad law manages to thumb its nose at the [*235] Constitution." [n155] Undermining the Senate's role in the treaty-making process is a problem because it violates the intent of the Framers of the Constitution and the system of checks and balances that they created: [n156]

[The] reason for involving both President and Senate [in treaty-making decisions] was that the Framers thought American interests might be undermined by treaties entered into without proper reflection. The Framers believed that treaties should be strictly honored, both as a matter of the law of nations and as a practical matter, because the United States could not afford to give the great powers any cause for war. But this meant that the nation should be doubly cautious in accepting treaty obligations. As James Wilson said, "Neither the President nor the Senate, solely, can complete a treaty; they are checks upon each other, and are so balanced as to produce security to the people. [n157]

Bopp also contends that the large 30% monetary withholding penalties U.S. citizens face under FATCA amount to a colorable claim for cruel and unusual punishment under the Eighth Amendment because those punishments can occur by no fault of the U.S. account holders if their FFI does not flawlessly meet the reporting requirements. [n158]

Moreover, Bopp believes that the search and seizure of the financial records of Americans with foreign financial accounts is unreasonable, and thus is in violation of the Fourth Amendment. [n159] The potentially unreasonable searches and seizures of American financial records are being carried out as a result of the IGAs, the legitimacy of which is also being called into question. [n160] However, a [*236] finding by the Supreme Court that FATCA is in violation of the Fourth Amendment does not necessarily hinge on whether the IGAs made by the Treasury are unconstitutional, although such a finding would undoubtedly be helpful to Bopp's case. Instead, the Court could find that FATCA's harsh withholding measures alone are enough to undermine the Fourth or Eighth Amendments, as outlined in Part V below.

Either way, the case arguably has merit and the Court may very well agree to hear it as a matter of first impression to decide whether the Executive branch can constitutionally create IGAs in the manner that they did in relation to FATCA. Bopp only recently became involved in the effort to repeal FATCA, and as such, there has not yet been substantial movement or elaboration on how he plans to carry out his constitutional claims; however, given his record in the Supreme Court, there is a real chance FATCA may not be around much longer. [n161]

Prior to Bopp joining the opposition to FATCA, Senator Rand Paul attempted to lead a constitutional charge against the anti-privacy provisions of the law on the basis that the provisions allowed warrantless searches of the financial records of U.S. persons. [n162] Additionally, Paul asserted that under the reciprocal Model 1 IGAs, the IRS is forcing U.S. financial institutions to disclose private account information to foreign governments without congressional approval, while also forcing the U.S. financial institutions to absorb the large cost associated with doing so. [n163]

In light of these allegedly unconstitutional provisions, Senator Paul introduced bill S. 887, the purpose of which is to "repeal the violation of sovereign nations' laws and privacy matters." [n164] Specifically, the bill seeks to strike the reporting requirements and some of the penalties for failure to comply with FATCA, which Paul deems unconstitutional, while leaving the rest of the law intact. [n165] [*237] However, it seems clear that a version of FATCA without the reporting requirements and penalties would no longer serve the law's purpose of increasing the burden on Americans trying to hide money overseas. [n166]

Speaking out against FATCA, Senator Paul stated, "FATCA's harmful impacts cover the spectrum. It is a violation of Americans' constitutional protections, oversteps the limits of executive power, disregards the mutual respect of sovereignty among nations and drains money from the federal treasury under the guise of replenishing it, and discourages overseas investment in the United States." [n167] The bill garnered substantial support from lobbying groups such as the National Taxpayers Union and the Credit Union National Association (CUNA). [n168] Senator Paul's bill is currently under review after being sent to hearing by Committee. [n169]

V. Analysis

Given the numerous concerns with FATCA, the question now is whether the law will stand. The law could meet its demise in a few ways: the Supreme Court could deem FATCA unconstitutional if such a case is brought before the Court and it grants certiorari, or the law could prove ineffective and be repealed.

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A. Supreme Court

As outlined above, if constitutional attorney Jim Bopp succeeds in bringing a case against FATCA, and the Supreme Court grants certiorari, FATCA may be struck down as unconstitutional. [n170] Such a case would involve fairly heavy discussion on the three elements Bopp stated he would form his case around: the Treasury's violation of the Senate's treaty-making power by implementing IGAs with foreign governments, the potential violation of the Fourth Amendment, and the potential violation of the Eighth Amendment. [n171]

The most heated debate over FATCA is not over the law itself, but rather over the subsequent IGAs. [n172] The most touted argument against the IGAs is that they are not valid in the United States, as they were not formed pursuant to the Constitution. As mentioned above, the Treasury Department does not have the power to make treaties or executive agreements without prior congressional authority to do so. By forming IGAs with foreign governments, the Treasury explicitly violated the Senate's treaty-making power under the Constitution. The Treasury's response is that IGAs are not treaties; rather they are executive agreements, which are within the power of the Treasury to enact. [n173] However, the problem with this argument is that IGAs unequivocally bind the United States internationally - which executive agreements arguably cannot do, [n174] - by forcing U.S. financial institutions to report to the foreign governments upon request. Due to the uncertainty surrounding executive agreements binding the United States internationally, there is a good chance the Supreme Court will grant certiorari to resolve the issue.

In addition to determining the limits of executive agreements, certiorari could very well be granted to clear the muddy waters of judicial deference given to administrative agencies, such as the Treasury Department. Currently, the landmark case is Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc. [n175] In [*239] Chevron, the Court held that judicial deference should be given to an administrative agency's interpretation of an ambiguous statute. [n176] First, the Court must determine if the statute is ambiguous. [n177] If the intent of Congress is clear in the statutory language, the statute is considered unambiguous and the administrative agency must follow its clear meaning. [n178] A statute is ambiguous if Congress has not directly clarified the statutory language at issue, and the administrative agency's interpretation will be given deference if it is based on a permissible construction of the statute. [n179] For an administrative agency's interpretation to be valid, it must not be arbitrary, capricious, or manifestly contrary to the statute. [n180]

Thus far, United States v. Mead Corp. has been the Court's most notable attempt at limiting Chevron deference. [n181] In Mead, the Court held that "administrative implementation of a particular statutory provision qualifies for Chevron deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." [n182] The Court stated that if Chevron did not apply, deference to administrative agencies could still be warranted under an old standard promulgated in Skidmore v. Swift & Co. [n183]

The Skidmore standard uses a totality of the circumstances approach to give administrative agency interpretations respect proportional to their power to persuade. [n184] While the Court in Mead set out to limit and clarify Chevron, its opinion resulted in even more confusion. [n185] The reason for this confusion stems from the fact that the term "force-of-law" has never been clearly defined by the Court, as well as the fact that the Court and lower courts have had difficulty [*240] over the years deciphering and implementing the vague Skidmore standard. [n186] As a result of the holding in Mead, the Court's method of granting deference to administrative agencies has become even more muddled. [n187] Due to the continued confusion regarding deference, [n188] the Court may find a case regarding the constitutionality of FATCA's IGAs to be the perfect platform for settling the issue of deference by creating a new, and much needed bright-line rule.

Whether or not the Court creates a new rule for deference, IGAs will likely be struck down. First, it is unclear whether IGAs qualify for deference. The mere fact that IGAs are arguably unconstitutional executive agreements that have the permanent binding effect of treaties [n189] could be enough to place them beyond the scope an administrative agency's interpretation of a statute. Although the constitutionality of executive agreements, which have the effect of binding treaties, is greatly contested, the general consensus is that such treaties must only be temporary and uncontroversial to be valid. [n190]

The seminal case giving weight to the argument in favor of such agreements is United States v. Curtiss-Wright Export Corp., where the Court found:

The President as the sole organ of the federal government in the field of international relations - a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. [n191]

Justice Sutherland, who wrote the Curtiss-Wright opinion, stated that the President has the power to make "international agreements as [*241] [they] do not constitute treaties in the constitutional sense." [n192] While this opinion certainly seems to grant credence to the argument in favor of internationally binding executive agreements, Justice Sutherland later clarified his opinion, greatly narrowing the applicability of such agreements: [n193]

An international agreement may, therefore, be a treaty within the meaning of a statute, or under the general definition, or may be an international compact, without being a treaty within the technical meaning of the Constitution. Precisely where the dividing line is to be drawn has never been authoritatively determined, but so far as indicated by the instances referred to, international agreements which are not treaties in the full constitutional sense, are perhaps confined to such as affect administrative matters, as distinguished from policies, and those which are of only individual concern, or limited scope and duration, as distinguished from those of general consequence and permanent character. [n194]

Based on Justice Sutherland's clarification of allowable internationally binding executive agreements, it is clear that even he is of the opinion that agreements of a permanent character, such as FATCA's IGAs, are unconstitutional. [n195] Therefore, if the Court follows Justice Sutherland's clarification, IGAs should be struck down as unconstitutional before the question of deference even arises, especially because they violate the Framers' intent to keep a system of checks and balances in the treaty-making process. [n196]

However, even if the Court does arrive at the question of deference in relation to IGAs, they should still strike them down. [*242] First, through the lens of Mead, it is arguable whether Congress intended to give the Treasury, in relation to FATCA, the authority to make rules carrying the force of law. The text of FATCA itself clearly lays out rules and a withholding mechanism by which the Treasury could implement the law. [n197] It makes no mention of the Treasury having the authority to implement IGAs, or using any other means, to enforce FATCA. [n198] Solely based on the text of the law, it appears that Congress did not delegate the required authority to the Treasury in regards to FATCA, which means that IGAs are not eligible for Chevron deference; therefore, such deference should not be granted and the IGAs should be declared unconstitutional. Also, the fact that the Treasury is the regulating authority in regards to FATCA should not be sufficient to pass Mead, as it does not seem that Congress intended to grant the Treasury the power to make IGAs.

However, if IGAs do pass the Mead test - perhaps because the Court finds they fall within the Treasury's inherent taxing authority - they would still fail Chevron. As noted above, the text of FATCA clearly defines the rules and collection scheme for the Treasury to follow in its implementation of the law. There is no ambiguity or vagueness in the language of the statute, nor is there any uncertainty as to how the Treasury should implement and enforce the law. While it is true that Congress has not clarified its meaning of the language used in the statute, such clarification is unnecessary as the language is clear. Accordingly, the statute must be found to be unambiguous and Chevron deference cannot be accorded to the Treasury with regard to IGAs.

Finally, it is unclear how the IGAs would fair under the vague Skidmore standard. But, given FATCA's clear statutory language and unambiguity, it is hard to imagine that IGAs will provide sufficient power to garner enough respect from the Court to uphold their constitutionality.

Regardless of whether the Court decides the IGAs are constitutional, the actual FATCA text will likely not be affected by the decision, as the two were formed separately and thus are likely severable. If IGAs are declared unconstitutional, FATCA could still [*243] be found constitutional, but it would require the FFIs to report directly to the IRS rather than to their own government, which would likely increase the reporting costs even more and could drive more FFIs away.

Alternatively, if the IGAs are upheld, FATCA could still be declared unconstitutional under one of the other claims outlined above [n199] and the IGAs would become useless. Such an approach would simply allow the Court to settle the matter as to whether executive agreements, which bind the United States internationally, are constitutional. In the end, the Court will likely strike down the IGAs as unconstitutional because they exceed the allowable authority bestowed upon the Executive branch to make international agreements, there are no statutes authorizing the type of IGAs used to implement FATCA, and they do not qualify for deference. [n200]

If the Court severs FATCA from the IGAs, then FATCA will face independent constitutional scrutiny regarding its alleged violation of the Fourth and Eighth Amendments. Perhaps the weakest claim of the two is the Eighth Amendment claim that the withholding penalties constitute cruel and unusual punishment. The Eighth Amendment reads, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." [n201]

The seminal case on cruel and unusual punishment is Furman v. Georgia, where the Court determined that there are four principles by which a punishment must abide so that it is not found to be cruel and unusual. [n202] These principles are: (1) that "a punishment must not by its severity be degrading to human dignity," [n203] (2) that "severe punishment ... [not be] obviously inflicted in wholly arbitrary fashion," [n204] (3) that "severe punishment ... [not be] clearly and totally rejected throughout society," [n205] and (4) that "severe [*244] punishment ... [not be] patently unnecessary." [n206] The Court further explained that a finding of cruel and unusual punishment should be based on a cumulative approach: [n207]

The function of these principles, after all, is simply to provide means by which a court can determine whether a challenged punishment comports with human dignity. They are, therefore, interrelated, and in most cases it will be their convergence that will justify the conclusion that a punishment is "cruel and unusual.' The test, then, will ordinarily be a cumulative one: If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes. [n208]

At first glance, it appears that the Eighth Amendment claim has little merit because the United States government has the right to tax its citizens, and a 30% withholding for failure to comply does not seem too severe of a punishment for fraud. However, the crux of the Eighth Amendment argument is that a U.S. citizen can be withheld upon even if he or she is fully compliant with FATCA. This would be possible if the taxpayer fully reported to the IRS, but the FFI where the taxpayer has his or her investments fails to fully comply. When the FFI fails to comply, taxes on all U.S. source income going to that FFI would be withheld, even though the U.S. citizen, whose money is actually invested, is already compliant with the IRS. [n209] If the FFI fails to comply, the U.S. person loses an additional 30% of [*245] his or her investment due to the withholding, resulting in a double tax on the investment by the IRS.

An argument can be made that such a withholding, despite full individual compliance, is cruel and unusual punishment in violation of the Eighth Amendment because it is a severe penalty that is being implemented arbitrarily. The reason such a withholding would be considered arbitrary is because both those in violation of the statute, as well as some of those not in violation of the statute, would be subject to the withholding penalty. [n210]

Such a claim regarding financial penalties has never been found to be cruel and unusual punishment by the Supreme Court, so, although the argument has some merit, it would probably fail. The Court would likely determine that the withholding penalty falls within the Treasury's power to tax U.S. citizens. However, if double taxation is found to be prevalent, the issue would more likely be resolved through congressional reform before a case reaches the Supreme Court.

As for the two constitutional claims against FATCA itself, finding that the law is in violation of the Fourth Amendment is perhaps the stronger of the two. The Fourth Amendment reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. [n211]

In a seminal case on Fourth Amendment searches, Chandler v. Miller, the Court determined the meaning of a reasonable search: [n212]

To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing. But particularized [*246] exceptions to the main rule are sometimes warranted based on 'special needs, beyond the normal need for law enforcement.' When such 'special needs' are alleged, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties. [n213]

Through FATCA, the Treasury demands privileged information from FFIs, and ventures into the private accounts of U.S. persons without a warrant, and without individualized suspicion of wrongdoing. [n214] In fact, the majority of the millions of U.S. persons affected by FATCA are likely completely innocent, with only a small minority guilty of any wrongdoing. [n215] However, FATCA does not distinguish between the two. [n216] It treats every U.S. person who has any investments or bank accounts with an FFI as someone who is attempting to skirt the IRS by hiding money overseas, when in fact most U.S. persons with overseas accounts report their income to the IRS and may permanently reside and work in that country. [n217]

Given that FATCA-based searches of private American foreign financial accounts are not founded on individualized suspicion of wrongdoing, the law must be deemed a special need to survive the Fourth Amendment claim, as outlined in Chandler. [n218] The Court will have to undertake a context-specific inquiry and examine the competing private and public interests to determine if the warrantless searches should be allowed. [n219] In this circumstance, the public interests in favor of FATCA are to prevent tax evasion by Americans and, in so doing, increase tax revenue for the federal government. [n220]

The public interests in opposition of FATCA are support of personal liberties, human rights, and general fairness and justice. [n221] [*247] Logically, general fairness and justice should mean ensuring that millions of innocent Americans are not adversely affected by FATCA by having their accounts closed and being stripped of their protection under foreign banking laws based on their national origin, as has been the case thus far.

On the private side, there really seems to be no private interests in favor of FATCA, as surely every FFI would rather see FATCA repealed than pay the steep costs associated with reporting and complying with the new law. Based on the weighing of these interests, it certainly seems as though subjecting innocent, law-abiding Americans to warrantless searches of their private accounts should be deemed in violation of the Fourth Amendment.

If the IRS believes that certain individuals are skirting the law, they should simply procure a warrant for the release of that individual's account information. While Congress may be infuriated over the amount of lost taxes after the revelation that occurred during the UBS case, [n222] the sins of the few are not the sins of all. While tax evasion is a serious issue that should be resolved, the Constitution should not be disregarded when it is convenient for the government to do so. Furthermore, there are undoubtedly alternative methods that can be taken to combat tax evasion and uphold the Constitution. [n223]

If the Supreme Court finds that FATCA results in warrantless searches of private American accounts, it could find FATCA in violation of the Fourth Amendment and strike it down. The likelihood of this occurring is unclear. While the Court may be more apt to allow such searches in national security situations, tax evasion probably does not qualify. Furthermore, the Court may be more inclined to strike down the law on constitutional grounds, given its overall ineffectiveness.

B. Ineffectiveness

If the purpose of FATCA is indeed to increase the burdens on Americans trying to store money overseas and thus bring more tax revenue back to the United States, then the IRS ideally wants every [*248] single FFI to register with it and comply with FATCA. Industry experts suggest that up to 900,000 FFIs are subject to FATCA, while the IRS estimated about 500,000 of those FFIs would register under the law, or about 56% of all affected FFIs. [n224]

However, the actual numbers are nowhere near either of those estimates. [n225] In the United Kingdom - typically a leader in compliance [n226] - only 7,861 FFIs, or about 10% of FFIs affected by FATCA, were registered with the IRS as of September 1, 2014. [n227]

Looking at the broader picture, FATCA withholding officially began on July 1, 2014 for countries without an IGA in place, which at the time totaled 143 countries. [n228] Prior to the withholding date, a total of more than 77,000 FFIs worldwide had registered with the IRS; however, that number has substantially slowed since July. [n229] Shockingly, less than 5,000 FFIs from countries without an IGA have registered with the IRS as of September 1, 2014; that is roughly 5% of the total FFIs affected by FATCA in countries where withholding had already begun. [n230]

Furthermore, of countries with an IGA in place, only a little more than 94,000 FFIs have registered; the withholding for these countries began on January 1, 2015. [n231] In total, by September 1, 2014, less than 100,000 FFIs registered with the IRS, making registration totals less than 20% of the IRS estimate and less than 12% of all FFIs potentially affected by FATCA. [n232] Those numbers have only [*249] increased by about 50,000 as of February 1, 2015. [n233] As of February 2015, there are about 154,000 FFIs registered with the IRS. [n234] While the increase seems substantial compared to the low overall number of registered FFIs, this is still only about 30% of the IRS estimate and about 17% of all FFIs potentially affected by FATCA. [n235]

Clearly, FATCA has not gained widespread acceptance overseas, even after the second round of withholding began at the beginning of 2015. [n236] If these numbers do not dramatically increase, and it does not seem like they will, then the IRS will be hard pressed to present FATCA as having achieved its goal if the actual FFI registration total is only about half of the IRS estimate of 56%.

If the goal is truly to substantially increase burdens on Americans storing money overseas, then FATCA has not yet achieved its purpose. True, it has made doing so more difficult, with about 30% compliance so far, but given that the vast majority of FFIs are not yet in compliance with FATCA, the law has plainly not met its purpose of substantially increasing that burden yet. If the numbers remain similar through the first year of withholding, then FATCA will surely face an increased opposition effort in Congress and may be in danger of being repealed, especially if the actual tax revenue garnered from FATCA is nowhere near the $ 1 billon estimate.

However, there may be an alternative explanation for the low registration numbers. It is possible that more FFIs than expected are showing Americans the door by closing existing accounts and refusing to open new U.S. accounts, along with selling off any American investments the FFI may have. If a banking giant like Deutsche Bank felt taking such extreme measures was necessary to avoid being affected by FATCA, [n237] surely other FFIs will follow in its footsteps.

In one sense, FATCA will have achieved its purpose of making storing money overseas more difficult if several banks decide to shut [*250] out Americans and only a small percentage of FFIs register with the IRS and comply with FATCA. This is because, although less than the IRS estimate of 56% of FFIs would actually be reporting to the IRS, Americans would still have much fewer options when it comes to investing and keeping money overseas as many FFIs would refuse to let them in.

Obviously, this disproportionately affects Americans residing overseas, as Americans who live in the United States could simply reinvest their money domestically. However, as noted by American Citizens Abroad, the Patriot Act discourages U.S. financial institutions from taking on customers who live overseas. As of now, the plight of Americans residing abroad has not garnered enough attention to warrant a Congressional repeal of FATCA, but such a development is certainly possible.

However, even if Congress does not repeal FATCA on the basis of U.S. citizens being shut out of financial institutions overseas, it may do so due to an even larger collateral problem for the U.S. federal government. When FFIs close all U.S. accounts, they must also sell off all U.S. investments to avoid being withheld upon under FATCA. The problem for the United States in this scenario is that investments in the United States would drop severely as FFIs sell off all their U.S. assets. This very well could have a substantial adverse effect on the United States and world economies. If such a state of affairs were to occur, the amount brought back through FATCA would assuredly not be enough to offset an economic downturn. Provided the downturn is linked back to FATCA, the law would certainly be repealed at that point.

VI. Conclusion

Although Congress' intent behind enacting FATCA - to cut down on off-shore tax sheltering and increase federal government tax revenue - was well meaning, the reality is that the law and accompanying IGAs have proven ineffective, unfair, and are likely unconstitutional. The dismal amount of FFIs that have registered with the IRS since FATCA's implementation speaks to its ineffectiveness, while civil and human rights claims from Americans residing both abroad and domestically speak to the law's disparate and unfair treatment of Americans based on their national origin.

[*251] Currently, the Treasury faces three different hurdles to prove the constitutionality of both FATCA and its accompanying IGAs. They must show that FATCA and its IGAs do not violate the Fourth Amendment, Eighth Amendment, and the Senate's treaty-making power. When a case is eventually brought before the Supreme Court, certiorari will likely be granted to create a new bright-line rule concerning administrative agency deference, or to determine the constitutionality of executive agreements, which bind the United States internationally. Either way, the likely outcome will be that the IGAs will be struck down as unconstitutional because they violate the Senate's treaty-making power.

FATCA itself will likely be severed from the IGAs, and it is unclear whether the isolated FATCA will be struck down or not. However, even if it survives, FATCA without its IGAs will likely prove to be even more ineffective than in its current form. After all, the Treasury created the IGAs for the purpose for making implementation of FATCA more effective. But, even with the IGAs in place, there are currently only about 30% of the total potentially affected FFIs registered with the IRS. If the IGAs are struck down, there is no telling how much more ineffective FATCA will become.

Without the IGAs allowing FFIs to report to their own governments, FFIs would face increased reporting burdens and costs to report to the IRS, which would likely lead to more FFIs closing their U.S. accounts and, as a result, FATCA's effectiveness would further deteriorate. Moreover, an increase in FFIs closing out U.S. accounts means more Americans living abroad struggling to find an FFI that will take them in, which is a problem for the U.S. federal government, because it will face increased criticism for disparate treatment of its citizens and probably face an ever-growing exodus of Americans renouncing their U.S. citizenship.

Additionally, while arguments persist over whether FATCA violates the Fourth and Eighth Amendments, arguments for finding a violation of the Fourth Amendment seem to hold more weight. While the Supreme Court could find that the 30% withholding penalties are arbitrary because compliant taxpayers could suffer if their FFI does not comply seamlessly, it is more likely that the Court will find the required reporting of U.S. accounts to be an unwarranted search. As such, FATCA could meet its demise at the judgment of the Supreme Court.

[*252] Regardless of which path gains traction, it seems that FATCA will likely fall, whether due to ineffectiveness leading to a Congressional repeal or the Supreme Court striking the law or its IGAs down as unconstitutional, as the law's collateral damage is clearly too much for its miniscule potential benefit.

Legal Topics:

For related research and practice materials, see the following legal topics:
Securities LawU.S. Securities & Exchange CommissionAdministrative ProceedingsRight to Financial Privacy ActTax LawFederal Tax Administration & ProcedureCriminal Procedure & Penalties (IRC secs. 7201-7217, 7231-7232, 7261-7262, 7268-7273, 7375)General OverviewTax LawInternational TaxesAmericans Operating AbroadGeneral Overview

FOOTNOTES:

n1. See, e.g., The Firm (Paramount Pictures 1993).

n2. Background and Current Status of FATCA, LexisNexis.com (2014), available at http://www.lexisnexis.com/store/images/samples/9780769853734.pdf.

n3. Id.

n4. Hiring Incentives to Restore Employment Act of 2010, Pub. L. No. 111-147, 124 Stat. 71. The FATCA legislation was enacted as part of the HIRE Act and comprises Chapter 4 of the Internal Revenue Code. 26 U.S.C.ßß1471-1474 (2012).

n5. 156 Cong. Rec. S1745 (daily ed. Mar. 18, 2010) (statement of Sen. Levin).

n6. Background and Current Status of FATCA, supra note 2.

n7. Id. An FFI is any financial institution that is a foreign entity. 26 U.S.C. ß 1471(d)(4). A financial institution is defined as any entity that:

(A) accepts deposits in the ordinary course of a banking or similar business,

(B) as a substantial portion of its business, holds financial assets for the account of others, or

(C) is engaged (or holding itself out as being engaged) primarily in the business of investing, reinvesting, or trading in securities (as defined in section 475(c)(2) without regard to the last sentence thereof), partnership interests, commodities (as defined in section 475(e)(2)), or any interest (including a futures or forward contract or option) in such securities, partnership interests, or commodities.

Id. ß 1471(d)(5).

n8. 26 U.S.C.ßß1471-1474 (2012).

n9. Marylouise Serrato, Comments - Financial Services Tax Reform Working Group, Ways and Means Committee, Ways & Means Committee (Apr. 4, 2013), available at http://waysandmeans.house.gov/uploadedfiles/american_citizens_abroad_wg_comment_3.pdf.

n10. FATCA - Archive, U.S. Dep't of the Treasury (Aug. 26, 2014), http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA-Archive.aspx.

n11. Allison Christians, The Dubious Legal Pedigree of IGAs (and Why It Matters), 69 Tax Notes Int'l 565, 567 (Feb. 11, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2280508.

n12. See Part II.

n13. See Part III.

n14. See Part IV.

n15. See Part V.

n16. 156 Cong. Rec. S1745 (daily ed. Mar. 18, 2010) (statement of Sen. Levin).

n17. Id.

n18. Anita Ramasastry, Secrets and Lies? Swiss Banks and International Human Rights, 31 Vand. J. Transnat'l L. 325, 328 (Mar. 1998). Article 47(a) of Swiss Federal Banking Statute states:

1. Whoever discloses a secret that was entrusted to him, or of which he has knowledge in his capacity as a member of an organ of the bank, as an employer, agent, liquidator, trustee, observer of the Banking Commission, or director or as an employee of a chartered accounting or audit firm, and whoever instigates another to such violation of the professional secrecy shall be punished by way of imprisonment up to six months or by a fine.

Id. at n.5.

n19. Id. at 328.

n20. 156 Cong. Rec. S1745 (daily ed. Mar. 18, 2010) (statement of Sen. Levin).

n21. Id.

n22. Id.

n23. Bank Secrecy Act, 31ßßU.S.C. 5311-5332 (2012). "It is the purpose of this section to require the maintenance of appropriate types of records by insured depository institutions in the United States where such records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings ... ." 12 U.S.C. ß 1829b(a)(2) (2012).

n24. 12 U.S.C. ß 1829b(b)-(e).

n25. Right to Financial Privacy Act, 12 U.S.C. ßß3401-3422 (2012).

n26. Id.

n27. Id.

n28. Mirit Reif, FATCA, FBAR, and What To Do If You Haven't Been Filing All Your U.S. Taxes, Dave Wolf & Co. (Feb. 27, 2014), http://www.hacohenwolf.com/fatca-what-is-fatca.

n29. Id.

n30. Id.

n31. 156 Cong. Rec. S1745 (daily ed. Mar. 18, 2010) (statement of Sen. Levin).

n32. Id.

n33. Id.

n34. See infra Part III-IV.

n35. 26 U.S.C.ßß1471-1474.

n36. FATCA - Archive, supra note 10.

n37. See Part III.A.

n38. See Part III.B.

n39. 26 U.S.C. ß 1471(a).

n40. Id.

n41. Id. ß 1471 (b)(1)-(2). Financial accounts are, with respect to any FFI, any depository or custodial account maintained by the FFI, or any non-regularly traded debt or equity interest in such FFI. Id. ß 1471(d)(2). A U.S.-owned foreign entity is any foreign entity that has one or more substantial U.S. owners. Id. ß 1471(d)(3). A substantial U.S. owner is a U.S. person who owns, directly or indirectly, more than 10% of the stock of a foreign entity, more than 10% of the interests in a partnership, or more than 10% of the beneficial interests of a trust. Id. ß 1473(2)(A).

n42. Id. ß 1471(b)(1).

n43. Id. ß 1471(b)(1)(C), (c)(2)(B).

n44. Id. ß 1471(b)(1)(B).

n45. Id. ß 1471(b)(1)(C). The required information is:

(A) The name, address, and [Taxpayer Identification Number (TIN)] of each account holder which is a specified United States person and, in the case of any account holder which is a United States owned foreign entity, the name, address, and TIN of each substantial United States owner of such entity.

(B) The account number.

(C) The account balance or value (determined at such time and in such manner as the Secretary may provide).

(D) Except to the extent provided by the Secretary, the gross receipts and gross withdrawals or payments from the account (determined for such period and in such manner as the Secretary may provide).

Id. ß 1471(c)(1)(A)-(D).

n46. Id. ß 1471(b)(1)(D)(i)-(ii).A recalcitrant account holder is an FFI that fails to provide the required information regarding U.S. accounts, or fails to waive any law preventing the account holder from releasing such information. Id. ß 1471(d)(6)(A)-(B). A withholdable payment is:

(i) any payment of interest (including any original issue discount), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, and other fixed or determinable annual or periodical gains, profits, and income, if such payment is from sources within the United States, and

(ii) any gross proceeds from the sale or other disposition of any property of a type which can produce interest or dividends from sources within the United States.

Id. ß 1473(1)(A)(i)-(ii).

n47. Id. ß 1471(b)(1)(E).

n48. Id. ß 1471(b)(1)(F)(i)-(ii).

n49. 26 C.F.R. ß 1.1474-1(b) (2014).

n50. Id.

n51. 26 C.F.R. ß 1.6302-2(a) (2014).

n52. 26 C.F.R. ß 1.1474-1(b) (2014).

n53. Foreign Account Tax Compliance Act, 26 U.S.C. ß 1471(b)(3) (2012).

n54. Id. ß 1471(b)(3)(B).

n55. Id. ß 1471(b)(3)(C)(i).

n56. Id. ß 1471(b)(3)(C)(ii).

n57. See supra text accompanying note 41.

n58. 26 U.S.C. ß 1471(c)(2).

n59. Id. ß 1471(c)(2)(B)(i)-(ii). In the event that an FFI is also a qualified intermediary, it must meet both the U.S. reporting requirements and any reporting or other requirements it has as a qualified intermediary. Id. ß 1471(c)(3). Electing to be subject to U.S. reporting requirements is not much of an easier option. U.S. reporting requirements include reporting payments of more than $ 600 under 26 U.S.C. ß 6041, dividend payments of more than $ 10 under 26 U.S.C. ß 6042, interest payments of more than $ 10 under 26 U.S.C. ß 6049, and more. Id. ß 1471(c)(2)(B).

n60. See supra text accompanying note 41.

n61. 26 U.S.C. ß 1471(b)(2).

n62. Id. ß 1471(b)(2)(A)(i)-(ii).

n63. Id. ß 1471(b)(2)(B).

n64. Id. ß 1471(d)(1)(B)(ii). An institution is part of an FFI's expanded affiliated group if it is in partnership, or if the FFI's parent corporation owns more than 50% of the institution's stock or has more than 50% of the total voting power of the stock of such institution. Id. ß 1471(d)(2)..

n65. Id. ß 1471(d)(1)(C)(i)-(ii).

n66. Id. ß 1471(f)(1)-(4).

n67. FATCA - Archive, supra note 10.

n68. Id.; Press Release, 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, U.S. Treasury Dep't (Feb. 7, 2012), available at http://www.treasury.gov/press-center/press-releases/Documents/020712%20Treasury%20IRS%20FATCA%20Joint%20Statement.pdf.

n69. FATCA - Archive, supra note 10.

n70. FATCA Information for Governments, Internal Revenue Serv., http://www.irs.gov/Businesses/Corporations/FATCA-Governments (last updated Apr. 6, 2015).

n71. Id.

n72. Id.

n73. Id.

n74. Id.

n75. Id.

n76. Id.

n77. Id.

n78. Id.

n79. FATCA - Archive, supra note 10. Only Switzerland, Japan, Chile, Bermuda, Hong Kong, Moldova, and Austria have signed Model 2 agreements with the United States; Armenia, Iraq, Nicaragua, Moldova, Paraguay, San Marino, and Taiwan have all reached Model 2 IGAs in substance. Id. This is compared to fifty-one countries having reached Model 1 agreements in substance and thirty-seven having reached a signed Model 1 agreement. Id.

n80. Press Release, U.S. Department of Treasury & Internal Revenue Service, Treasury to Treat Jurisdictions with FATCA Agreements in Substance as Agreements in Effect to Prepare for Start of Law (Apr. 2, 2014), available at http://www.treasury.gov/press-center/press-releases/Pages/jl2343.aspx.

n81. Foreign Account Tax Compliance Act (FATCA), Resource Center, U.S. Dep't of the Treasury (June 9, 2014), http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx.

n82. FATCA: International Data Exchange Services (IDES), Internal Revenue Serv. (Apr. 2015), http://www.irs.gov/pub/fatca/p5190idesuserguide.pdf.

n83. James O'Toole, JP Morgan: 76 Million Customers Hacked, CNN Money (Oct. 3, 2014), money.cnn.com/2014/10/02/technology/security/jpmorgan-hack/?iid=EL.

n84. Telephone Interview with William Byrnes, Associate Dean, Thomas Jefferson School of Law (Sept. 12, 2014).

n85. Id.

n86. Id.

n87. Serrato, supra note 9.

n88. Id.

n89. Id.

n90. Robert Wood, FATCA Carries Fat Price Tag, Forbes (Nov. 30, 2011), available at http://www.forbes.com/sites/robertwood/2011/11/30/fatca-carries-fat-price-tag/.

n91. Id.

n92. William Byrnes & Haydon Perryman, August FATCA GIIN List Analysed by Byrnes and Perryman, International Financial Law Prof Blog (Aug. 1, 2014), http://lawprofessors.typepad.com/intfinlaw/2014/08/august-fatca-giin-list-analysed-by-byrnes-and-perryman.html.

n93. Id.

n94. Serrato, supra note 9.

n95. Subsection A and B, and accompanying notes.

n96. Serrato, supra note 9.

n97. Id.

n98. Id.

n99. Id.

n100. Id.

n101. Foreign Account Tax Compliance Act, 26 U.S.C. ß 1473(2)(A)(i)-(iii) (2012).

n102. Serrato, supra note 9.

n103. Id.; Peter Frawley, Legislation to Enable Compliance with an Intergovernmental Agreement Between the United States and New Zealand, Inland Revenue (Sept. 13, 2013), http://taxpolicy.ird.govt.nz/sites/default/files/2013-ris-arearm-bill-04.pdf.

n104. Frawley, supra note 103, at 2.

n105. Id.

n106. Id.

n107. Id.

n108. Id. at 6.

n109. Universal Declaration of Human Rights Home Page, Office of the High Comm'r for Human Rights (Dec. 8, 1948), http://www.ohchr.org/EN/UDHR/Pages/Introduction.aspx.

n110. The Universal Declaration of Human Rights, United Nations (1948), available at http://www.un.org/en/documents/udhr/. Article 2 of the UDHR states:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs ... .

Id. Furthermore, Article 7 of the UDHR states, "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination." Id.

n111. Ralph Z. Hallow, Superlawyer Jim Bopp Takes on McCain-backed tax Act that Targets Americans Overseas, Wash. Times (May 5, 2014), http://www.washingtontimes.com/news/2014/may/5/superlawyer-jim-bopp-takes-on-mccain-backed-tax-ac/?page%3Dall.

n112. See supra Part III.

n113. Serrato, supra note 9, at 4.

n114. Id.

n115. Brett Wolf, New IRS Enforcement Policy Ignites Debate On Value of Bank 'Structuring' Reports, Reuters (Nov. 6, 2014), blogs.reuters.com/financial-regulatory-forum/2014/11/06/new-irs-enforcement-policy-ignites-debate-on-value-of-bank-structuring-reports/.

n116. Id. A transaction that might indicate fraud is a cash transaction that involves $ 10,000 or more. Id.

n117. Instructions for Forms 1099-INT and 1099-OID, Internal Revenue Serv. (2015), www.irs.gov/pub/irs-pdf/i1099int.pdf.

n118. Addison Wiggin, Not Just Fat Cats Hopping Through FATCA Hoops, Forbes (July 10, 2014), available at http://www.forbes.com/sites/greatspeculations/2014/07/10/not-just-fat-cats-hopping-through-fatca-hoops/.

n119. John D. McKinnon & Eyk Henning, Banks Get Break on New Tax-Evasion Enforcement, Wall St. J. (May 2, 2014), http://www.wsj.com/articles/SB10001424052702303948104579537924282856770

n120. Foreign Account Tax Compliance Act, 26 U.S.C. ß 1471(a) (2012).

n121. The Universal Declaration of Human Rights, supra note 110.

n122. Frawley, supra note 103, at 2.

n123. In essence, forcing Americans to face this dilemma places them in a sort of artificial exile, which violates Article 9 of the UDHR which states, "No one shall be subjected to arbitrary arrest, detention or exile." The Universal Declaration of Human Rights, supra note 110.

n124. Andrew Mitchel, 2013 Expatriations Increase by 221%, International Tax Blog (Feb. 6, 2014), http://intltax.typepad.com/intltax_blog/2014/02/2013-expatriations-increase-by-___.html.

n125. Id.

n126. Id.

n127. Id.

n128. Andrew Mitchel, 2014-More Expatriations Than Ever, International Tax Blog, http://intltax.typepad.com/intltax_blog/number-of-expatriates/.

n129. Alex Newman, Critics Mount Constitutional Attack on Dreaded FATCA Tax Regime, The New American (May 13, 2014), http://www.thenewamerican.com/usnews/constitution/item/18253-critics-mount-constitutional-attack-on-dreaded-fatca-tax-regime.

n130. See infra Part IV.B.

n131. Christians, supra note 11, at 565.

n132. Id.

n133. Michael D. Ramsey, Treaty Clause, The Heritage Foundation (2012), http://www.heritage.org/constitution/#!/articles/2/essays/90/treaty-clause.

n134. Christians, supra note 11, at 565-67.

n135. Id.

n136. Id.

n137. Id. at 567.

n138. Id.

n139. Id.

n140. Id. at 566.

n141. Letter from Representative Bill Posey, U.S. House of Representatives, to Secretary Jack Lew, Sec'y of the Treasury (July 1, 2013), available at http://www.repealfatca.com/downloads/Posey_letter_to_Sec._Lew_July_1,_2013.pdf.

n142. Letter from Alastair M. Fitzpayne, Assistant Secretary for Legislative Affairs, to Representative Bill Posey, U.S. House of Representatives (June 23, 2014), available at http://federaltaxcrimes.blogspot.com/2014/07/irs-letter-to-congressman-defending-its.html.

n143. Allison Christians, IRS Claims Statutory Authority for FATCA Agreements Where No Such Authority Exists, Tax, Society & Culture (July 4, 2014, 9:34 PM), http://taxpol.blogspot.co.nz/2014/07/irs-claims-statutory-authority-for.html.

n144. Id.

n145. Id.

n146. See Christians, supra note 11, at 567.

n147. Id.

n148. Id.

n149. Id.

n150. See infra Part IV.B.ii.

n151. Jim Bopp, The Bopp Law Firm's Takedown of FATCA, The Bopp Law Firm, http://www.bopplaw.com/fatca-takedown (last visited Apr. 23, 2015); Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).

n152. Hallow, supra note 111; Newman, supra note 129.

n153. See supra Part IV.B.i.

n154. Bopp, supra note 151.

n155. Hallow, supra note 111.

n156. Ramsey, supra note 133.

n157. Id.

n158. Bopp, supra note 151.

n159. Id.

n160. Id.; Newman, supra note 129.

n161. Newman, supra note 129.

n162. Press Release, Rand Paul, Sen. Rand Paul Introduces Bill to Repeal Anti-Privacy Provisions in FATCA (May 8, 2013), at http://www.paul.senate.gov/?p=press_release&id=793.

n163. Id.

n164. S.887, 113th Congress. (2013), available at http://www.gpo.gov/fdsys/pkg/BILLS-113s887is/pdf/BILLS-113s887is.pdf.

n165. Press Release, supra note 162.

n166. Id.

n167. Press Release, supra note 162.

n168. Patrick Temple-West, Senator's Attack on Tax-Dodge Law Gains Some Support, Reuters (May 8, 2013), http://www.reuters.com/article/2013/05/08/us-usa-tax-fatca-idUSBRE94704420130508. CUNA represents almost 90% of all state and federally chartered credit unions in the United States. Letter from Bill Cheney, President & CEO of CUNA to Senator Rand Paul (May 16, 2013), available at http://www.cuna.org/Legislative-And-Regulatory-Advocacy/Legislative-Advocacy/Legislative-Hot-Topics/Foreign-Account-Tax-Compliance-Act-(FATCA)/. CUNA estimates that FATCA, in its current form, would annually impose billions of dollars in compliance costs on U.S. financial institutions, not to mention violating the constitutional privacy rights of their members and customers. Id.

n169. Press Release, supra note 162.

n170. See supra Part IV.B.

n171. See supra text accompanying note 152.

n172. See supra Part IV.B.

n173. Letter from Alastair M. Fitzpayne, supra note 142.

n174. Christians, supra note 11, at 567.

n175. 467 U.S. 837 (1984).

n176. Id. at 844.

n177. Id. at 842.

n178. Id. at 842-43.

n179. Id. at 843.

n180. Id. at 844.

n181. 533 U.S. 218 (2001).

n182. Id. at 226-27.

n183. Id. at 221; 323 U.S. 134 (1944).

n184. Skidmore, 323 U.S. at 140.

n185. Richard W. Murphy, Judicial Deference, Agency Commitment, and Force of Law, 66 Ohio St. L.J. 1013, 1038 (2005).

n186. Id.

n187. Id.

n188. Id.

n189. Christians, supra note 11, at 567.

n190. Id.

n191. 299 U.S. 304, 320 (1936).

n192. Id. at 318.

n193. George Sutherland, Constitutional Power and World Affairs 120-21 (Columbia University Press eds., 1919), available at https://ia700406.us.archive.org/33/items/cu31924030469484/cu31924030469484.pdf.

n194. Id.

n195. Id.

n196. Ramsey, supra note 133.

n197. Foreign Account Tax Compliance Act, 26 U.S.C. ßß1471-1474 (2012).

n198. Christians, supra note 11, at 565-67.

n199. See supra Part IV.B.ii.

n200. Christians, supra note 11, at 565-67.

n201. U.S. Const. amend. VIII.

n202. 408 U.S. 238, 281 (1972).

n203. Id.

n204. Id.

n205. Id.

n206. Id.

n207. Id. at 282.

n208. Id.

n209. Bopp, supra note 151.

n210. Id.

n211. U.S. Const. amend. IV.

n212. Chandler v. Miller, 520 U.S. 305, 313-14 (1997).

n213. Id.

n214. See supra Part IV.B.

n215. See supra Part IV.A.

n216. Id.

n217. Id.

n218. 520 U.S. at 313-14.

n219. Id.

n220. 156 Cong. Rec. S1745 (daily ed. Mar. 18, 2010) (statement of Sen. Levin).

n221. See supra Part IV.

n222. 156 Cong. Rec. S1745 (daily ed. Mar. 18, 2010) (statement of Sen. Levin).

n223. Frederic Alain Behrens, Using a Sledgehammer to Crack a Nut: Why FATCA Will Not Stand, 2013 Wis. L. Rev. 205, 205-36 (2013).

n224. Byrnes & Perryman, supra note 92.

n225. Id.

n226. Id.

n227. Haydon Perryman, September 1, 2014 IRS GIIN List (99,861 Entities by Country), HaydonPerryman.com http://haydonperryman.com/2014/09/01/september-1-2014-irs-giin-list-99861-entities-by-country/.

n228. Byrnes & Perryman, supra note 92.

n229. Id.

n230. William Byrnes, FATCA FFI Update and It Doesn't Look Pretty. September Did Not Break 100,000!, International Financial Law Prof Blog (Sept. 2, 2014), http://lawprofessors.typepad.com/intfinlaw/2014/09/fatca-ffi-update-and-it-doesnt-look-pretty-september-did-not-break-100000.html.

n231. Id.

n232. Id.

n233. William Byrnes, GIIN Lists Analysis: June 2014 through February 2015 (February 23, 2015), available at http://lawprofessors.typepad.com/intfinlaw/2015/02/february-fatca-updates-giins-and-ides.html.

n234. Id.

n235. Id.; Byrnes & Perryman, supra note 92.

n236. Byrnes, supra note 230; Byrnes & Perryman, supra note 92.

n237. Wiggin, supra note 118.