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Jerry R. Dagrella
University of the Pacific, McGeorge School of Law

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* J.D., University of the Pacific, McGeorge School of Law, to be conferred May 2001.

I. INTRODUCTION

Taxpayers generally exploit every legal means available to them to pay less in United States federal taxes.[1] Kenneth Dart is no exception.[2] With assets worth over $3 billion, he is ranked among America's top twelve wealthiest persons.[3] Nevertheless, to avoid paying U.S. federal taxes on his fortune, Darth renounced his U.S. citizenship and moved to Ireland.[4] He is but one example of the many Americans who have renounced their citizenship to avoid U.S. federal taxes.[5]

Under the common law, renouncing one's citizenship, commonly referred to as expatriation,[6] was simply not permitted.[7] Originally, the United States followed the

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1. *See* Commissioner v. Newman, 159 F.2d 848, 850-51 (2d Cir. 1947) (stating:
[T]here is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions. To demand more in the name of morals is mere cant.) (Hand, J., dissenting);
see also Gregory v. Helvering, 293 U.S. 465, 469 (1935) (holding that "[t]he legal right of a taxpayer to decrease the amount of what would otherwise be his taxes, or altogether to avoid them, by means which the law permits cannot be doubted."); *see also Who is an Expatriate?* (visited Nov. 26, 2000) <http://www.ppc.ch/expatwho.htm> (explaining the importance of an expatriate to become aware of his tax situation so that it is not to his disadvantage). *See generally* Murphy Logging Co. v. United States, 378 F.2d 222, 223 (1967) (holding that "[t]ax reduction is not evil if you do not do it evilly").

2. *See* United States House of Representatives Ways and Means Committee, *W & M Democratic Staff Report on Expatriate Tax Bill*, 95 TNI 115-19, 115-19 (1995) [hereinafter *W & M Democratic Staff*] (identifying Kenneth Dart as one of several recent expatriates who renounced U.S. citizenship to save on taxes); *see also Harris Offshore: Residency Programs for those Seeking to Relocate Outside the USA* (visited Nov. 26, 2000) <http://www.marc-harris.net/offshore/expatriates.htm> [hereinafter *Harris Offshore*] (naming Kenneth Dart among several American tax exiles).

3. *See W & M Democratic Staff*, *supra* note 2, at 115-19.

4. *See id.* (indicating that Kenneth Dart renounced his U.S. citizenship and moved to Ireland to escape U.S. federal taxes). Kenneth Dart also moved his company, Dart Container Corporation, to the Cayman Islands. *See id.*; *see also Harris Offshore*, *supra* note 2 (finding that Kenneth Dart is also a citizen of Belize).

5. *See* Ryan J. Donmoyer, *U.S. Democrats Gun for Expatriate Tax Cheats*, 19 TNI 1420, 1420 (1999) (claiming that some of the richest taxpayers have demonstrated their willingness to renounce citizenship for pecuniary gain); *see also* Brigid McMenamin, *Flight Capital: Avoiding U.S. Taxes by Renouncing Citizenship*, FORBES, Feb. 28, 1994, at 55 (stating that each year "boatloads" of Americans are willing to renounce their citizenship to escape taxation). *But see* Staff of the Joint Comm. On Taxation, 104th Cong., ISSUES PRESENTED BY PROPOSALS TO MODIFY THE TAX TREATMENT OF EXPATRIATION 1 (Comm. Print 1995) (arguing that very few Americans renounce their citizenship for the purpose of avoiding U.S. taxes). Some wealthy expatriates include the following people: Campbell's Soup heir, John Dorrance III, now an Irish citizen; founder of Carnival Cruise Lines, Ted Arson, who now lives in Israel; director and former Treasurer of the Hartford-based Loctite Corporation, a maker of adhesives, Frederick Krieble, who took residence in the Turks and Caicos islands; and a leading international money manager, J. Mark Mobius, who has German citizenship and lives in Hong Kong and Singapore. *See* Robert Lenzer & Philippe Mao, *The New Refugees*, FORBES, Nov. 21, 1994, at 131-32; *see also Harris Offshore*, *supra* note 2 (identifying many more American tax exiles and stating that the expatriate community grew by well over 300 people in 1993 alone); *see also W & M Democratic Staff*, *supra* note 2, at 115-19 (naming some of the most highly publicized wealthy expatriates).

6. According to BLACK'S LAW DICTIONARY, expatriation is the voluntary act of abandoning or renouncing one's country, and becoming the citizen or subject of another country. BLACK'S LAW DICTIONARY 576 (6th ed. 1990); *see also Expatriation* (visited Nov. 26, 2000) <http://www.fwkc.com/encyclopedia/low/articles/e/e007001701f.html> (defining expatriation as the "renunciation or abandonment by a person of his or her nationality and allegiance, or acquisition of citizenship in another country."). The Internal Revenue Code refers to expatriates as

doctrine known as "perpetual allegiance," taking the position that an individual had no legal right to forsake his sovereign.[8] Almost every country around the globe adopted this doctrine as a foundational notion of citizenship.[9] However, in the late nineteenth century, the United States abandoned the perpetual allegiance doctrine[10] and enacted the Expatriation Act of 1868 (the Act).[11] Other nations soon followed the United States' approach, and expatriation gained international recognition in the early twentieth century.[12]

It is said that the Act was enacted "to assail the conduct of the British Government and to declare the right of naturalized Americans to renounce their native allegiance."[13] However, some of the United States' wealthiest citizens undoubtedly adopted their own useful purpose for the new law—tax-avoidance.[14]

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individuals who relinquish their citizenship. *See* I.R.C. § 877(a) (West 2000). For purposes of this comment, an expatriate will refer to a U.S. citizen who renounces his or her U.S. citizenship.

7. *See* Mackenzie v. Hare, 239 U.S. 299, 308 (1915) (recognizing the perpetual allegiance rule of English common law).

8. *See* Perez v. Brownell, 356 U.S. 44, 67 (1958) (indicating that "[t]he common-law doctrine of perpetual allegiance [is] evident in the opinions of this court."); *see also Mackenzie*, 239 U.S. at 309 (acknowledging that "the doctrine of perpetual allegiance maintained by England was accepted by the United States."). *See generally* Peter Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 EMORY L.J. 1411, 1426 (1997) (professing that in the early nineteenth century, the United States reflected its weakness when it failed to challenge the dominant international position of perpetual allegiance).

9. *See* Spiro, *supra* note 8, at 1420 (acknowledging that most countries did not recognize the right of expatriation).

10. *See Mackenzie*, 239 U.S. at 300 (stating, "[w]hatever may have been the law of England and the original law of this country as to perpetual allegiance of persons to the land of birth, Congress by the Act of 1868, explicitly declared the right of expatriation to have been the law."); *see also* Elwin Griffith, *Expatriation and the American Citizen*, 31 HOW. L.J. 453, 457 (1988) (indicating that the Act recognized the rights of naturalized citizens); *see also* T. Alexander Aleinikoff, *Symposium on Law and Community: Theories of Loss of Citizenship*, 84 MICH. L. REV. 1471, 1476 (1986) (declaring that the Expatriation Act of 1868 firmly established that Americans could abjure their allegiance).

11. 15 Stat. 223 (1907).

12. *See* Spiro, *supra* note 8, at 1429 (finding that the right of expatriation moved towards international recognition during the early twentieth century).

13. Afroyim v. Rusk, 387 U.S. 253, 288 (1967).

14. *See Harris Offshore*, *supra* note 2 (explaining that their "organization speaks to at least one new American client interested in expatriating every week"); *see also* Stanley Mailman, *Expatriation and Senator Moynihan's Tax Proposal*, N.Y. L.J. Apr. 24, 1995, at 3 (pointing out a recent cover story in *Forbes* magazine entitled, *"The New Refugees: As their tax burdens grow, many affluent Americans are abandoning their citizenship"*); *see also Expatriation Taxation—Not Just for Rich Tax Dodgers* (visited Nov. 26, 2000) <http://www.taxprophet.com/ foreign/expat2.html> [hereinafter *Expatriation Taxation*] (recognizing that several Americans renounce their allegiance to this country for the sole purpose of saving taxes); *see also* Karen DeWitt, *Some of Rich Find a Passport Lost is a Fortune Gained*, N.Y. TIMES, April 12, 1995, at A1 (noting that each year, many wealthy Americans renounce their citizenship to save a fortune in U.S. taxes); *see also* Donmoyer, *supra* note 5, at 1420 (stating some of America's most affluent citizens are fleeing the country to avoid paying taxes on their wealth).

This offends many Americans,[15] leading to unrelenting media coverage[16] and political debate.[17]

Currently at the heart of the controversy regarding tax-motivated expatriation are two pieces of legislation enacted by Congress in 1996. The first is an immigration statute, the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA), which denies tax-motivated expatriates re-entry into the United States. The second is a tax bill, the Health Insurance Portability and Accountability Act of 1996 (HIPAA), which amends section 877 of the Internal Revenue Code.[18] Congress found that many wealthy Americans renounced their citizenship for pecuniary gain,[19] contrary to the purpose and reasoning behind the enactment of the Expatriation Act of 1868.[20] Therefore, Congress enacted the above laws broadening the U.S. tax base to prevent expatriates from avoiding their fair share[21] of taxes.[22]

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15. *See, e.g.*, Martin A. Sullivan, *News Analysis—Democrats Revisit Expatriate Tax: With Neutrality & Justice for All?* 19 TNI 1705, 1705 (1999) (stating bluntly that the thought of Americans renouncing their citizenship to avoid taxes "makes us regular folks mad"); *see also* Michael Kinsley, *Love It or Leave It*, TIME, Nov. 28, 1996, at 96 (referring to tax-motivated expatriates as "financial draft evaders"); *see also* Alice G. Abreu, *Taxing Exits*, 29 U.C. DAVIS L. REV. 1087, 1122 (1996) (analogizing tax-motivated expatriation with the act of flag burning).

16. *See* Alan S. Lederman & Bobbe Hirsh, *New Tax Liabilities and Reporting Obligations Imposed on Expatriates*, 85 J. TAX'N 325, 325 (1996) (noting the substantial publicity received on the issue of tax-motivated expatriation).

17. *See* Sullivan, *supra* note 15, at 1705 (finding that tax-motivated expatriation and section 877 has sparked much unrelenting political debate).

18. *See* Jeffrey M. Colon, *Changing U.S. Tax Jurisdiction: Expatriates, Immigrants, and the Need for a Coherent Tax Policy*, 34 SAN DIEGO L. REV. 1, 1-3 (1997) (finding that "[o]ne of the most contentious tax legislative battles of the 104th Congress erupted over the Clinton administration's proposal to amend the U.S. tax rules applicable to expatriates.").

19. *See* Lederman & Hirsh, *supra* note 16, at 325 (explaining that news publications about wealthy expatriates caught Congress' attention); *see also* Donmoyer, *supra* note 5, at 1420 (indicating the publicity attained by a news article on wealthy expatriates and the reception the article received among lawmakers).

20. *See* Afroyim v. Rusk, 387 U.S. 253, 288 (1967). *See generally* Perez v. Brownell, 356 U.S. 44, 67-68 (1958) (holding:

> Here, in the United States, the thought of giving... up [the right of expatriation] cannot be entertained for a moment. Upon that principle this country was populated. We owe to it our existence as a nation. Ever since our independence we have upheld and maintained it by every form of words and acts. We have constantly promised full and complete protection to all persons who should come here and seek it by renouncing their natural allegiance and transferring their fealty to us. We stand pledged to it in the face of the whole world.).

21. *See* Abreu, *supra* note 15, at 1097 (explaining that when a taxpayer leaves the country and renounces his or her citizenship, he or she escapes the imposition of tax on a portion of his or her income, which the tax system fails to take into account).

22. *See Expatriation Taxation*, *supra* note 14 (describing the measures Congress took in an attempt to close the tax loophole used by expatriates); *see also* C. Jones Perry Jr., *New Law Imposes More Tax, But Expat Planning can Still be Effective*, 7 J. INT'L TAX'N 492, 492 (1996) (discussing previous legislative attempts to close the tax loopholes used by expatriates). *See generally* Lederman & Hirsch, *supra* note 16, at 325 (commenting on the congressional response to press reports of tax-motivated expatriation).

These laws are a subject of much debate[23] because of their proclaimed ineffectiveness[24] and the peculiar reasons behind their enactment.[25] This Comment analyzes the expatriation tax regime created by these new rules. Part II addresses the background of expatriation in the United States.[26] Part III explains why renouncing citizenship for tax purposes is so attractive for certain individuals[27] and presents an overview of the development of U.S. expatriation laws aimed at those attempting to avoid taxes.[28] Additionally, it addresses the reasons why previous laws were ineffective in deterring tax-motivated expatriation.[29] Part IV discusses the scope and effect of the amendments to the expatriation rules[30] and explains why improvements to the new body of law are essential.[31] Finally, Part V examines proposed legislation that advances alternative solutions to the current expatriation tax laws.[32]

II. THE HISTORY OF EXPATRIATION

A. *The Expatriation Act of 1868*

The doctrine of perpetual allegiance was one of the settled principles of the English common law.[33] In fact, it was the dominant international position to disallow an individual the legal capacity to forsake his sovereign.[34] It was a system of "once

23. *See* Sullivan, *supra* note 15, at 1705 (referring to the taxation of expatriates as a "great political issue").

24. *See id.* (explaining that the expatriation rules are not effective in deterring tax-motivated expatriates); *see also* Charles B. Rangel et al., *U.S. Representative Rangel would Tighten Expatriation Rules to Prevent Tax Avoidance*, 1999 WTD 217-33 (stating that section 877 has failed to deter tax-motivated expatriation); *see also* Heidi Glenn, *U.S. Congressman Asks Joint Tax Committee to Review Expatriation Rules by May 31, 2000*, 19 TNI 1531, 1531 (1999) (finding the expatriation rules to be useless legislation); *see also* Perry, *supra* note 22, at 492 (arguing that Congress has been particularly unsuccessful in deterring tax-motivated expatriation).

25. *See* Orrin Tilevitz & Malgorzata Czapiewska, *Getting the Tax-Free Boot: Tax-Motivated Expatriation May Preclude U.S. Visa*, 14 TNI 1329, 1329 (1997) (referring to the amended version of section 877 as "misguided, technically flawed, probably in violation of a host of bilateral and multilateral treaties, and arguably unconstitutional."); *see also* Lederman & Hirsh, *supra* note 16, at 325 (quoting Senator Moynihan, who criticizes one of the amendments to section 877 as "add[ing] wealthy 'expatriates' to the list of terrorists, convicted criminals, persons with communicable diseases, and others who [face] permanent exile from the United States.").

26. *See infra* notes 33-48 and accompanying text.

27. *See infra* notes 49-107 and accompanying text.

28. *See infra* notes 108-31 and accompanying text.

29. *See infra* notes 132-38 and accompanying text.

30. *See infra* notes 139-80 and accompanying text.

31. *See infra* notes 181-89 and accompanying text.

32. *See infra* notes 190-202 and accompanying text.

33. *See* Mailman, *supra* note 14, at 3 (indicating that the British Government denied a subject the right to sever his allegiance).

34. *See* Spiro, *supra* note 8, at 1420 (finding that most countries followed the doctrine of perpetual allegiance).

a subject, always a subject,"[35] and the United States adopted this approach as a foundational notion of citizenship.[36]

However, the perpetual allegiance doctrine was ill-suited to a growing nation whose doors were open to immigrants,[37] and, thus, it could not last.[38] Notwithstanding the many years it took for the doctrine to be universally abandoned,[39] the U.S. government rejected the perpetual allegiance doctrine and recognized the right of expatriation[40] by enacting the Expatriation Act of 1868.[41]

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35. *Id.*

36. *See* Shanks v. Dupont, 28 U.S. 242, 246 (1830) (holding that "[t]he general doctrine is, that no persons can by any act of their own, without the consent of the government, put off their allegiance, and become aliens.").

37. *See* Mie Murazumi, Note, *Japan's Laws on Dual Nationality in the Context of a Globalized World*, 9 PAC. RIM L. & POL'Y J. 415, 429-30 (2000) (arguing that the "combination of the perpetual allegiance doctrine and the increased mobility of people gave rise to dual nationality," which created problems for many individuals who were forced to fulfill obligations to two countries).

38. *See* Spiro, *supra* note 8, at 1420 (arguing that the costs of enforcing the perpetual allegiance doctrine eventually outweighed its benefits).

39. *See Research in International Law of the Harvard Law School, The Law of Nationality*, 23 AM. J. INT'L L. 28 (1929) (categorizing the expatriation laws of several countries). The United States sought to secure the rights of expatriates by negotiating what became known as the Bancroft Treaties with various countries. *See id.* For instance, in 1868, a treaty was negotiated with the North German Confederation. *See* 15 Stat. 615. The treaty provided that each country recognize the naturalization of its native-born citizens by the other country. *See id.* at 616-17. It further provided that "if a German naturalized in America renews his residence in North Germany, without the intent to return to America, he shall be held to have renounced his naturalization . . . [and] the intent not to return may be held to exist when the person naturalized in the one country resides more than two years in the other country." *Id.* The United States had similar rights under existing treaties with many other countries. *See, e.g.*, Convention with Sweden and Norway on Naturalization, May 26, 1869, U.S.-Swed.-Nor., art. 1, 17 Stat. 809, T.S. No. 350; *see also* Convention with Great Britain on Naturalization, May 13, 1870, U.S.- Gr. Brit., art. 1, 16 Stat. 775, T.S. No. 130; *see also* Treaty with the King of Prussia, Feb. 22, 1868, art. 1, 15 Stat. 615, T.S. No. 261. Similar treaties were reached with Baden, Bavaria, Belgium, Hesse, Mexico, and Wurttemberg. *See* Afroyim v. Rusk, 387 U.S. 253, n.58 (1967).

40. The history of the Expatriation Act of 1868 and its interpretation by the Supreme Court indicate that a person's citizenship can only be lost by the voluntary renunciation or abandonment by the citizen himself. *See* Note, *"Voluntary": A Concept in Expatriation Law*, 54 COLUM. L. REV. 932 (1954); *see also Afroyim*, 387 U.S. at 268 (holding that a citizen has "a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship,").

41. 15 Stat. 223 (1907). *See generally The Expatriation Act of 1868 and How Blacks Can Get Out From Under U.S. Taxes* (visited Nov. 26, 2000) <http://www.directblackaction.com/expat.txt> [hereinafter *The Expatriation Act*] (providing background on the Expatriation Act of 1868). On its face, the Act simply announced a right; it failed to prescribe any method by which a citizen could actually exercise the right of expatriation. *See, e.g.*, Aleinikoff, *supra* note 10, at 1476 (finding that the Expatriation Act of 1868 did not speak to the issue of what type of conduct would evidence expatriation); *see also* Mailman, *supra* note 14, at 3 (stating that the Act left open what means or circumstances would terminate U.S. citizenship). The Attorney General assumed the position that naturalization in another country would be one way to exercise the right of expatriation. *See id.* (finding that the Attorney General argued that naturalization elsewhere was evidence of expatriation). Consequently, the Supreme Court adopted the Attorney General's position by recognizing that naturalization in another country results in an impairment of the status of citizenship. *See* Savorgnam v. United States, 338 U.S. 491, 498 (1950) (holding that "[f]rom the beginning, one of the most obvious and effective forms of expatriation has been that of naturalization under the laws of another nation"). Later, Congress passed legislation prescribing the methods by which an individual could exercise his right of expatriation. *See* Expatriation Act of 1907, 34 Stat. 1228 (1907) (recognizing that naturalization in a foreign country was a legal means of expatriation); *see also Developments in the Law—Immigration and Nationality*, 66 HARV. L. REV. 643, 732 (1953) (finding that the Act was nothing more than

B. The Tax Savings from Expatriating

After the Act's enactment, many Americans came to recognize that a financial advantage could be attained by expatriating. By abandoning their U.S. citizenship they could save millions on taxes.[42] Consequently, when some of United States' wealthiest citizens expatriate, the U.S. government realizes a diminution in tax revenue.[43] Popular newsstand articles attacked these tax-motivated expatriates as "unpatriotic"[44] Americans and "billionaire Benedict Arnolds."[45] Following increased publicity regarding U.S. citizens who obtained tax advantages through expatriation, Congress recognized that a loophole existed in the tax regime[46] and attempted to eliminate that loophole by passing new laws.[47] These laws aimed to deter tax-motivated expatriation.[48]

III. ENACTMENT OF SECTION 877

The most controversial expatriate legislation is section 877 of the Internal Revenue Code, enacted in 1966.[49] The statute proposed to continue the taxing of Americans who renounced their citizenship for pecuniary gain.[50] The purpose of

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a codification of prior administrative practice); *see also* Nationality Act of 1940, ch. 876, 54 Stat. 1137 (1940); *see also* Note, *Nationality Act of 1940*, 54 HARV. L. REV. 860 (1941); *see also* Note, *The Expatriation Act of 1954*, 64 YALE L. J. 1164 (1955); *see also* Nationality Act of 1960, ch. 876, 54 Stat. 1137 (1960).

42. *See* DeWitt, *supra* note 14, at A1 (stating that "a handful of very wealthy Americans . . . have renounced their citizenship to save millions—some say billions—in taxes".).

43. *See* Kenneth D. Heath, *The Symmetries of Citizenship: Welfare, Expatriate Taxation, and Stakeholding*, 13 GEO. IMMIGR. L.J. 533, 558 (stating that when Americans renounce their U.S. citizenship for purposes of tax-avoidance, the U.S. Government loses significant tax revenue).

44. Sullivan, *supra* note 15, at 1705; *see also* Edward M. Kennedy, *Senator Kennedy's Statement on 'Billionaires' Tax Loophole*, 11 TNI 152, 152 (1995).

45. *See* Colon, *supra* note 18, at 3 n.4 (quoting Rep. Neil Abercrombie). *See, e.g.*, DeWitt, *supra* note 14, at A1; *see also* Lenzner & Mao, *supra* note 5, at 131.

46. *See* DeWitt, *supra* note 14, at A1 ("A loophole in the tax law, one that congressional Democrats have been trying to close, allows non-citizens to avoid taxes on capital gains and estates. That, critics point out, has permitted a handful of very wealthy Americans who have renounced their citizenship to save millions—some say billions—in taxes.").

47. *See* Donmoyer, *supra* note 5, at 1 (commenting on Congress' response to the publicity obtained by news articles on tax-motivated expatriation); *see also supra* notes 19, 22 and accompanying text.

48. *See* Colon, *supra* note 18, at 5-6 (stating that the purpose behind the enactment of section 877 was to "dissuade" tax-motivated expatriation); *see also* DiPortanova v. United States, 690 F.2d 169, 179 (1982) (finding that Congress enacted section 877 "to discourage voluntary expatriation undertaken with a principal purpose of tax-avoidance."); *see also* Crow v. Commissioner, 85 T.C. 376, 386 (1985) (agreeing with the Internal Revenue Service in stating that the purpose of section 877 was to prevent tax-motivated expatriation); *see also* Sullivan, *supra* note 15, at 1705 (explaining the rationale behind the enactment of section 877).

49. *See* I.R.C. § 877 (West 2000); *see also* Sullivan, *supra* note 15, at 1705 (professing that section 877 has been the subject of much Congressional debate).

50. *See* I.R.C. § 877 (providing in pertinent part: "Every nonresident alien individual who, within the 10-year period immediately preceding the close of the taxable year, lost U.S. citizenship, unless such loss did not have for one of its principal purposes the avoidance of taxes, shall be taxable for such taxable year . . . ."); *see also* Internal Revenue Service, *U.S. IRS Training Manuals in International Issues—Phase I, Module J: Boycotts/Tax*

section 877 is to equalize the tax treatment between U.S. citizens[51] and tax-motivated expatriates (or nonresident aliens[52]), so that expatriation will no longer be an attractive course of action.[53]

A. *Different Tax Regimes for Citizens and Nonresident Aliens*

Expatriation is an attractive course of action to wealthy Americans because of the different tax regimes that apply to U.S. citizens and nonresident aliens.[54] The moment a U.S. citizen renounces his citizenship to live in another country, a new personal tax situation develops.[55] For tax purposes, this former citizen is classified as a nonresident alien.[56] The need for special expatriate tax provisions arises primarily for two reasons: (1) nonresident aliens generally pay less taxes on their U.S.-source income[57] than U.S. citizens,[58] and depending on where they reside, pay

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Havens/Residency/Foreign Income Exclusions/NRA/Tax Treaties/FIRPTA (Instructor Guide), 1999 WTD 247-35 [hereinafter *U.S. IRS Training Manuals*] (explaining section 877).

51. Section 877 also included long-term residents who expatriate. *See* I.R.C. § 877 (West 2000). The code defines a long-term resident as any individual who is a lawful U.S. permanent resident in at least 8 of the preceding 15 years, ending with the year during which termination of residency occurs. *See id.* § 877(e)(2). An individual is not considered to be a lawful permanent resident for any year in which he or she is taxed as a resident of another country if provided for under the provisions of a tax treaty between the United States and the other country. *See id.* U.S. citizens and residents are generally taxed in the same way, and relinquishment of U.S. permanent residency status may well be treated in a similar manner as relinquishment of U.S. citizenship. However, the treatment of the relinquishment of residency status raises issues that differ from those involving the relinquishment of citizenship and that are generally beyond the scope of this comment. Thus, this comment focuses on the treatment of expatriation by U.S. citizens.

52. A nonresident alien is an individual who is neither a U.S. citizen nor a U.S. resident. *See Publication 515, Withholding of Tax on Nonresident Aliens and Foreign Corporations* (visited Nov. 26, 2000) <http://www.irs.ustreas.gov/plain/forms_pubs/pubs/p51501.htm> (defining nonresident alien).

53. *See supra* note 48 and accompanying text (indicating that the purpose behind the enactment of section 877 was to deter tax-motivated expatriation).

54. The factors that candidates to expatriation are most likely to consider are the estate tax and income tax savings. The maximum estate tax rate is 55%. *See* I.R.C. § 2001(c)(1) (West 2000). The highest marginal income tax rate is currently 39.6%, except for capital gains, which are topped at 28%. *See id.* § 1(a),(h). The actual marginal income tax rate can be substantially higher than 39.6% for individuals that lose a substantial portion of their itemized deductions and personal exemptions as a result of the phase-outs effected by sections 68 and 151(d). *See id.* §§ 68, 151(d); *see, e.g.*, Ann Maxey, *West Virginia's Limited Liability Company Act: Problems with the Act*, 96 W. VA. L. REV. 905, 963 n.178 (1994) (estimating the top marginal income tax rate, adjusted only for itemized deductions and personal exemptions, to be about 41%).

55. *See Who is an Expatriate?*, *supra* note 1 (explaining that "these tax situations are created by the interpretation countries give to the notion of domicile and residence of the individual and also due to the extant laws in the country of nationality and the country of residence.").

56. *See supra* note 52 (defining nonresident alien).

57. *See* I.R.C. § 871(West 2000) (providing the tax rates applicable to nonresident aliens).

58. *See* I.R.C. § 1 (West 2000) (stating the different income tax rates imposed on U.S. citizens depending upon their filing status); *see also* Renee S. Liu, Note, *The Expatriate Exclusion Clause: An Inappropriate Response to Relinquishing Citizenship for Tax Avoidance Purpose*, 12 GEO. IMMIGR. L. J. 689, 689-90 (providing a simplified explanation of the tax differences between U.S. citizens and nonresident aliens).

no taxes on their non-U.S.-source income;[59] and (2) unlike U.S. citizens, nonresident aliens do not pay U.S. federal estate and gift taxes.[60]

1. Income Tax

For federal income tax purposes, citizens are subject to a progressive rate tax, up to a maximum of 39.6% on their worldwide income.[61] Nonresident aliens, on the other hand, are subject to a flat tax of *only* 30%[62] on their U.S.-source income.[63]

U.S. Income Tax Rates for Citizens and Nonresident Aliens

Source of Income[64]	Citizen	Nonresident Alien
United States	up to 39.6%[65]	30%[66]
Outside United States	up to 39.6%[67]	0%[68]

Figure 1

Because of the different scope of each tax regime, the tax liability computed under one may vary significantly from the tax liability computed under another.[69] The following example illustrates the disparities between these two different tax regimes: assume Richie Rich, in the year 2000, receives taxable income in the following amounts from these designated sources—$10 million, United States; $5

59. *See Harris Offshore, supra* note 2 (identifying several countries that do not impose income taxes on their citizens).

60. *See* I.R.C. §§ 2001, 2501 (West 2000); *see also infra* notes 89, 90, 93 and accompanying text (citing articles demonstrating that the lack of U.S. federal estate and gift taxes on nonresident aliens makes expatriation an attractive course of action to many wealthy Americans).

61. *See* I.R.C. § 1 (providing a tax table of the income tax rates applicable to U.S. citizens).

62. *See id.* § 871 (indicating the tax rate imposed on nonresident aliens).

63. *See id.* § 877(b) (stating that a nonresident alien is subject to tax on U.S.-source income only). *But see Expatriation Taxation, supra* note 14 (noting that a nonresident alien engaged in trade or business within the United States during the taxable year is subject to tax at the progressive rates, not the flat tax rate, on all taxable income that is connected to the conduct of that trade or business). *See* fig. 1.

64. The Internal Revenue Code has special rules for determining whether certain items of gross income shall be treated as income from sources within the United States. *See* I.R.C. § 877(d) (West 2000) (indicating the special code rules for determining what portion of a persons income is deemed to be U.S.-source income).

65. *See* I.R.C. § 1 (West 2000).

66. *See id.* § 871.

67. *See id.* § 1.

68. *See id.* § 871. The United States does not tax the foreign income of a nonresident alien, but does tax the foreign income of U.S. citizens. *See Harris Offshore, supra* note 2. This alone makes expatriation attractive, especially if the country one moves to imposes no income tax or at least a lower income tax than the United States. *See id.*

69. *Compare* I.R.C. § 1 (providing the tax rates for U.S. citizens), *with* I.R.C. § 871 (providing the tax rates applicable to nonresident aliens). *See* figs. 2 & 3 (displaying examples of the potential differences in tax liability computed under sections 1 and 871).

million, Monaco; and $3 million, Cayman Islands. *Figures 2* and *3* display the significant differences in tax liability computed under each regime.

U.S. Citizen

	United States	Monaco	Cayman Islands	
Taxable Income[70]	$10,000,000	$5,000,000	$3,000,000	
U.S. Tax Rate[71]	39.6%	39.6%	39.6%	
Tax Liability[72]	$3,940,772[73]	$1,960,772[74]	$1,168,772[75]	**$7,070,316[76]**

Figure 2

70. *See* I.R.C. § 63 (West 2000). Taxable income is the tax base on which the federal income tax is levied. *See id.* Taxable income is computed by subtracting deductions from gross income to produce adjusted gross income, and then subtracting from adjusted gross income available personal exemptions and either the standard deduction or the itemized deduction. *See id.*

71. *See* I.R.C. § 1 (West 2000). U.S. citizens are subject to progressive tax rates. *See id.*

72. Tax liability is the amount that a taxpayer legally owes after multiplying his or her tax base by the applicable tax rate. *See* BLACK'S LAW DICTIONARY 576 (6th ed. 1990).

73. Tax liability computed as follows: assuming Richie is an unmarried individual, according to section 1 of the Internal Revenue Code, the tax on $10,000,000 is "$79,772 plus 39.6% of the excess over $250,000." I.R.C. § 1 (West 2000).

74. Tax liability computed as follows: assuming Richie is an unmarried individual, according to section 1 of the Internal Revenue Code, the tax on $5,000,000 is "$79,772 plus 39.6% of the excess over $250,000." *Id.*

75. Tax liability computed as follows: assuming Richie is an unmarried individual, according to section 1 of the Internal Revenue Code, the tax on $3,000,000 is "$79,772 plus 39.6% of the excess over $250,000." *Id.*

76. Total tax liability is equal to the sum of all tax liability amounts ($3,940,772 + $1,960,772 + $1,168,772). *See id.*

Nonresident Alien

	United States	Monaco	Cayman Islands	
Taxable Income[77]	$10,000,000	$5,000,000	$3,000,000	
U.S. Tax Rate[78]	30%	0%	0%	
Tax Liability[79]	$3,000,000[80]	$0	$0	$3,000,000[81]

Figure 3

As *Figures 2* and *3* indicate, Richie pays more taxes (nearly $1 million more on U.S.-source income; over $4 million more on all income combined) as a U.S. citizen than as a nonresident alien.[82] Moreover, since neither Monaco nor the Cayman Islands taxes income, Richie incurs no additional tax liability in these countries.[83] As a result, if Richie is a U.S. citizen, expatriation is an attractive course of action.[84]

2. Estate and Gift Taxes

One of the oldest and most common forms of taxation is the estate tax.[85] Estate tax is the taxation of property owned by a person at the time of his or her death.[86] The estates of U.S. citizens are subject to a progressive rate tax of up to fifty-five percent at time of death.[87] Although there are many ways to structure one's estate

77. *See* I.R.C. § 63 (West 2000) (defining taxable income).

78. *See id.* § 871. The United States imposes a flat tax on nonresident aliens as opposed to the progressive tax imposed on citizens. *Compare id.* § 1 *with id.* § 871.

79. *See supra* note 72 and accompanying text (defining tax liability).

80. *See* I.R.C. § 871.

81. *See id.*

82. Richie's total tax liabilities on U.S.-source income as a citizen and as a nonresident alien are $3,940,772 and $3,000,000, respectively. *See supra* notes 73, 80 and accompanying text. Thus, Richie pays $940,772 ($3,940,772 - $3,000,000) less as a nonresident alien. Richie's total tax liability as a U.S. citizen (with a filing status as an unmarried individual) is $7,070,316, while his total tax liability as a nonresident alien is only $3,000,000. *See supra* notes 74, 81 and accompanying text. The difference in tax liability between a citizen and nonresident alien is, thus, $4,070,316 ($7,070,316 - $3,000,000).

83. *See Who is an Expatriate?*, *supra* note 1 (indicating the benefits of establishing residence in Monaco); *see also Harris Offshore*, *supra* note 2 (noting the income tax savings in renouncing U.S. citizenship and moving to the Cayman Islands).

84. *See Harris Offshore*, *supra* note 2 (explaining why expatriation is so attractive for many of America's wealthiest citizens).

85. *See Free Advice: Tax Law* (visited Nov. 26, 2000) <http://www.freeadvice.com/law/5862us.htm> (stating that "[t]he only thing certain in life is death and taxes.").

86. *See* I.R.C. § 2001 (West 2000).

87. *Id.* However, there are several provisions that provide relief for estate tax liability:

> [An] unlimited estate tax marital deduction when property is passed to a surviving U.S. citizen spouse of the decedent (so long as certain prerequisites are met), a unified credit which enables every individual

to reduce tax liability,[88] an individual may opt to expatriate and avoid tax liability altogether.[89] In contrast, nonresident aliens are not subject to estate taxes by the U.S. at time of death.[90]

Another federal tax is imposed on all gifts made by a U.S. citizen to others during his or her lifetime.[91] The gift tax is paid by the individual giving the gift and not by the person receiving it, and the tax rates are the same as the estate tax.[92] Gift tax, like the estate tax, is not imposed on nonresident aliens.[93]

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to dispose of up to $650,000 (indexed) of property by gift during lifetime and distribution after death, [and] an exclusion for disposition of property to a qualified charitable organization.

Free Advice: Tax law, *supra* note 85.

88. *See Free Advice: Tax Law*, *supra* note 85 (explaining how an individual can reduce estate tax liability by making use of available credits, deductions, exclusions, and exemptions); *see also* Richard S. LeVine, *International Offshore Foreign Immigration Tax Attorney* (visited Nov. 26, 2000) <http://members.aol.com/_ht_a/taxguru/ index.htm> (offering advice on how to structure the estate to reduce tax liability).

89. *See* McMenamin, *supra* note 5, at 55 (explaining that many Americans move out of the country to avoid the 55% federal estate tax); *see also Harris Offshore*, *supra* note 2 (describing how expatriation has become the "ultimate tax planning tool" because the United States continues to be the only nation to enforce high rates of estate taxes on its citizens); *see also* Lenzer & Mao, *supra* note 5, at 131-32 (referring to expatriation as the "ultimate estate plan"); *see also supra* note 54 and accompanying text (indicating that the estate tax is one of the primary factors that candidates of expatriation are most likely to consider).

90. *See Harris Offshore*, *supra* note 2 (explaining the significant tax savings an American expatriate can attain without the imposition of an estate tax). *But see* Sullivan, *supra* note 15, at 1705 (noting that even with section 877 in force, expatriates, as nonresident aliens, can avoid estate tax). *See fig. 4.*

91. There are, however, many exceptions to the imposition of the federal gift tax:

> [(1)] every individual is allowed to make a gift of a present interest of up to $10,000 per donee per year free from gift tax (a husband and wife each has an annual exemption so a married couple can gift up to $20,000 per donee per year without incurring any tax), [(2)] transfers to qualified political organizations are not subject to gift tax (although there are many laws which limit the amount that a person can contribute to a political organization), [(3)] gifts to pay tuition to a qualified educational organization or to persons who qualify as a provider of medical care made on behalf of another individual are excluded, [(4)] loans of qualified artwork are not treated as a transfer subject to gift tax under certain circumstances, [(5)] . . . an unlimited gift tax marital deduction when property is transferred to a surviving U.S. citizen spouse of the donor (so long as certain prerequisites are met), and [(6)] a unified credit which enables every individual to dispose of up to $650,00 of property by gift during lifetime and distribution after death.

See Free Advice: Tax Law, *supra* note 85; *see also* I.R.C. §§ 2501, 2503, 2513, 2522, 2523, 2524 (West 2000).

92. *See* I.R.C. § 2501.

93. *See id.*; *see also Harris Offshore*, *supra* note 2 (explaining the significant tax savings an American expatriate can attain if no gift tax is imposed). *But see* Sullivan, *supra* note 15, at 1705 (noting that even with section 877 in force, expatriates, as nonresident aliens, can avoid paying gift taxes). Nonresident aliens are generally subject to gift tax on certain transfers of U.S.-situated property. *See* I.R.C. § 2501. Such property includes real estate and tangible property located within the United States. *See id.* However, nonresident aliens are generally not subject to U.S. gift tax on the transfer of intangibles, such as stock or securities, regardless of where such property is situated. *See id. See* fig. 4.

U.S. Estate and Gift Tax Rates for Citizens and Nonresident Aliens

	Citizen	Nonresident Alien
U.S. Estate Tax Rate[94]	up to 55%	0%
U.S. Gift Tax Rate[95]	up to 55%	0%

Figure 4

The lack of U.S. federal estate and gift taxes on nonresident aliens makes expatriation "the ultimate tax planning tool."[96] Wealthy Americans "have . . . wealth because they live in a place that makes it possible" but "most of it hasn't been taxed at all in the course of its accumulation."[97] However, because many U.S. citizens do not want to leave half their assets to the U.S. government, they move out of the country and take their assets with them, thereby avoiding the fifty-five percent federal tax on estates and gifts. For instance, suppose Duchess Diamond, an American citizen, has assets worth $10 billion. If she remains an U.S. citizen, at the time of her death (assuming all assets remain) her estate will pay nearly $5.5 billion in U.S. estate tax.[98] Alternatively, if she gave away all her assets during her lifetime, she would personally owe nearly $5.5 billion in U.S. gift tax.[99] However, if Duchess chose to expatriate before she died or transferred her assets by gift, the tax savings would be substantial.[100] In other words, after expatriation, Duchess' entire estate may be transferred to her heirs or gifted to relatives or friends with no tax liability.[101]

94. *See* I.R.C. § 2001 (West 2000).

95. *See id.* § 2501.

96. *Harris Offshore*, *supra* note 2 (explaining that if an American citizen were to expatriate to the Bahamas, he or she would not be charged an estate tax); *see also supra* notes 54, 89, 93 and accompanying text.

97. Lynn Thompson, DAILY RECORDER, October 20, 2000, at 6 (quoting Bill Gates).

98. *See infra* note 104 and accompanying text.

99. *See infra* note 107 and accompanying text.

100. *See* Rangel, *supra* note 24, at 217 (providing a similar example using wealthy Microsoft executive Bill Gates).

101. *See id. See* figs. 5 and 6.

Estate Tax Savings

	Citizen	Nonresident Alien
Assets at Death	$10,000,000,000	$10,000,000,000
U.S. Estate Tax Rate[102]	55% (progressive rate)	0%
Tax Liability[103]	$5,499,640,800[104]	$0

Figure 5

Gift Tax Savings

	Citizen	Nonresident Alien
Gifted Assets	$10,000,000,000	$10,000,000,000
U.S. Gift Tax Rate[105]	55% (progressive rate)	0%
Tax Liability[106]	$5,499,640,800[107]	$0

Figure 6

B. Modifying the Differential Treatment

Expatriation is financially beneficial because the U.S. taxes its citizens at higher rates than it does its nonresident aliens.[108] The goal of a tax-motivated expatriate is to make his or her new tax situation more advantageous.[109] He or she can achieve

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102. *See* I.R.C. § 2001 (West 2000).

103. *See supra* note 72 and accompanying text (defining tax liability).

104. Under the Internal Revenue Code tax tables, the estate tax on $10,000,000 is "$1,290,800, plus 55% of the excess over $3,000,000." I.R.C. § 2001.

105. *See id.* § 2502.

106. *See supra* note 72 and accompanying text (defining tax liability).

107. Under the Internal Revenue Code tax tables, the gift tax on $10,000,000 is "$1,290,800, plus 55% of the excess over $3,000,000." I.R.C. § 2001; *see also id.* § 2502 (indicating that the gift tax rate is the same as the estate tax rate).

108. *See Harris Offshore*, *supra* note 2 (stating that the United States is virtually the only nation that enforces high rates of tax on the worldwide income of its citizens). *See generally supra* notes 61-84 and accompanying text (comparing the income tax for U.S. citizens, which can be as high as 39.6%, with the income tax for nonresident aliens, which is only 30%).

109. *See The Taxman Cometh* (visited Nov. 25, 2000) <http://www.us-expatriate-handbook.com/chpt8.htm> (indicating the obvious: "[b]eing able to hold on to as much ... income as possible, while legally minimizing taxes, is the goal of most expat[riate]s."); *see also Who is an Expatriate?*, *supra* note 1 (explaining the importance of an

this goal through expatriation because of the elimination of higher progressive rates on a nonresident alien's U.S.-source income[110] and the lack of estate and gift taxes in most other countries.[111] More aptly put, by renouncing U.S. citizenship and moving abroad, the taxpayer becomes a nonresident alien[112] for tax purposes and therefore avoids the high federal tax rates imposed by the United States.[113]

To eliminate this tax advantage, Congress enacted section 877 of the Internal Revenue Code in 1966.[114] Section 877 taxes, at the higher progressive rates, any individual who relinquished his or her citizenship principally to avoid U.S. taxes.[115]

1. Income Tax

Section 877 provided, in relevant part:

> Every nonresident alien who at any time after March 8, 1965, and within the 10-year period immediately preceding the close of the taxable year lost United States citizenship, . . . such loss . . . [having as] one of its principal purposes the avoidance of taxes . . . shall be taxable for such taxable year . . . [on United States-source income at the progressive rates, if such exceeds the flat tax].[116]

As enacted in 1966, section 877 deprived a tax-motivated expatriate of the tax advantages available to nonresident aliens for ten years following the date of

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expatriate to become aware of his new tax situation so that it is not to his disadvantage, providing examples of expatriation, and offering advice on how to best protect earnings).

110. *See* I.R.C. § 871 (West 2000) (indicating that a nonresident alien is subject to a flat tax rate); *see also* Liu, *supra* note 58, at 689-90 (explaining the different tax rates imposed on nonresident aliens and U.S. citizens).

111. *See Harris Offshore*, *supra* note 2 (indicating that few countries other than the United States impose estate taxes on the assets of its citizens).

112. *See supra* note 52 and accompanying text (defining nonresident alien).

113. *See* I.R.C. §§ 1, 2001, 2501 (providing, respectively, the federal income, estate, and gift tax rates for U.S. citizens).

114. *See id.* § 877; *see also supra* note 48 and accompanying text (citing articles and cases that address the reasoning behind the enactment of section 877).

115. *See* I.R.C. § 877. In the rare event that the flat tax yields a greater tax liability than the progressive tax in section 877, the expatriate does not pay the progressive rate tax and instead pays the greater amount imposed by the flat tax. *See id.* However, the IRS bears the burden of proving that an individual's expatriation was tax-motivated. *See* Lederman & Hirsh, *supra* note 16, at 325 (commenting that it is a difficult burden for the IRS to identify tax-motivated expatriates); *see also* Liu, *supra* note 58, at 695 (noting that section 877, as enacted in 1966, put the burden of proof on the IRS to prove an expatriation was tax-motivated).

116. I.R.C. § 877 (West 2000).

expatriation[117] *if* the IRS could prove tax-motivation.[118] As the following example illustrates, section 877 effectively subjected tax-motivated expatriates to tax on their U.S.-source income at the rates applicable to U.S. citizens (up to 39.6%) rather than the rates applicable to other nonresident aliens (30%).[119]

Assume Richie Rich, a wealthy U.S. citizen, expatriated on January 1, 1995. His U.S.-source taxable income for the year 1995 is $10 million. Generally, as a nonresident alien, Richie pays a 30% flat tax on this income, incurring a net tax liability of $3 million.[120] Conversely, if Richie's expatriation proves to be tax-motivated, then pursuant to section 877, he is instead subject to the progressive rate tax structure.[121] Accordingly, Richie will pay almost $4 million in U.S. taxes.[122] Thus, with section 877 in force, Richie is obligated to pay nearly $1 million more in federal taxes.[123]

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117. *See id.; see also* Richards v. United States, 752 F.2d 1413, n.7 (9th Cir. 1985) (explaining that under section 877, "a citizen who renounces his citizenship for the principal purpose of avoiding U.S. taxes will be treated as a citizen for tax purposes for ten years following his expatriation."); *see also Expatriation Taxation*, *supra* note 14 (commenting on the 10-year rule).

118. *See infra* notes 133-138 and accompanying text (explaining that the IRS must first prove the intent to avoid taxes for section 877 to apply); *see also* Lederman & Hirsh, *supra* note 16, at 325 (noting that because the IRS carried the heavy burden of proving intent, section 877 was difficult to enforce).

119. *See* I.R.C. § 877 (West 2000). Expatriation tax provisions permit a credit against U.S. taxes imposed for any foreign income, gift, estate, or similar taxes. *See id. See* fig. 7.

120. *See id.*

121. *See id.* Individuals subject to the expatriation tax pay taxes at the progressive rates generally applicable to U.S. citizens. *See id. See generally id.* § 1 (providing an overview of the tax tables). Again, in the rare event that the flat tax normally applied to nonresident aliens yields a greater tax liability than the progressive rate structure, the expatriate does not pay the progressive rate tax, but instead pays the greater amount imposed by the flat tax. *See id.* § 877. More simply put—the tax-motivated expatriate is subject to tax under section 877 or section 871, depending on which method results in the highest total tax liability. *See id.* § 877(a)(1) and (b).

122. *See infra* note 128 and accompanying text.

123. This is the outcome Congress expects since the purpose of enacting section 877 is to deter expatriation for tax savings; by eliminating the tax savings, the incentive to expatriate for tax purposes is lost. *See supra* notes 21, 48 and accompanying text (indicating that the purpose of section 877 was to deter tax-motivated expatriation and, thereby, avoid the loss of federal tax revenue). *See generally* Liu, *supra* note 58, at 689-90 (acknowledging the success Congress achieved in closing so many tax avoidance loopholes, but also recognizing that Congress has been particularly unsuccessful in achieving similar results with tax-motivated expatriation).

Income Tax Savings

	Nonresident Alien	Citizen
Taxable Income[124]	$10,000,000	$10,000,000
U.S. Tax Rate[125]	30% (flat rate)	39.6% (progressive rate)
Tax Liability[126]	**$3,000,000[127]**	**$3,940,772[128]**

Figure 7

2. Estate and Gift Taxes

The ten-year rule applies to estate and gift taxes as well.[129] Under this approach, if an expatriate dies within ten years of the date of expatriation, his or her estate is subject to U.S. estate tax.[130] Moreover, gifts by an expatriate within the ten-year period are subject to U.S. gift tax.[131]

C. Problems with Section 877

The policy underlying the provisions of section 877 is to dissuade tax-motivated expatriation by taxing these expatriates on the same basis as U.S. citizens.[132] However, the 1966 provisions of section 877 did not apply unless it could be shown that a taxpayer expatriated to avoid U.S. taxes.[133] Proving that an individual expatriated to avoid U.S. taxes requires evidence of intent—something inherently difficult to prove.[134] It necessitates the use of substantial administrative resources,

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124. *See supra* note 70 and accompanying text (defining taxable income).

125. *See* I.R.C. § 871 (West 2000) (providing the flat tax rate for nonresident aliens); *see also id.* § 1 (providing the progressive tax rate for U.S. citizens).

126. *See supra* note 72 and accompanying text (defining tax liability).

127. *See* I.R.C. § 871.

128. Under the Internal Revenue Code, the income tax on $10,000,000 is "79,772 plus 39.6% of the excess over $250,000." *Id.* § 1.

129. *See id.* §§ 2106, 2107, 2501(a)(3)(C); *see also Expatriation Taxation, supra* note 14 (explaining the estate and gift tax consequences for expatriates subject to section 877).

130. *See* I.R.C. §§ 2106, 2107; *see also Expatriation Taxation, supra* note 14.

131. *See* I.R.C. § 2501(a)(3)(C) (West 2000); *see also Expatriation Taxation, supra* note 14.

132. *See supra* notes 22, 48 and accompanying text (discussing the reasons behind the enactment of section 877).

133. *See* Lederman & Hirsh, *supra* note 16, at 325 (indicating that the IRS had the burden of proving tax-motivation before a special expatriate tax was imposed on a former U.S. citizen).

134. Of the two cases in which the IRS attempted to enforce section 877, *Furstenberg* held that the taxpayer was aware that expatriating would complicate her tax status and would therefore not afford her any benefits. Furstenburg v. Commissioner, 83 T.C. 755 (1984). The Tax Court in *Kronenberg* held that it was quite obvious that the taxpayer renounced his citizenship with a tax avoidance purpose. Kronenberg v. Commissioner, 64 T.C. 428 (1975).

which the IRS was hesitant to devote toward enforcing section 877.[135] If an expatriation was identified as having occurred within the preceding ten years, the expatriate could rebut the presumption of tax-avoidance by presenting facts evidencing his or her non-tax-avoidance motive.[136] The IRS faced a disadvantage in refuting the expatriate's evidence because relevant facts concerning the expatriate's motivations typically lay only in the hands of the expatriate himself.[137] Therefore, the provisions of section 877 were wholly ineffective in curbing tax-motivated expatriation.[138]

IV. AMENDING SECTION 877

> One in five Americans has considered leaving America. Three million would do so right this minute if they only knew how. What will the United States Government do to stop capital displacement? What about fears of a "brain-drain effect" as Americans leave America in record numbers? The Americans leaving are not a hopeless huddled mass; they constitute America's best and brightest....[139]

Recent news reports recognized the ineffectiveness of section 877.[140] Publications such as *Time*, *Forbes*, and the *New York Times* printed articles that examined recent cases of expatriation by very wealthy former U.S. citizens.[141] The articles painted a picture of wealthy and unpatriotic Americans renouncing citizenship for the sole purpose of decreasing U.S. tax liabilities—with section 877 providing little by way of preventative measures.[142] Articles alleged that tax benefits were the main reason for the decision to renounce citizenship, implying that section

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135. *See* Lederman & Hirsh, *supra* note 16, at 325 (stating that the difficult task of proving a tax-motive diminished the effectiveness of the expatriation laws); *see also* Liu, *supra* note 58, at 695-96 (explaining that the U.S. tax system is dependent upon voluntary compliance in order to be effective; thus, the IRS rarely attempts to make anyone pay his taxes, especially if the person is no longer residing within the U.S. jurisdiction).

136. *See* Lederman & Hirsh, *supra* note 16, at 325.

137. *See id.*

138. *See* Liu, *supra* note 58, at 695 (explaining why section 877 was a failure).

139. McMenamin, *supra* note 5, at 55 (quoting Roger Gallo).

140. *See, e.g.*, Lenzer & Mao, *supra* note 5, at 131 (identifying several wealthy expatriates and arguing that section 877 is an ineffective piece of legislation); *see also* DeWitt, *supra* note 14, at A1; *see also* Kinsley, *supra* note 15, at 96.

141. *See id.*

142. *See supra* note 140 and accompanying text (citing articles that discuss expatriation); *see also* Sullivan, *supra* note 15, at 1705 (discussing articles that identify wealthy tax-motivated expatriates and criticize section 877 as ineffective legislation).

877 was an unsuccessful deterrent.[143] These accusations received attention from many people, including lawmakers.[144]

Recognizing the insufficiency of section 877 in deterring tax-motivated expatriation, Congress reformed the law in 1996.[145] Congress extended the reach of the existing tax scheme by enacting two new pieces of legislation amending expatriation law:[146] the IIRIRA[147] and section 511 of the HIPAA.[148]

A. Illegal Immigration Reform and Immigration Responsibility Act of 1996

Under the IIRIRA, tax-motivated expatriates are ineligible to receive a U.S. visa.[149] The purpose of this statute is to deter—some say by way of punishment—tax-motivated expatriation[150] by denying these expatriates re-entry into the United States.[151]

B. Health Insurance Portability and Accountability Act of 1996

HIPAA amended section 877 of the tax code. As explained earlier, under section 877, U.S. citizens who renounce their citizenship are subject to U.S. taxes on U.S.-

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143. *See* Sullivan, *supra* note 15, at 1705.

144. *See* Donmoyer, *supra* note 5, at 1420 (discussing the legislatures' reaction to publicity attained by popular news publications).

145. *See Expatriation Taxation*, *supra* note 14 (describing the measures Congress has taken in an attempt to close the tax loopholes used by expatriates); *see also* Liu, *supra* note 58, at 696-98 (describing the amendments to section 877 and the rationale behind the changes).

146. *See* Liu, *supra* note 58, at 696-98.

147. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 352, I.N.A. § 212(a)(10), 110 Stat. 3009-546 [hereinafter IIRIRA].

148. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, §§ 511-13 [hereinafter HIPAA].

149. *See* Vernon K. Jacobs & J. Richard Duke, *Tax Myth: Saving Taxes by Expatriating* (visited Nov. 25, 2000) <http://www.rpifs.com/taxhelp/otexpat.htm> (indicating that the new provision in the Immigration law has sparked much controversy regarding its constitutionality); *see also* Tilevitz & Czapiewska, *supra* note 25, at 1329 (claiming that the IIRIRA "will likely affect very few individuals, probably will rarely, if ever, be enforced, and likely would not be enforceable if the INS ever tried to enforce it.").

150. *See* Liu, *supra* note 58, at 708 (providing an excellent analysis of the IIRIRA).

> [T]he exclusion of taxpatriates . . . comports with neither the policy goals of I.R.C. section 877 nor concepts of citizenship which the country seeks to promote. Ironically, the new expatriates statutes instead damage the integrity of the Code and citizenship in this country. . . . Reacting to media attention, Congress enacted a law based on anger and inability to close the Code's loophole for expatriates by tax methods. By attaching it to the revised tax law, it succeeded only in creating another useless law with a punitive consequence.

Id.

151. The IIRIRA amends section 212 of the Immigration and Naturalization Act by adding tax-motivated expatriates to the list of excluded aliens. *See* I.N.A. § 212(a)(10), 8 U.S.C. § 1182 (1999) (providing that "any alien who is a former citizen of the United States who officially renounces United States citizenship and who is determined by the Attorney General to have renounced United States citizenship for the purpose of avoiding taxation by the United States is inadmissible").

source income for ten years after they leave the United States.[152] However, the burden of proof for establishing motive originally lay with the IRS.[153] HIPAA shifted that burden, in most instances, to the taxpayer.[154] Under HIPAA's new amendments to section 877, individuals are presumed to have a tax-avoidance motive if their previous "tax liabilities" or current "net worth" exceeds a fixed amount.[155]

1. Tax Liability and Net Worth Tests

Section 877 provides that the expatriation of a former citizen is presumed to be tax-motivated[156] if either: (1) on the day of renunciation he or she had an average net tax liability that exceeded $100,000 for each of the five taxable years prior to expatriation;[157] or (2) on the day of renunciation, he or she had a minimum net worth of $500,000.[158] The original figures are subject to cost-of-living adjustments for the calendar years after 1996.[159]

The following examples illustrate the effect of the tax liability and net worth tests.[160] First, for purposes of the tax liability test, assume Richie Rich, a former U.S. citizen who expatriated on January 1, 1996,[161] incurred $95,000 in U.S. taxes in 1995. Furthermore, in the preceding years of 1994, 1993, 1992, and 1991, Richie's

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152. *See* I.R.C. § 877 (West 2000); *see also, supra* note 116 and accompanying text (quoting the text of section 877, in pertinent part).

153. *See* Liu, *supra* note 58, at 695-96 (explaining that because of the lack of resources the IRS had difficulty proving tax-motive).

154. *See* Lederman & Hirsh, *supra* note 16, at 325 (finding that the effectiveness of prior law diminished because the IRS had the burden of proving tax motive).

155. *See* I.R.C. § 877(a)(2).

156. An individual who is presumed to have expatriated for tax reasons is subject to the progressive rate tax and not the flat tax normally applied to nonresidents. *See id.* § 877. However, certain exceptions from the presumption that an individual relinquished his or her U.S. citizenship for tax purposes may apply. *See id.* For example, the presumption does not apply to individuals that fall within certain categories, such as being a dual citizen who, within one year from the date of loss of citizenship, submit a ruling request for a determination by the Secretary of Treasury as to whether such loss of citizenship was tax-motivated. *See id.*

157. *See id.; see also U.S. I.R.S. Training Manuals, supra* note 50, at 247-35 (explaining the background of section 877(a)(2) from which the tax liability test is derived, and describing the method by which one can determine his tax liability for purposes of the tax liability test).

158. I.R.C. § 877(a)(2) (West 2000); *see also U.S. I.R.S. Training Manuals, supra* note 50, at 247-35 (explaining the valuation of interests in property and the method by which an individual can determine his net worth for purposes of the net worth test).

159. I.R.C. § 877(a)(2); *see also U.S. I.R.S. Training Manuals, supra* note 50, at 247-35 (noting that the original figures of $100,000 and $500,000 are subject to cost-of-living adjustments for calender years after 1996).

160. *See U.S. I.R.S. Training Manuals, supra* note 50, at 247-35 (providing an instructor's guide by which an individual can determine, through the use of appropriate Internal Revenue Code sections, whether his expatriation is presumed to be tax-motivated).

161. An individual must file a form with the State Department in order to relinquish citizenship. *See* I.R.C. § 6039; *see also* Liu, *supra* note 58, at 697. This enables the IRS to determine who is expatriating for tax reasons. See Liu, *supra* note 58, at 697. Upon a finding that the expatriation was tax-motivated, the IRS will then tax the former citizen for a period of ten years beyond the date of expatriation. *See* I.R.C. § 877. On rare occasions, the IRS may tax expatriates for a period of up to fifteen years. *See id.*

tax liabilities were $98,000, $129,000, $88,000 and $155,000, respectively. Richie's average annual net income tax for the five years preceding his expatriation—totaling all figures and dividing by five—is $113,000. However, the statutory limit is $100,000.[162] Since Richie exceeds this statutory limit, under amended section 877, his expatriation is presumed to be tax-motivated.[163] Alternatively, under the net worth test, if on the day of Richie's renunciation of citizenship, the value of all his assets equaled or exceeded $500,000, his expatriation is similarly presumed to be tax-motivated.[164]

Richie can appeal the presumption only if he submits a ruling request[165] and meets certain other requirements.[166] Otherwise, Richie will continue to be taxed on his U.S.-source income at the progressive rates for another ten years beyond the date of his expatriation.[167]

2. *Ruling Requests*

Under amended section 877, an expatriated individual that satisfies either the tax liability test or the net worth test is subject to tax on his or her U.S.-source income, at the progressive rates, for ten years following the date of expatriation, unless:

1) he or she meets certain eligibility criteria[168] granting him or her the right to appeal the presumption and prove that his or her loss of citizenship was not tax-motivated;[169]

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162. *See* I.R.C. § 877(a)(2).201

163. *See id.*

164. *See* I.R.C. § 877(a)(2) (West 2000).

165. *See U.S. I.R.S. Training Manuals, supra* note 50, at 247-35 (detailing the information that is to be included in the ruling request).

166. *See id.* (specifying the eligibility criteria that must be met by an individual seeking to submit a ruling request); *see also* Liu, *supra* note 58, at 697 (explaining the method by which a former citizen and presumed taxpatriate may contest an IRS finding of tax-motivation, and the formal necessities required for filing an appeal).

167. *See* I.R.C. § 877.

168. *See U.S. I.R.S. Training Manuals, supra* note 50, at 247-35 (noting that if an individual fails to meet the requisite criteria to be eligible to submit a ruling request, and he satisfies either the tax liability test or the net worth test, then the presumption will stand firm that his expatriation had as one of its principal purposes the avoidance of U.S. taxes).

169. *See* I.R.C. § 877(f). Section 877(f) states:

> If the Secretary establishes that it is reasonable to believe that an individual's loss of United States citizenship would, but for this section, result in a substantial reduction for the taxable year in the taxes on his probable income for such year, the burden of proving for such taxable year that such loss of citizenship did not have for one of its principal purposes the avoidance of taxes ... shall be on such individual.

Id. In determining eligibility criteria the Secretary of the Treasury takes into account the following factors: (1) the substantiality of the former citizen's ties to the United States, (2) the extent of ownership of U.S. assets, (3) whether a spouse retains U.S. citizenship, and (4) whether the new country of citizenship imposes little or no income tax. *See Expatriation Taxation, supra* note 14.

2) he or she submits a ruling request within the appropriate time period as set by statute;[170] and
3) he or she obtains a favorable decision from the Internal Revenue Service.[171]

Moreover, an individual is eligible to request a ruling only under the following circumstances:[172]

1) he or she was born with dual citizenship and continues to be a citizen of the other country;[173]
2) he or she, within a reasonable period after the loss of U.S. citizenship, becomes a citizen of the country in which either he or she, his or her spouse, or one of his or her parents, was born;[174]
3) he or she was not present in the U.S. for more than thirty days each year of the preceding ten-year period;[175] or
4) he or she terminated his or her citizenship before attaining the age of eighteen and one-half years.[176]

If the taxpayer meets one of the foregoing exceptions, appeals the statutory presumption within one year of his expatriation,[177] and receives a favorable decision from the IRS,[178] then he or she is excluded from the expatriate tax regime provided

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170. *See* I.R.C. § 877.

171. *See id.*

172. *See U.S. I.R.S. Training Manuals, supra* note 50, at 247-35. Note, however, that regardless of eligibility, the IRS does not rule on requests involving mere hypothetical situations or proposed plans of transactions for an individual that has no definite intention to expatriate. *See id.*

173. *See* I.R.C. § 877(c)(2) (West 2000).

174. *See id.*

175. *See id.*

176. *See id.* (specifying the circumstances wherein an individual is eligible to request a ruling). An individual who "narrowly fails" to meet the criteria of one of the listed categories is permitted to submit a ruling request. *See U.S. I.R.S. Training Manuals, supra* note 50, at 247-35 (providing examples that illustrate circumstances in which an individual narrowly fails to satisfy the criteria of an enumerated category, but is eligible to submit a ruling request). For instance, an individual who spent 35 days in the United States during one of the years of a 10 year period would "narrowly fail" to meet the criteria of the third category mentioned in section 877(c)(2). *See id.* However, it is within the sole discretion of the IRS to decline a ruling on any request if it determines that the individual does not narrowly fail to satisfy the criteria of an enumerated category. *See* I.R.C. § 877(c) (West 2000).

177. *See* I.R.C. § 877(c)(1) (West 2000). This statute provides:

> Subsection (a)(2) shall not apply to an individual if (A) such individual is described in a subparagraph or paragraph (2) of this subsection, and (B) within the 1-year period beginning on the date of the loss of United States citizenship, such individual submits a ruling request for the Secretary's determination as to whether such loss has for one of its principal purposes the avoidance of taxes.

Id.

178. *See U.S. I.R.S. Training Manuals, supra* note 50, at 247-35. Merely submitting a ruling request does not shield an individual from tax liability in the interim. *See id.* In other words, if an individual's ruling request is pending before the IRS during the time in which his tax return should be filed for a particular year, then he must report income on his U.S. tax return for that year as if he were a tax-motivated expatriate subject to the 10 year rule.

by the amended section 877.[179] The effect of the tax liability and net worth tests is to presume tax-avoidance intent for those wealthy Americans that stand to gain considerable tax savings by expatriating.[180]

C. Problems with Amended Version of Section 877

Although the new amendments presume tax-avoidance intent once a certain threshold of income or wealth is met, lawmakers are asserting that the amended version of section 877 may be as ineffective as its predecessor.[181] These new provisions have not been well-received within the legal community.[182] Recent news reports conclude that the new provisions have failed[183] and that additional amendments to section 877 are essential.[184]

In short, the 1996 amendments made several modifications to the prior ineffective provisions regarding expatriation.[185] Most importantly, it eliminated the requirement that the IRS establish a tax-avoidance motive.[186] However, lawmakers allege that the 1996 legislation made no serious attempt to curb the avoidance of estate and gift taxes,[187] even though expatriation has been described as the ultimate

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See id.

179. *See id.* (stating that if an individual obtains a favorable ruling, then he may amend the previous year's U.S. income tax return).

180. *See* I.R.C. § 877(a)(2) (West 2000).

181. *See* Rangel, *supra* note 24, 217-33 (stating that lawmakers are not satisfied with the current provisions of section 877).

182. *See, e.g.*, Tilevitz & Czapiewska, *supra* note 25, at 1329 (referring to the IIRIRA as follows: "[t]he [amended version of section 877] will likely affect very few individuals, probably will rarely, if ever, be enforced, and likely would not be enforceable if the INS ever tried to enforce it. It is misguided, technically flawed, probably in violation of a host of bilateral and multilateral treaties, and arguably unconstitutional."); Donmoyer, *supra* note 5, at 1420 (criticizing the new rules as "draconian on its face" and still with "plenty of loopholes").

183. *See* Rangel, *supra* note 24, at 217-33 (citing a *Forbes* article that briefly summarized the effect of the amended version of section 877 as follows: "It ain't workin"); *see also* Glenn, *supra* note 24, at 1531 (noting that tax-motivated expatriation rules, thus far, are ineffective in deterring tax-motivated expatriates); *see also* Perry, *supra* note 22, at 492 (recognizing that Congress has not been successful in deterring tax-motivated expatriation); *see also* Liu, *supra* note 58 (acknowledging the success Congress has achieved in closing so many tax-avoidance loopholes, but also recognizing that Congress has been particularly unsuccessful in achieving similar results for tax-avoidance by expatriation).

184. *See* Rangel, *supra* note 24, at 217-33 (indicating that lawmakers have pushed for new legislation in response to news reports which criticize the current expatriation laws as ineffective); *see also* Donmoyer, *supra* note 5, at 1420 (explaining that lawmakers have introduced a bill that would serve to close the current loopholes of section 877 as signed into law in 1996).

185. *See* Sullivan, *supra* note 15, at 1705 (explaining the 1996 amendments to section 877).

186. *See* I.R.C. § 877 (West 2000); *see also supra* notes 156-59 and accompanying text; *see also* Liu, *supra* note 58, at 698 (describing the 1996 amendments to section 877 and the rationale behind the changes).

187. *See* Rangel, *supra* note 24, at 217 (providing an excellent example of this failure).

> Bill Gates, one of the wealthiest individuals in the world, has approximately $90 billion in assets. If he were to die or transfer those assets to his children by gift, the potential liability would be substantial. If Bill Gates were to expatriate, he could immediately make unlimited gifts in cash to his children without any gift tax liability. If he expatriated ten years before he died, his entire $90 billion stake in Microsoft could be transferred to his heirs with no income tax or estate tax ever being imposed on that accumulation of wealth.

technique in avoiding estate and gift taxes.[188] For this reason, lawmakers argue that further amendments to section 877 are necessary.[189]

V. SOLUTION

A. *Proposed Legislation*

The U.S. House Ways and Means Committee asked the Joint Committee on Taxation to review section 877 and draft a bill that would be more effective at deterring tax-motivated expatriation.[190] Lawmakers propose that a special expatriation tax is more appropriately collected at the time of expatriation rather than over a ten-year period.[191] They argue that collection of an expatriation tax over a ten-year period, provided for under current law, is more difficult than collection at the time of expatriation, primarily because the individual moves outside of U.S. jurisdiction.[192] In addition, lawmakers suggest that an estate or gift tax should be imposed on any U.S. citizen that receives a gift or inheritance from a U.S. expatriate.[193] Representatives Charles B. Rangel and Robert T. Matsui, among other Congressmen, introduced H.R. 3099, a bill incorporating the proposal.[194]

Id.; *see also supra* notes 96-107 and accompanying text.

188. In addition, there were other ways to avoid the prior provisions, such as delaying gains, monetizing assets without recognition of gains, and investing indirectly through derivatives. *See* Rangel, *supra* note 24, at 217.

189. *See id.* (indicating the desire of several lawmakers to introduce legislation that prevents tax-avoidance by expatriation); *see also* Sullivan, *supra* note 15, at 1705 (describing the continued political debate over the need to amend the expatriation laws).

190. *See* Glenn, *supra* note 24, at 1531 (noting that Democrats Charles B. Rangel and Robert T. Matsui were charged with the responsibility of drafting a bill that would amend section 877); *see also* Rangel, *supra* note 24, at 217-33 (stating that "[c]losing a loophole that only the extraordinarily wealthy can utilize . . . is a matter of fundamental fairness to the rest of our citizens).

191. *See* Sullivan, *supra* note 15, at 1705 (describing the changes lawmakers seek to make to current expatriation laws); *see also* Rangel, *supra* note 24, at 217-33 (providing a summary of the bill that is proposed to amend section 877).

192. *See* Liu, *supra* note 58, at 695-96 (explaining that the U.S. tax system is dependent upon voluntary compliance in order to be effective; thus, the IRS rarely attempts to make anyone pay his taxes, especially if he is no longer residing within the United States' jurisdiction).

193. *See* Rangel, *supra* note 24, at 217-33 (suggesting that the ability to avoid estate and gift taxes could be eliminated if the United States were to impose the applicable gift and estate taxes on U.S. citizens who receive gifts or inheritance from expatriates).

194. H.R. 3099, 106th Cong. (1999).

B. Effect on Existing Law

1. Income Tax

Under H.R. 3099, U.S. citizens that expatriate would be deemed to have sold all of their property[195] at fair market value at the time of expatriation.[196] Gain or loss from the deemed sale of property would be recognized at that time.[197] The net gain, if any, on the deemed sale would be included in the expatriate's gross income as

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195. The "deemed sale" rule would apply to all property interests held by an individual on the date of relinquishment of citizenship, excluding certain U.S. real property interests, interests in retirement plans, and interests in foreign pension plans. *See id.* Taxes are imposed only to the extent that the value of any or all interests exceed $500,000. *See id.* H.R. 3099 provides in pertinent part:

> This section shall not apply to the following property: (1) [United States real property interests] Any United States real property interest (as defined in section 897(c)(1), other than stock of a United States real property holding corporation which does not, on the day before the expatriation date, meet the requirements of section 897(c)(2). (2) [Interests in certain retirement plans]—(A) [In General]—Any interest in a qualified retirement plan (as defined in section 4974(c)), other than any interest attributable to contributions which are in excess of any limitation or which violate any condition for tax-favored treatment. (B) [Foreign pension plans]—(i) [In General]—Under regulations prescribed by the Secretary, interests in foreign pension plans or similar retirement arrangements or programs. (ii) [Limitation]—The value of property which is treated as not sold by reason of this subparagraph shall not exceed $ 500,000.

Id.

196. *See id.* (providing in pertinent part: "all property of a covered expatriate to whom this section applies shall be treated as sold on the day before the expatriation date for its fair market value.").

197. *See id.* H.R. 3099 further states:

> In the case of any sale under paragraph (1)—(A) notwithstanding any other provision of this title, any gain arising from such sale shall be taken into account for the taxable year of the sale, and (B) any loss arising from such sale shall be taken into account for the taxable year of the sale to the extent otherwise provided by this title, except that section 1091 shall not apply to any such loss. Proper adjustment shall be made in the amount of any gain or loss subsequently realized for gain or loss taken into account under the preceding sentence.

Id.

though the property were sold for its fair market value on that date[198] and will be subject to U.S. tax at that time.[199]

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198. *See id.* Under the proposal, an individual is permitted to elect to defer payment of the expatriation tax with respect to the deemed sale of property. *See id.* The proposal notes:

> If the taxpayer elects the application of this subsection with respect to any property treated as sold by reason of subsection (a), the payment of the additional tax attributable to such property shall be postponed until the due date of the return for the taxable year in which such property is disposed of (or, in the case of property disposed of in a transaction in which gain is not recognized in whole or in part, until such other date as the Secretary may prescribe.

Id.; *see also* Rangel, *supra* note 24, at 217-33 (stating the an expatriate may elect to defer the tax provided that he or she pays interest). Under this election, the expatriation tax with respect to a particular property, plus interest therein, is due when the property is subsequently transferred. *See* H.R. 3099, 106th Cong. (1999). In order to elect deferral of the expatriation tax, the individual is required to provide adequate security (e.g., a bond) to ensure that the deferred expatriation tax and interest is eventually paid. *See id.* The bill declares:

> No election may be made under paragraph (1) with respect to any property unless adequate security is provided with respect to such property. (B) [Adequate Security]—For purposes of subparagraph (A), security with respect to any property shall be treated as adequate security if—(i) it is a bond in an amount equal to the deferred tax amount under paragraph (2)(A) for the property, or (ii) the taxpayer otherwise establishes to the satisfaction of the Secretary that the security is adequate. (5) [Waiver of certain rights]—No election may be made under paragraph (1) unless the taxpayer consents to the waiver of any right under any treaty of the United States which would preclude assessment or collection of any tax imposed by reason of this section.

Id.

199. *See* H.R. 3099, 106th Cong. (1999). Special rules would apply in the case of trust interests. *See id.* U.S. real property interests, which remain subject to U.S. taxing jurisdiction in the hands of nonresident aliens, generally are excepted from the proposal. *See id.* An exception also applies to interests in qualified retirement plans and, subject to a limit of $500,000, interests in certain foreign pension plans as prescribed by regulations. *See id.* The Treasury Secretary is authorized to except other property interest as appropriate. *See id.* The bill is aimed at wealthy expatriates that stand to gain considerable tax savings; thus, it imposes the special tax only on net gain to the extent that it exceeds $600,000. *See id.* Furthermore, the proposal asserts:

> The amount which would (but for this paragraph) be includible in the gross income of any individual by reason of this section shall be reduced (but not below zero) by $ 600,000. For purposes of this paragraph, allocable expatriation gain taken into account under subsection (f)(2) shall be treated in the same manner as an amount required to be includible in gross income.

Id.; *see also* Rangel, *supra* note 24, at 217-33 (stating that the bill would exempt the first $600,000 from tax). Moreover, the provisions of H.R. 3099 provide for the exclusion of expatriates that fall within certain limited categories:

> An individual shall not be treated as a covered expatriate if—"(A) the individual—"(i) became at birth a citizen of the United States and a citizen of another country and, as of the expatriation date, continues to be a citizen of, and is taxed as a resident of, such other country, and "(ii) has been a resident of the United States (as defined in section 7701(b)(1)(A)(ii)) for not more than 8 taxable years during the 15-taxable year period ending with the taxable year during which the expatriation date occurs, or "(B)(i) the individual's relinquishment of United States citizenship occurs before such individual attains age 18 ½, and "(ii) the individual has been a resident of the United States (as so defined) for not more than 5 taxable years before the date of relinquishment.

H.R. 3099, 106th Cong. (1999).

2. Estate and Gift Taxes

H.R. 3099 would also eliminate the ability to avoid the estate and gift taxes through expatriation by imposing the applicable gift or estate tax on the receipt[200] by U.S. citizens of gifts or inheritance from expatriates.[201] Thus, U.S. citizens receiving a gift or inheritance from an expatriate would pay taxes at the rates found in sections 2001 and 2501 of the tax code (up to 55%) and not the tax rates in section 1 (topped at 39.6%).[202]

VI. CONCLUSION

The U.S. government taxes its citizens at higher rates than nonresident aliens. For instance, U.S. citizens are taxed on their worldwide income at progressive rates of up to 39.6%, but nonresident aliens are taxed at a flat tax rate of only 30%. Moreover, the United States, unlike most other countries, imposes high estate and gift taxes on its citizens. For wealthy Americans, there are significant tax savings in renouncing U.S. citizenship. In addition, with the rise of telecommunications, technology, and the internet, renouncing one's citizenship may become a less than burdensome and more attractive solution to tax problems.

It offends people to think that some Americans care so little about U.S. citizenship that they are willing to renounce it for mere pecuniary gain. As a result, tax-motivated expatriation has become the focus of unrelenting media coverage and much political debate. Congress responded by amending the Tax Code so that expatriation would no longer be attractive. However, the attempt to deter tax-motivated expatriation has failed. The inability of Congress to enact legislation that effectively deters tax-motivated expatriation both decreases tax revenue and blemishes the integrity of the federal tax system. "The willingness of our citizens to voluntarily comply with our tax laws is threatened when very wealthy individuals can avoid their responsibility as citizens by turning their backs on this country and walking away with enormous wealth."[203] The time has arrived for a revision of the expatriation laws. H.R. 3099 would eliminate many of the tax advantages available to expatriates, particularly with regard to income, estate, and gift taxes. Adoption of

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200. *See* Rangel, *supra* note 24, at 217-33 (explaining, however, that the U.S. citizen receiving the gift or inheritance may have the tax liability reduced by any foreign gift or estate taxes paid on the assets received).

201. *See* H.R. 3099, 106th Cong. § 2681 (1999). Section 2681 provides in pertinent part:

"(a) [In General]—If, during any calendar year, any United States citizen or resident receives any covered gift or bequest, there is hereby imposed a tax equal to the product of—"(1) the highest rate of tax specified in the table contained in section 2001(c) as in effect on the date of such receipt, and "(2) the value of such covered gift or bequest. "(b) [Taxes to be paid by recipient]—The tax imposed by subsection (a) on any covered gift or bequest shall be paid by the person receiving such gift or bequest."

Id.; *see also* Rangel, *supra* note 24, at 217-33 (arguing that by imposing a tax on the recipient of gifts or inheritance, an expatriate is no longer be able to avoid U.S. federal estate or gift taxes).

202. *See* I.R.C. §§ 1, 2001, 2501 (West 2000).

203. Rangel, *supra* note 24, at 217-33.

the proposal would serve to close the tax loopholes of section 877. Until then, these tax loopholes still remain.[204]

204. *See* Glenn, *supra* note 24, at 1531 (stating that until the proposal is officially adopted by Congress "[i]t's merely an invitation that says to those who want to leave, leave now.").