C. Enforcement of the Immigration Provisions

Under the immigration provisions, a former U.S. citizen who "officially renounces" citizenship does not qualify for admission to the United States if the Attorney General determines that the renunciation was for tax avoidance purposes.[378] According to the GAO, no procedures are in place to implement this provision.[379] Thus, since its enactment in 1996, no individual has been deemed inadmissible under this provision.[380]

The immigration provision presents several enforcement difficulties. As a threshold matter, the INS and the Department of State do not agree on when an individual has "officially" renounced U.S. citizenship.

The immigration provision does not define what it means to "officially" renounce United States citizenship. Another statutory provision lists the acts by which an individual may lose or relinquish their U.S. citizenship.[381] The phrase "officially renounces United States citizenship" is not used in that section. Instead, certain acts are described using the words "formal" or "formally." These acts are: (1) formally declaring allegiance to another country, (2) making a formal renunciation of nationality before a U.S. diplomatic or consular officer in a foreign country, and (3) making a formal renunciation of nationality in the United States during a time of war.[382] Other acts, such as naturalizing in a foreign country, are not described in the statute as "formal." By using the phrase "officially renounces United States citizenship," the immigration provision creates an ambiguity as to acts that are considered "official." The immigration provision could be interpreted to apply to individuals committing any of a number of possible types of acts, or its application could be limited to only those individuals committing acts described as "formal."

According to the Department of State the phrase "officially renounces United States citizenship" means only a "formal" renunciation of U.S. citizenship before a U.S. consular officer abroad. On the other hand, according to the INS, any of the acts qualifies as "official" if performed voluntarily and with the intent to relinquish citizenship. If the act is confirmed by the issuance of a CLN, the INS maintains that the individual has "officially renounced" U.S. citizenship.

Committing any one of the acts does not automatically result in the loss of citizenship. The act must be voluntarily performed for loss of citizenship to occur. This is a subjective test and intent is not presumed. Intent may be difficult to prove absent some accompanying act

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[378] 8 U.S.C. sec. 1182(a)(10)(E), which became effective September 30, 1996.

[379] *See* GAO Report at A-256.

[380] *See* A-143 (October 8, 2002, letter from the INS).

[381] 8 U.S.C. sec. 1481.

[382] 8 U.S.C. sec. 1481(a)(2), (a)(5), and (a)(6).

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wholly inconsistent with U.S. citizenship. In September 1990, the Department of State issued a policy statement designated as "Advice About Possible Loss of U.S. Citizenship and Dual Nationality." The policy statement provides that for certain acts, the Department of State operates on the premise that the individual intended to retain U.S. citizenship:

> As already noted, the actions listed above can cause loss of U.S. citizenship only if performed voluntarily and with the intention of relinquishing U.S. citizenship. The Department has a uniform administrative standard of evidence based on the premise that U.S. citizens intend to retain United States citizenship when they obtain naturalization in a foreign state, subscribe to routine declarations of allegiance to a foreign state, or accept non-policy level employment with a foreign government.[383]

Thus, an individual could commit an act by becoming naturalized in a foreign country but still retain their U.S. citizenship if they lacked the requisite intent. The difficulty in determining whether an individual had the requisite intent, hinders the determination that citizenship has been lost and in turn, that such individual is subject to the immigration provision.

No database to track individuals who lose citizenship for tax reasons can be developed until the responsible agencies agree who has lost citizenship within the meaning of the provision and therefore, should be included in the database. Without agreement on the individuals to whom the law applies, no action can be taken.

The difficulty in determining when a U.S. citizen has committed an act with the requisite intent to relinquish citizenship also has tax implications. When performed with the requisite intent, the act of relinquishing citizenship terminates the obligation to continue to pay U.S. taxes on worldwide income. No Federal law requires an individual to request a CLN or notify the Department of State of the intent to relinquish citizenship within a specified amount of time after the act has been committed. If an individual does notify a consular officer at some later date, the loss of citizenship is retroactive to the date of the relinquishment of citizenship. This retroactivity permits individuals who relinquish citizenship for tax reasons to assess after the fact whether it would be advantageous to claim that the relinquishment was effective at an earlier date. It is unlikely that the Federal Government would possess evidence to contradict a former citizen's statement of subjective intent.

Another enforcement problem exists with respect to the requirement that the Attorney General determine whether the former U.S. citizen renounced his or her citizenship for tax avoidance purposes. The law does not set out any criteria for determining tax avoidance. While the Attorney General could seek guidance from the IRS on how to apply the law generally, he cannot have access to a specific taxpayer's return information without the consent of the taxpayer. Thus, the Attorney General cannot access a taxpayer's returns for purposes of determining a tax avoidance motive.

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[383] Department of State, *Advice About Possible Loss of U.S. Citizenship and Dual Nationality*, 67 Interpreter Releases 1092 (October 1, 1990).

The law does not require the Attorney General to consult with or follow the opinion of the IRS regarding a former citizen's tax avoidance motive. Conceivably, the Attorney General, through the Department of Justice's Tax Division, could make a determination independent of the IRS, but it would require a review of detailed submissions from the individual seeking admission. Ordinarily, applications for tourist visas are granted within 24 hours. This process would be lengthened substantially if the Attorney General were to make an independent determination. In addition, for individuals for whom a visa is not required, a determination would have to be made at the time the individual attempts to enter the United States. Such a time-consuming process is ill-suited to having the INS make a determination at the port of entry. Even if admitted under deferred inspection, district agents of the INS would have to rely on individuals with tax expertise to make the determination. This also assumes that the individual being inspected would have available the needed records to provide to the INS for examination.

The IRS is required to publish quarterly in the *Federal Register* the names of each individual losing United States citizenship within the meaning of section 877(a).[384] The IRS publishes the list quarterly; however, the list is not limited to those individuals who have relinquished citizenship for tax avoidance purposes. Thus, the Department of State and the INS cannot rely on the list as a source of individuals to be deemed inadmissible to the United States. As a result, the list does not aid in the enforcement of the immigration provision.

The differing interpretations of the statute and the inability to access taxpayer records from the IRS has led to a lack of enforcement for the entire period that the law has been in effect. While the INS has been working with the Departments of State and Justice and the IRS to develop guidelines for administering the immigration provisions, no guidelines or procedures have been actually established.[385]

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[384] Sec. 6039G(e).

[385] *See* A-143 (October 8, 2002, letter from the INS).