

LAWSUIT BY U.S. PRESIDENTIAL CANDIDATE CHALLENGES THE CONSTITUTIONALITY OF FATCA

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Senator Rand Paul, R-Ky., along with six current and former U.S. citizens living abroad, filed a lawsuit, July 14, in the U.S. District Court for the Southern District of Ohio challenging the constitutionality of the Foreign Account Tax Compliance Act (FATCA) and foreign bank account reporting (FBAR) regime.

"FATCA eschews the privacy rights enshrined in the Bill of Rights in favor of efficiency and compliance by requiring institutions to report citizens' account information to the IRS even when the IRS has no reason to suspect that a particular taxpayer is violating the tax laws," the petition states.

Republicans Overseas Action, a political organization that represents the interests of U.S. Republicans who live abroad, challenges FATCA, intergovernmental agreements (IGAs), and FBAR on behalf of the plaintiffs. They make eight separate claims under the president's constitutional power to make international agreements; the due process clause of the Fifth Amendment, providing equal protection; the Eighth Amendment excessive fines clause; and Fourth Amendment protections against searches unsupported by probable cause.

"At its core, FATCA is a bulk data collection program requiring foreign financial institutions to report to the IRS detailed information about the accounts of U.S. citizens living abroad, including their account balances and account transactions," the petition says.

The petitioners, other than Senator Rand, all live abroad and are portrayed in the petition as sharing a commitment to public service. Five of the petitioners are current U.S. citizens, while one renounced her citizenship after the implementation of FATCA.

One of the petitioners, Stephen J. Kish, Ph.D., currently resides in Toronto, Ontario. Dr. Kish is a professor of psychiatry and pharmacology at the University of Toronto and the head of the Human Brain Laboratory at the Centre for Addiction and Mental Health (CAMH) in Toronto. He was born in Seattle, Washington, on July 11, 1948. He lived in Seattle for the duration of his childhood, completing his primary and high school education there. He graduated from the University of Notre Dame in South Bend, Indiana in 1970. He received a master's degree in biochemical pharmacology at the University of Southampton in England in 1973 and a Ph.D. in pharmacology at the University of British Columbia in Vancouver in 1980.

He has worked his entire professional life in Toronto, and in 1985, Stephen decided to become a Canadian citizen to ensure that he would be able to remain in Canada with his wife and be able to pursue his research career in Toronto.

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The petitioners also moved for a preliminary injunction declaring as unconstitutional, and enjoining the government from enforcing, FATCA and its corresponding IGAs and foreign bank account reporting.

"This lawsuit will not only enable Republicans Overseas to defend all overseas Americans' and stateside 'Green Card' holders' right to privacy and other constitutional protections, but also provide them immediate injunctive relief by crippling the Treasury's ability" to enforce IGAs and the FATCA enforcement capabilities of the IRS and the Financial Crimes Enforcement Network, James Bopp Jr. of the Bopp Law Firm, lead attorney for the plaintiffs, said in a statement by Republicans Overseas Action.

Specifically, the suit makes the following claims:

- The IGAs are unconstitutional sole executive agreements because they exceed the scope of the president's independent constitutional powers, and because they override FATCA;
- The heightened reporting requirements for foreign financial accounts deny U.S. citizens living abroad the equal protection of the laws;
- The FATCA foreign financial institution (FFI) penalty, passthrough penalty, and willfulness penalty are all unconstitutional under the excessive fines clause;
- FATCA's information reporting requirements are unconstitutional under the Fourth Amendment; and
- The IGAs' information reporting requirements are also unconstitutional under the Fourth Amendment.

The lawsuit also challenges certain aspects of foreign bank account reporting, which requires disclosure of foreign bank accounts with balances in excess of \$10,000. It asserts that FBAR civil penalties under 31 U.S.C. section 5321 are unconstitutional under the excessive fines clause of the Eighth Amendment, alleging that they are "grossly disproportionate to the gravity of the offense." It asserts that the willfulness penalty is designed to punish and is therefore subject to the excessive fines clause.

"In practice, it is just a trap for the unprepared and the uninformed, pinching regular middle-class Americans residing outside the United States. The penalties for failing to file the report can be financially devastating and can wipe out a person's entire savings," the complaint states.

Some practitioners have speculated that penalty rates under FBAR -- \$10,000 for non-willful FBAR violations and a maximum penalty of the greater of \$100,000 or 50 percent of the account value for willful FBAR violations -- may be unconstitutional under the Eighth Amendment. As the complaint notes, FBAR penalties are cumulative, and the ultimate fine can exceed the account value. The IRS issued guidance on May 13 that would provide both hard and soft caps to FBAR penalties.