

Cromwell's ghost

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Some tax-compliant Americans have strong reasons to stay offshore, says Derek Sambrook

Panama, the region's banking centre, has seen a flood of business from Venezuela (see [Here comes the sun](#)).

Conversely, because of the Foreign Account Tax Compliance Act (FATCA), some Americans have been exiting the local banks - in some instances, they are egged on by the banks, who see American depositors as trouble. And a coterie of banks, growing in number, may themselves use the acronym FATCA: Forum Against Taking Clients from America. As I am sure you appreciate, the forum has not been restricted to Panama for its membership.

However, some tax-compliant Americans have strong reasons to stay offshore. Tax and transparency are a given for them because one compelling reason for Americans to look offshore is litigation, which features largely in every stratum of their society.

Many causes have roots that can be traced back 900 years to the Norman Conquest, when the English king's private and intimate council (known as the Privy Council) advised the monarch on matters of justice "throughout his dominions".

This Court of the Star Chamber (called so because the meeting place in the Palace of Westminster had stars painted on the ceiling) with its omnipotent privy councillors made America's founding fathers all too well aware of the dangers of centralising and concentrating state power in the hands of a select few. An autocratic Oliver Cromwell in the 17th century only sharpened their focus and strengthened their resolve to protect individual rights.

Although Cromwell defended the English parliament against the dictates of the monarchy, he nevertheless created a tyranny far worse than that which existed under the English kings. Retired US Army Lieutenant General Dave R Palmer, a military historian and author, wrote in his book 1794: America, Its Army, and the Birth of the Nation that the

constitution of the US "was written by 55 men - and one ghost". The ghost was Cromwell, who haunted the minds of those 55 men.

Reductio ad absurdum

Alexis de Tocqueville, the French writer and author of influential work Democracy in America, commented more than a century and a half ago on America's ingrained obsession with the rights of the individual, going on to observe that in its desire to reject unfettered power by any one individual it went too far by establishing "a network of small complicated rules, minute and uniform" that could reduce citizens and even judges 'to nothing better than a flock of timid and industrious animals".

Since then, the labyrinth of laws and reams of regulations have multiplied to the point of absurdity and beyond, I am sure, anything that de Tocqueville could have imagined or Cicero, centuries earlier, intended when he said: "We are in bondage to the law in order that we may be free."

This fixation with an individual's rights has, however, eventually led to a common belief that, no matter what the circumstances, someone else is to blame for one's personal adversity. No longer is a plaintiff even required to demonstrate actual injury.

In January 2000, the US Supreme Court introduced a standard that permits a plaintiff to claim on the grounds of possible, and not just proven, injury (Friends of the Earth v Laidlaw). BP plc, Europe's second-largest oil company, which got into deep water following the 2010 blowout of its deep-water Macondo well, off the coast of Louisiana, understands how crippling the cost of litigation in America can be.

Blame game

This blame game avoids issues such as personal responsibility or self-reliance and is the reason why litigation looms large in everyday life in the US today. Thus the attraction of insulating assets from lawsuits through a legitimate offshore structure, which may well be tax-neutral and provide little or no privacy whatsoever. The tyranny of kings has been replaced by the tyranny of tort, the process by which a civil action might end in one's own personal financial ruin.

It is not surprising that some Americans, caught unwittingly in the grip of litigation, may feel that the Statue of Liberty is right where it should be: offshore. That's where an increasing number of Americans are seeking the protection that they feel they need - FATCA or no FATCA.

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