Notwithstanding any other provision of law, not later than 30 days after the close of each calendar quarter, the Secretary shall publish in the Federal Register the name of each individual losing United States citizenship (within the meaning of section 877(a) or 877A, i.e., expatriation to avoid US tax laws) with respect to whom the Secretary receives information under the preceding sentence during such quarter.

IRC section 6039G(d).

On April 15, 2017, thousands of Americans protested by marching in Los Angeles, Modesto, Milpitas, Oakland, Palm Springs, Redding, Sacramento, San Diego, San Francisco, San Jose, Washington, D.C., and other cities across the United States. At issue was President Donald Trump's refusal to release his tax returns. Others went further than “Chicken in Chief” signage. On April 18, 2017, an uncertain number privately protested by failing to pay their United States (“U.S.”) Federal income tax. Never mind that filing annual returns is required, failure to pay the tax shown on a return incurs penalties, and willful failures to file returns or pay tax constitute a Federal crime.

Then there are those thousands of Americans that have gone further still: expatriation, i.e., loss of citizenship. Since the 2010 passage of the Foreign Account Tax Compliance Act (FATCA), expatriation has generally increased. Yet 2016 was exceptional: a record 5,409 individuals renounced their citizenship. For scale, that is roughly the same number of people that expatriated over the eight years of Clinton's presidency.

At a time when nearly one-third of Californians are in favor of secession from the U.S., we might rightly wonder what U.S. citizenship means in 2017. We might also wonder what motivates those that have renounced. That question is easily answered thanks to Internal Revenue Code (“IRC”) section 6039G.

I. 6039 WHAT?

For readers who rarely venture north of the income tax provisions of the IRC, the first surprise may be that section 6039G even exists. To be clear, since late 1996 the U.S. has purported to publish the name of every individual losing citizenship. Viewed objectively today, one's instinct may be to liken section 6039G to the diatribes of Twitter’s most powerful user. (“You are going to walk away from America without retribution or consequence? WRONG!”) Theatrics aside, expatriation clients often inquire as to the origins of and motivation for this provision. Uncertain, I dug into contemporary news articles, the Congressional Record, reports by the Joint Committee on Taxation, and other legislative history to answer these questions. This article explores what I found.

A. It Was Oh So Quiet at the Beginning

This public shaming of expatriates has its genesis in a bill introduced in April 1995 by Democratic Representative Sam Gibbons of Florida. Representative Gibbons introduced “a bill to require the Secretary of State to publish the names of United States citizens who renounce their citizenship.” His goal was clear: “Individuals enjoying enormous tax advantages through renunciation of their U.S. citizenship should be publicly identified.”

Gibbons was the senior ranking Democrat on the powerful House Committee on Ways and Means at the time. He briefly chaired the committee immediately before the Republicans took control of the House in 1995.

Representative Gibbons planted a seed but his 1995 bill failed to make it out of the Judiciary Committee. However, the Gibbons language was eventually incorporated into the more comprehensive and prominent expatriation tax-reform bill (the “Expatriation Tax Act of 1995”) by Republican Representative Bill Archer of Texas, then-Chairman of the House Ways and Means Committee. Although Archer’s bill also failed to become law, most of its substantive provisions (including the public shaming provision) were eventually incorporated into the Health Insurance Portability and Accountability Act (“HIPAA”) of 1996.

The House Report on HIPAA is brief in its discussion of section 6039G. The expatriation provisions were included as “revenue offsets . . . to avoid increasing the budget deficit.” While HIPAA did include revenue offsets when it was introduced, the initial bill did not include the expatriation tax provisions. The expatriation provisions may have been added during a markup session by the Committee on Ways and Means. (Recall
that Representative Archer, sponsor of the failed Expatriation Tax Act of 1995, was chair of the Committee at that time and Representative Gibbons was the ranking member.) The House Report justified the addition of section 6039G solely by stating “information reporting and sharing rules to enhance compliance with the expatriation tax provisions.”

The HIPAA legislative history explains how section 6039G appeared in the IRC. However, the public shaming provision is not discussed at any length, hence, the “why” of section 6039G requires further discussion.

II. WHY SHAME EXPATRIATES?

A. Gibbons’s Original 1995 Bill

As later adoptions of the public shaming provision (i.e., Archer’s bill and HIPAA) do not provide insight into its motivation, it is useful to review legislative history from earlier incarnations. There is a logical inference that must be drawn here. Namely, that the motivation behind Representative Gibbons’s bill (which failed to pass) remained constant when the text of the bill was later picked up in Archer’s bill (which also failed to pass), and eventually in HIPAA (which passed). While it is acknowledged that the late Justice Scalia would shudder if such an inference were argued as a means of statutory interpretation, the inquiry here is one of policy.

The statement by Gibbons in April 1995 when he introduced his bill (“Individuals enjoying enormous tax advantages through renunciation of their U.S. citizenship should be publicly identified.”) appears to be the only record of why a provision like section 6039G exists (other than the House conclusions that information reporting will enhance compliance). No other member of the House seems to have been as passionate about naming expatriates, but Gibbons had sought to name expatriates repeatedly in floor speeches to the House. Why did Gibbons have such a penchant for outing expatriates? To understand, it is useful to review the political context.

B. The Environment

The bill by Representative Gibbons was introduced amidst a nasty spell of partisan bickering over taxation of expatriates. The U.S. first enacted an expatriation tax regime in the 1960s. By the 1990s, the regime was acknowledged as ineffective by Republicans and Democrats alike. Hence, President Clinton proposed radical change to the expatriation tax in his 1996 budget proposal, possibly after reading an inflammatory article in Forbes magazine. Much debate followed, but it was clear that some major changes were afoot in the taxation of expatriates and expatriation. Meanwhile, the Democratic Party was still collectively licking its wounds in early 1995 from a bruising election cycle (the Republican Revolution, i.e., the 1994 midterm elections). Representative Gibbons, however, was hitting his stride. His “red-faced bursts of outrage” at Republicans around this time were noted in the press.

Gibbons was in favor of Clinton’s proposed expatriation tax. His first fight over expatriate taxation seems to have come in late March 1995. During debate over an unrelated tax bill, Representative Gibbons sought to introduce an amendment that a joint reconciliation committee favor a Senate tax bill (which included an expatriation tax section and closely followed Clinton’s proposal) rather than his own chamber’s tax bill (which was promoted by Republicans, including Chairman Archer, and did not include any expatriation provisions). In his speech on the floor of the House, Representative Gibbons noted that the Senate (Democratic) proposal was meant to target 12 to 24 individuals who expatriated for tax reasons, and went on to name a few of them. The Gibbons amendment failed, the Republicans won the day, and the resulting legislation did not change the expatriation tax.

A few months later, the New York Times and Gibbons accused Republican congressmen of delaying expatriation tax legislation to benefit a few wealthy individuals. In particular, the press and Democratic congressmen were alarmed at the lobbying by one California law firm for one client with regard to one specific provision: the effective date of new expatriation tax provisions. President Clinton and Democrats wanted to make any expatriation tax legislation retroactive to early February 1995, when it was first announced (as is common with tax legislation). They accused Republicans of pushing for a later effective date due to intense lobbying on behalf of one particular expatriate (Mr. Joseph Bogdanovich, an executive at Heinz Company), who applied for a Certificate of Loss of Nationality in mid-February 1995. Therefore, if the effective date of any new rules was early February, Mr. Bogdanovich would have been subject to additional taxation. If the Republicans changed the effective date of the legislation, Mr. Bogdanovich would be subject only to the old rules (which he had skirted effectively, we can assume).

This was the environment in which section 6039G was born. Democrats were furious over the apparent pay-to-play legislation; Representative Gibbons for one was not going to take it lying down. With this understanding, the provision’s raw retaliatory nature makes more sense.

C. Sunlight Is the Best Disinfectant

Representative Gibbons and the rest of Congress knew of certain high-profile expatriates because of press reports. Evidently not satisfied with relying on the press to expose tax-dodging expatriates, Gibbons sought the names of wealthy expatriates from the State Department directly (presumably to shame all of them on the House floor, rather than just those that appeared in articles in Forbes, the New York Times, and the Washington Post). This effort failed. The State Department was legally unable to give Gibbons a list of so-called “economic Benedict Arnolds.” So Gibbons proposed a bill that would remove barriers to disclosure of names of
expatriates (e.g., the Privacy Act of 1974) and would go further and require publication of the name of all expatriates in the Federal Register. Gibbons also said that he would “continue to work toward making our tax system fair to all who benefit from this great country. [Publishing the names of expatriates] is one small step in that direction.”20 As noted above, his bill failed initially. Yet this failed bill was the first incarnation of section 6039G. Thus, it is this moment that is crucial in understanding the motivation behind section 6039G.

Certainly most reasonable people can agree that democracy should not be directly influenced by wealthy individuals so as to personally benefit themselves at the expense of the nation. Despite Gibbons’s “red faced” speeches on the House floor and reports in reputable media, that is exactly what Mr. Bogdanovich achieved.

In this context, Representative Gibbons looks like a campaigner against corruption. When he could not stop tax-motivated expatriations, he sought to shine a light on the attorneys who advised on them and the individual citizens who implement the attorneys’ advice. According to the New York Times, “Once, when a Republican challenged his demeanor during a fight over procedure, Mr. Gibbons shot back, ‘I will be as petulant as I want to be.’”21 Most constituents approve of petulance, at least in the limited context of Mr. Bogdanovich.

III. 6039G TODAY

With an adequate understanding of what motivated Gibbons, I can understand why section 6039G made it into the IRC. No one relishes corruption. Yet it has been over 20 years since Mr. Bogdanovich, Kenneth Dart (an heir to the drinking cup business), and John Dorrance III (a Campbell soup heir) expatriated, to the chagrin of Congress. In the interim, at least 27,500 expatriates have endured the shame of public naming in an official federal government publication. While certainly a fraction of them were tax motivated and deserved public shame, experience suggests that it was a small fraction.

Exceptions do exist. The tax expatriate has not become extinct. Facebook’s Eduardo Saverin expatriated in the first quarter of 2012,22 just before Facebook made its initial public offering in May 2012.23 If anything, Mr. Saverin’s high-profile expatriation tends to prove that section 6039G does not have a deterrent effect, or at least not an effect strong enough to stop tax motivated expatriation.

Expatriation is a fundamental right in the U.S., and has been since this nation’s founding.24 The U.S. Supreme Court has acknowledged a right to anonymity in the exercise of other fundamental rights (e.g., speech and abortion). One might wonder why expatriation is different. Even if anonymity is not guaranteed, why should the federal government be in a position of shaming expatriates in 2016? What public good is served? What collective interest is justified? Today, is section 6039G just sour grapes? Or does the law serve a legitimate government interest?

Gibbons retired from Congress in 1996 and died in 2012.25 The fight over the expatriation tax was one of his last in an over 30-year career in Congress. After 22 years, it could be argued that perhaps it is time that Congress bury the hatchet and retire section 6039G. In the meantime, the quarterly lists of names of individuals provide an intriguing data set.

IV. PUTTING 6039G TO USE

“Reality is not a function of the event as event, but of the relationship of that event to past, and future, events.”26 Without some context, it is difficult to know what to make of the 5,409 expatriations in 2016. When compared to the U.S. Census Bureau’s estimated total U.S. population as of December 31, 2016, (324,304,407, in case you are curious)27 a mere 5,409 individuals seems insignificant. Indeed, the cohort of 5,409 individuals represents a measly 0.001668 percent of the U.S. population. However, a more useful comparison for advisors and policy makers is not the raw number (5,409), but how it compares with similar periods.

To address this second question, I compiled and organized the data printed in the Federal Register dating back to the passage of HIPAA in August 1996. Additionally, I used historical expatriation data compiled by the State Department dating back to 1962.28 Although the combined data is not free from defects (nor uniform), the bounty of information allowed for a look at expatriation trends over the last several decades.

A. The Results

1. Tax Legislation Impacts Expatriation

There are two notable surges in this chart. The first surge (in the first half of 1997) was undoubtedly due to changes in the IRC. As discussed supra, HIPAA included changes to the taxation of expatriates and expatriation.29 Most notably, HIPAA changed existing Code section 877 to presume a tax-avoidance motive for expatriation in certain (broad) circumstances.30
Although HIPAA was retroactive to February 1995 (i.e., expatriating after its passage did not avoid its application),\textsuperscript{52} the partisan bickering and public shaming of expatriates that motivated the passage of the HIPAA expatriate tax provisions may have scared many Americans living abroad. Over 1,400 people reportedly expatriated during the first half of 1997, which helped make 1997 the seventh-most popular year for expatriation on record.\textsuperscript{53}

2. \textbf{FATCA Led to High Levels of Expatriation by the Well-Advised}

The beginning of second surge (visible in both of the above charts) is almost certainly due to the ancillary effects of the Foreign Account Tax Compliance Act (FATCA).\textsuperscript{54} FATCA was passed in March 2010, which explains the bump in expatriations from the second quarter of 2010 through 2011. These were most likely individuals that had existing relationships with knowledgeable tax advisors (e.g., accountants and attorneys). Their advisors called them to tell them about FATCA and they expatriated. FATCA is a law designed to reduce unreported foreign income and undisclosed non-U.S. assets. Hence, the increased number of expatriations in the wake of FATCA would seem to indicate that those expatriating in response to FATCA had something to hide.

However, an expatriating individual is required to certify, under penalties of perjury, that she has met her tax obligations with respect to the five years prior to expatriation.\textsuperscript{55} While wily expatriates may have chanced filing false returns, many modern U.S. tax treaties allow the U.S. to continue to tax a former citizen.\textsuperscript{56} Hence, there would be little advantage in expatriating with false returns, unless the client has a strong appetite for risk.

A less-cynical explanation may be found in the challenges of living abroad as an American citizen. Several foreign financial institutions opted \textit{not} to comply with FATCA due to its complexity and drain on resources. Their solution was to fire their American clients.\textsuperscript{57} American citizens that have made a home abroad may have found it more convenient to renounce their citizenship than upend their financial affairs.

3. \textbf{FATCA’s Current Wave Is Unprecedented}

There were other small declines in a few of the quarters since the passage of FATCA (more easily visible in the second chart),\textsuperscript{58} before the number of expatriations started on their current record-breaking trend. This third surge in expatriations likely involves ordinary working Americans abroad with modest accounts at foreign banks. It was in mid-2014 that the U.S. finalized many of the information sharing agreements to implement FATCA.\textsuperscript{59} Around the same time, more and more Americans with accounts at foreign banks began receiving letters. Usually, the letters would ask the account holder to certify compliance with their U.S. filing obligations. For many living abroad, this was the first time they realized they had filing obligations in the U.S. After realizing the cost of annual filing (professional fees to lawyers and accountants), Americans abroad of modest means may have made the rational decision that it was not worth keeping their passport.

Yet for those of us that remain American citizens, we might rightly wonder if the country is worse off. As a nation that prides itself on being the land of the brave and home of the free, should we not pause for reflection when our fellow citizens permanently opt-out of our collective bargain? The chart above demonstrates that not only are expatriations rising, but the percentage of Americans losing citizenship is steadily increasing. The cost of FATCA (or perhaps the political climate) is higher in terms of expatriations than the Vietnam War or Watergate. In short, expatriation at these levels is clearly no longer just a hobby of the ultra-rich. Even if expatriation could not be characterized as “mainstream” (expatriates still make up less than one hundredth of one percent), policy makers would be wise to pay attention to the trend.
V. CURIOSITIES IN THE DATA

The section 6039G list is imperfect. Experienced practitioners will know that an expatriate’s name may appear on a section 6039G list several months after expatriation. (The list only should include expatriates losing citizenship in the quarter prior to publication.60) Additionally, many online commenters have raised challenges to the legitimacy and completeness of the section 6039G list.61 However, external evidence and conspiracy theories are not necessary. There is ample evidence from within the master section 6039G list itself to demonstrate mistakes. Compare the IRC Code and Code of Federal Regulations (which dictate what should appear on the list) with the 82 Federal Register notices that form the base of the master list. There are plenty of curiosities in the data. This section examines a few of those internal inconsistencies.

A. Hooper, Charles W. (Deceased)

The last name on the July 2002 section 6039G notice was Charles W. Hooper and it included the parenthetical note “(deceased).”62 To state the obvious, it would be unusual that a dead person would have the ability to perform an expatriating act. Without any personal knowledge of Mr. Hooper’s circumstance, one can imagine two explanations:

1. Mr. Hooper performed an expatriating act, properly applied for a Certificate of Loss of Nationality (CLN), died, then the Secretary published his name; or

2. Mr. Hooper performed an expatriating act, died before applying for a CLN, his legal representative applied for a CLN after he died, then the Secretary published his name.

Whatever Mr. Hooper’s expatriation story, it is also noteworthy that the Internal Revenue Service (“IRS”) included that Hooper was dead in the section 6039G list. Section 6039G(d) requires that the IRS publish the name of the individual losing citizenship. However, that same section also has an important provision that allows the Secretary to publish the names. Specifically, “Notwithstanding any other provision of law . . .”63 This second provision allows the publication of the section 6039G list despite provisions in the Privacy Act of 1974.64

In Mr. Hooper’s case, however, it seems unlikely that there was any Privacy Act claim. The Privacy Act applies only to living individuals who are U.S. citizens (or lawful permanent residents).65 According to the Federal Register, at the time of publication of his death, Mr. Hooper was neither a citizen nor a living person. Thus, there was no Privacy Act violation by publication of Mr. Hooper’s death.

Thus, it purely an academic inquiry as to why the IRS published the parenthetical notation of Mr. Hooper’s death. One that will mostly likely go unanswered.

B. Insurance Companies Are People Too

On the August 2000 section 6039G list, an odd entry appeared in the table listing the surnames and first names of recent expatriates: “REINSURANCE, LTD, RBC.”66 At first, this appears to be a mistake of some kind. Yet, RBC was not the only insurance company appearing in a section 6039G notice. Sandwiched in the middle of the April 2003 section 6039G list was “Limited, ING Re (Ireland).”67 ING Re Limited is now dissolved. When it was still trading, it was the life insurance subdivision of the American division of the Dutch banking and insurance company ING Group.68 Further, tucked into the July 2003 section 6039G list, among names of individuals, was “Reinsurance Limited, Imagine International,”69 i.e., Imagine International Reinsurance Limited. Three separate entities on three separate section 6039G lists. This was some strange pattern.

Although it is not uncommon to read about corporate tax inversions in the mainstream media,70 these are not corporate inversions (which involve a merger). These are expatriations by non-individuals. Section 6039G(d) states that the “Secretary shall publish in the Federal Register the name of each individual losing United States citizenship (within the meaning of section 877(a) or 877A) . . .”71 Further, the provisions of sections 877 and 877A (referenced in section 6039G) make several references to expatriates as “individuals.” Thus, it seems fairly clear that the expatriation provisions contemplate individuals, not entities.

What is an individual for section 6039G purposes? Whereas a “person” can be a partnership, trust, company, or other entity,72 an “individual” is not commonly defined in the IRC.73 “Individual” has its ordinary meaning (i.e., a human being). With sections 6039G, 877, and 877A all applicable to individuals, it remains wholly unclear why three separate insurance companies made it on to the section 6039G list. Other international practitioners I have polled were similarly baffled.

C. Twenty-Seven Thousand Stories

Behind each name on the section 6039G list is a life story. Some are stories that made headlines (e.g., Tina Turner, Eduardo Saverin, or Boris Johnson). Most have not. As the examples above indicate, the list contains more than meets the eye. Post-death expatriations and expatriations by non-individuals are beyond the scope of what should be published on the section 6039G list. Yet they appear. So I am left wondering: what other tales remain to be told by section 6039G?

VI. CONCLUSION

What began as a campaign against one California law firm and its very wealthy client has grown in to a “name and shame” list with tens of thousands of names. The circumstances that led to the codification of section 6039G may excuse the statute’s retaliatory quintessence. However, publicly shaming all
expatriates no longer makes sense. Retaliation is not an American ideal; why is the American government used as an instrument of revenge so many years on? Furthermore, the list has clear errors, which undermine public confidence in government records. On the other hand, if section 6039G is a lemon, with its long-running nature we can make lemonade. Policymakers have an incredible tool and should use expatriation data when devising the next generation of expatriation taxation and anti-money laundering enforcement.

ENDNOTES

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4. See IRC § 6012(a).

5. See IRC § 6651(a)(2).

6. See IRC § 7203 (misdemeanor willful failure to file or pay tax). See also IRC § 7201 (felony willful tax evasion); IRC § 7206(1) (felony willful false return).


10. Incomplete data relating to 1995 makes an absolute comparison difficult. However, figures from the State Department for 1993-94 combined with lists of names published in the Federal Register from 1996-2000 lead to an estimate of 4,836 expatriates from January 1993 to December 2000 (excluding 1995), with a median of 514 expatriates per year. If 1995 was on par with the median (which is generous), an overall estimate of 5,350 expatriates from 1993 to 2000 is suggested.


12. This is a fictionalization. President Trump did, however, post a series of messages on Twitter, which read:

The U.S. is going to substantially [sic] reduce taxes and regulations on businesses, but any business that leaves our country for another country, fires its employees, builds a new factory or plant in the other country, and then thinks it will sell its product back into the U.S. ..... [sic] without retribution or consequence, is WRONG! There will be a tax on our soon to be strong border of 35% for these companies [. . . .]


42. 141 Cong. Rec. at E822. Never mind that Gibbons’s sense of fairness was not universal: he voted against both the 1964 and 1968 Civil Rights Acts. See Martin, supra note 16, at A28.


45. Administration’s Proposal Relating to the Tax Treatment of Americans Who Renounce Citizenship: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways and Means, 104th Cong. 41, 43 (1995) (prepared remarks of Robert F. Turner, Charles H. Stockton Professor of International Law, U.S. Naval War College) (“It is important to keep in mind that the claimed ‘right of expatriation’ was at the very core of the intellectual justification for the American Revolution and has long been a fundament of US policy.”).


49. See JT. Comm. on Taxation, JCS-5-95, Description of Revenue Proposals Contained in the President’s Fiscal Year 1996 Budget Proposal 17-18 (Feb. 17, 1995).

50. HIPAA, supra note 20, at § 511, et seq.

51. Id. at § 511(a)(2).

52. Id. at § 511(g).

53. See Quarterly Publication of Individuals, Who Have Chosen To Expatriate, as Required by § 3069F, 62 Fed. Reg. 23532 (Apr. 30, 1997). See also Quarterly Publication of Individuals, Who...
Have Chosen To Expatriate, as Required by § 6039(f), 62 Fed. Reg. 39305 (July 22, 1997).


55. IRC § 877(a)(2)(C).


60. IRC § 6039G(d).


63. IRC § 6039G(d).


71. IRC § 6039G(d) (emphasis added).

72. See IRC § 7701(a)(1) (defining person). See also 26 C.F.R. § 301.7701-6(a) (defining person).

73. See generally IRC § 7701. See also 26 C.F.R. § 301.7701-1, et seq.