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September 27, 2012 DRAFT

Abstract

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[Readers who are pressed for time may begin with Part III (p. 16) and not miss too much of the story.]

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In early 1924, James Couzens was a Republican Senator from Michigan and reportedly the richest member of Congress. Andrew Mellon was beginning his fourth year as Secretary of the Treasury — a service that would eventually span 11 years under three Republican Administrations — and one of the wealthiest persons in the entire country. This article describes how a feud between these two men, an ensuing investigation led by Couzens of the Bureau of Internal Revenue (BIR) (predecessor to the modern-day IRS), and a tax case against Couzens that was described as the "greatest tax suit in the history of the world," helped lead to creation of the U.S. Joint Committee on Taxation (JCT) and its staff. The events — filled with political intrigue, backstabbing (real or imagined), and unintended consequences — antagonized Congress's relationship with the executive branch, but improved cooperation between the House and Senate, and both were instrumental in the JCT's creation. The story also provides insight on the unique role the JCT has played in Congress for over 85 years. Finally, the article explains how creation of the JCT became entangled with two of the most contentious tax issues of the day — the publicity of tax return information and the depletion allowance for oil and gas production — and played a role in changing the law in both areas.

Part I describes the JCT and the tax law most relevant to the events leading to the JCT's creation. It reviews the first Act of the modern income tax and changes — largely to accommodate the country's needs during World War I — to increase tax rates, enact an excess-profits tax, and liberalize the allowance for depletion and war-related losses. Part II discusses the House's proposal in 1926 to establish a temporary Joint *Commission* on Taxation (consisting of members of Congress

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and the public) to make simplification recommendations to Congress. Parts III and IV then detail the Senate's path to the JCT — the feud between Couzens and Mellon, the BIR investigation and its aftermath, and the tax action against Couzens — and the merging of the two chambers' interests to produce the legislation creating the JCT and its staff in 1926. Part V concludes with observations on the Couzens-Mellon saga, including its impact on inter-branch and inter-cameral relations and creation and certain key aspects of the JCT.

I. BACKGROUND.

A. The JCT.

The JCT is a bipartisan committee of ten members of the House and Senate tax-writing committees, and exists principally to provide justification for its staff.[1] The committee does not report legislation, and rarely convenes hearings or performs other traditional functions of a legislative committee. The staff of the JCT — currently including about 50 economists, lawyers, and accountants — assists every member of Congress at each stage of the tax legislative process, and provides a source of tax expertise that is independent of the executive branch. The staff is nonpartisan rather than bipartisan; unlike staff supporting most other Congressional committees (including certain joint committees), the JCT staff is not affiliated with any party and is not separated into majority and minority party staff members.

Although the staff serves all of Congress, its principal duty is to be a policy advisor to the chairs, ranking members, and other members of the tax-writing committees. In this role, the staff helps to develop, analyze, and evaluate many tax policy options for those committees and assists with all of the legislative tasks necessary for enactment of a bill. In addition, the staff provides the official revenue estimates used by Congress for all proposed tax legislation.[2] The staff also reviews all tax refunds in excess of $2 million and monitors the administration of the tax laws by the IRS.[3] Occasionally, the staff performs tax-related investigations, such as examining President Nixon's tax returns and the tax positions of the Enron Corp. The JCT and its chief of staff are given direct access to otherwise confidential tax return information and permitted to delegate that access to others.[4]

B. The 1913 income tax.

In 1913, following ratification of the Sixteenth Amendment, Congress approved as the first Act of the modern income tax a law generally resembling a "flat tax."[5] The 1913 Act imposed a one percent "normal tax" on the net income of individuals and an additional surtax (ranging from one to six percent) on income above certain thresholds. The Act's tax rates, therefore, were not completely flat, but the combination of a very large exemption amount before imposition of any income tax liability ($4,000 for married couples, equivalent to over $90,000 today), plus a very high threshold before any surtax became applicable ($20,000 of income, equivalent to over $450,000 today), meant that the vast majority of individuals were either exempt from paying the tax or taxed at a flat one percent rate on all of their income above the exemption amount. Only about two percent of households paid any income tax, and only about 0.02 percent of the population paid any surtax.[6] The Act similarly levied a flat, one percent normal tax (and no surtax) on the net income of all corporations.

The base of the tax was extremely straightforward by today's standards. In general, the only allowable deductions from gross income were for business expenses, interest, taxes, business and casualty losses, bad debts, and a reasonable allowance for depreciation and depletion. There were few exclusions from gross income, and no tax credits at all. Thus, the law generally taxed income comprehensively, and was essentially devoid of provisions extraneous to the determination of taxable income and tax liability (commonly referred to as "tax expenditures" today).[7] The law integrated the one percent corporate income tax with the individual income tax by permitting taxpayers to deduct (for purposes of the one percent normal tax) any dividends received from companies subject to the corporate tax. The corporate tax therefore generally functioned as a form of withholding tax on the income of the corporation's high-income shareholders.[8] More generally, the Act included a broad "withholding at source" provision that required withholding agents to withhold and remit to the BIR the normal tax (1%) on many items of income paid to taxpayers. Thus, although some taxpayers (generally, those with net income over $3,000) were required to file income tax returns, many could potentially pay all of their tax through withholding.[9]

Although the income tax approved in 1913 was new, it had ample precedents. In drafting the initial bill for the House Ways & Means Committee, Congressman (and future Secretary of State

under President Franklin Roosevelt) Cordell Hull (D.-Tenn.) drew upon the experiences of the British income tax (over 100 years old), two earlier federal income taxes in the United States (one during and after the Civil War, and another briefly in 1894), and the country's 1909 corporate excise tax that determined tax liability based on the amount of a corporation's "net income."[10] To be sure, the final legislation was confusingly drafted and contained some gaping holes.[11] For example, the statute appeared to permit deductions only for purposes of the normal tax, and not the surtax, thus raising the possibility that the law imposed, in part, a tax on gross income.[12] Moreover, apart from drafting errors and ambiguity, there were embedded within the 1913 income tax law many difficult questions that required some compromise between the theory of an income tax and administrative considerations and other policy objectives. What the country needed was time to let the fledgling tax gradually mature.[13] Unfortunately, world events soon made that hope an impossibility.[14]

C. World War I and its effect on income tax rates.

With the outbreak of war in Europe, Congress initially satisfied the country's additional revenue needs through temporary excise taxes on alcohol and tobacco and other special taxes. Income taxes were not raised, in part because the Treasury needed the additional revenue quickly.[15] Confirming, however, the view of war as "the hothouse of income taxation,"[16] Congress soon turned to the income tax and made extensive changes in 1916, 1917, and 1918. Table 1 shows the changes in the tax rates and exemption amounts of the new tax by 1918:

Table 1: Change in income tax rates and exemption amounts between 1913 and 1918

	1913	1918
Exemption – single persons	$3,000	$1,000
Exemption – married couples	$4,000	$2,000
Normal tax on individuals	1% on all net income (in excess of exemption amount)	6% on net income (in excess of exemption amount) up to $4,000; 12% on all additional net income
Surtax on individuals	1% to 6%, beginning at net income over $20,000	1% to 65%, beginning at net income over $5,000
Corporate tax rate	1% on all net income	12% on all net income (in excess of $2,000)

Thus, in just five years, the maximum individual income tax rate rose from seven to 77 percent (12 percent maximum normal tax plus 65 percent maximum surtax), and the breadth of the tax also increased significantly. The corporate tax rate increased from one to 12 percent, and a

sizable "excess-profits" tax (discussed next) applicable to certain businesses was also enacted. Congress generally made these and many other changes to the income tax very hurriedly, during a period when it was also busy adding and amending many other taxes (including an estate tax in 1916 and the excess-profits tax in 1917), and considering and passing other important legislation.[17] Table 2 shows how dramatically these changes altered the amount and source of revenue raised by the federal government during this period.[18] As some observers subsequently noted, the country was fortunate to have been able to draw upon the new income tax in this time of crisis, and with much patriotic support from the public, the tax proved to be highly productive.[19] The changes, however, also magnified the flaws of the new income tax system and greatly increased the stakes involved to remedy them.[20] The following sections describe three other key changes made.

Table 2: Amount and source of federal revenue, FY ending June 30, 1914 and 1918[21]

	FY 1914		FY 1918		
Source of revenue	Amount ($M)	% of total	Amount ($M)	% of total	% change, FY 1914-18
Income tax (including corporate and excess-profits tax)	71	9.7%	2,839	68.0%	3,898.6%
Other sources	664	90.3%	1,335	32.0%	101.1%
Total	735	100.0%	4,174	100.0%	467.9%

D. The supplemental tax on excess/war profits.

Despite repeal of the tax in 1921, the U.S.'s experience with its first "excess-profits tax" (EPT) provides important background in understanding the events leading to the JCT's creation in 1926. By 1939 (just one year prior to enactment of the U.S.'s *second* general EPT), there remained many EPT cases from 1917 and 1918 that were still open and unresolved.[22] The JCT staff spent some portion of its earliest years focusing on the continuing administrative problems with the EPT.[23]

At the outset of the Great War, a number of European countries approved special taxes on profits earned as a result of the war. According to Professor Plehn, a war-profits tax (WPT) was first proposed in Denmark and Sweden in 1915 to tax the extraordinary profits of businesses that exported goods to Germany when many trade routes to that country had been cut off.[24] As Professor Seligman explained, "[i]t was a natural feeling that no private enterprise should be permitted to make inordinate gains out of the misery of humanity, and that the community is

entitled to a great part of the profits for which no individual enterprise is really responsible."[25] In 1916, the United States took a small step in the same direction when it imposed (in addition to the income tax) a 12½ percent tax on the profits of certain munitions manufacturers.[26]

By 1917, with its involvement in the war deepening and the push for increased national "preparedness," the United States initially decided to follow a Canadian (rather than the European) precedent, and approved as part of the Revenue Act of March 3, 1917 ("March, 1917 Act") a supplemental tax on "excess" profits, and not merely those attributable to the war.[27] After the country declared war one month later, Congress began debating and eventually passed the War Revenue Act of Oct. 3, 1917 ("WRA of 1917"), whose EPT superceded (with retroactive effect) the tax approved in March.[28] Although the March, 1917 Act version of the EPT therefore never took effect, its description helps to explain Congress's thinking as it grappled with how best to finance the country's war-time needs.

The initial choice of an EPT rather than a European-style WPT was for both policy and political reasons. In theory, an EPT potentially applied to *all* very profitable businesses (including those earning windfall and monopoly gains), not just those experiencing an increase in profitability as a result of the war. Thus, businesses that were highly (but equally) profitable both prior to and during the war were potentially exempt from a WPT but not an EPT. In one of several positions he would eventually take as he helped to design and administer the EPT for the Treasury Department, Thomas Sewall Adams (a Yale professor of political economy who served in the Treasury and as an informal advisor for well over a decade)[29] argued that businesses with high profits during both periods were especially appropriate targets for taxation because their "extra war profits added to a high level of pre-war profits create an unusual capacity to bear taxes."[30] An EPT also had the potential of becoming a permanent feature of the tax system, whereas a WPT, by its nature, seemed destined to be only a temporary levy.[31] The possible permanence of an EPT was attractive to Cong. Claude Kitchin (D.-N.C.), chairman of the House Ways & Means Committee and majority leader of the House, who has been described as maintaining "nineteenth-century anti-monopolistic, redistributionist traditions."[32] Like a WPT, the EPT was imposed in addition to income taxes on the same profits.

A decision to tax "excess" profits, of course, required a baseline determination of "normal" profits that would not be subject to the special levy. In the March, 1917 Act, normal profits were generally determined to be eight percent of "invested capital," defined as the sum of cash (and value of tangible property) contributed to a business plus the business's accumulated profits.[33] The product represented Congress's estimate of a normal return on investment, and the EPT only applied to business income in excess of the normal return. This definition of normal profits was, obviously, very crude. It favored capital-intensive firms over ones relying primarily on labor (which might have little or no "invested capital"). Further, it failed to differentiate businesses (and their levels of profitability) based upon the riskiness of their activities and their age, size, type, and stage of development. The test also ignored the significance of intangible capital, such as goodwill, in helping to generate income; if such capital was not reflected in a firm's realized, accumulated profits, it was excluded from "invested capital" and therefore did not contribute to the calculation of the firm's normal profits that would be exempt from the EPT. The inability to take into account factors such as these constituted the "cardinal defect of any tax levied upon the excess-profits principle."[34] From a practical standpoint, the amount of a business's "invested capital" was an especially difficult determination for older businesses and ones previously involved in reorganizations.

The March, 1917 Act's low (eight percent) tax rate on the amount of excess profits moderated these concerns somewhat. In addition, because of Congress's rushed passage of that Act, the concerns did not receive full consideration. The law constituted the fourth emergency revenue measure since 1913 and, as Randolph Paul later explained, "[t]ax bills were in a losing race with events" during that period.[35] When debate on the proposed EPT began to get snarled in the Senate, Senate leaders maneuvered to get that chamber to approve the House version of the bill, thereby bypassing two legislative stages (full consideration by the Senate and review by a Conference Committee) where the merits of the EPT might have been more fully aired.[36]

Following the U.S.'s declaration of war in April, 1917, and the realization that a far higher tax rate for the EPT was needed, the crudeness of its tax base became a more pressing problem. At first, the Ways & Means Committee continued its expedited legislative process and reported, without benefit of any public hearings, essentially the same EPT as enacted in March, but with the

tax rates doubled.[37] Following House approval, however, the bill got bogged down in the Senate, which conducted ten weeks of hearings during which businesses had time to present their grievances.[38] In part to avoid having to determine the amount of a business's "invested capital," the Senate revived interest in a British-style WPT rather than an EPT.[39] In theory, the baseline (exempt) level of earnings under a WPT was determined by a business's *actual* earnings during a pre-war period (such as 1911-13), and not by some contrived determination of normal profits. The WPT, thus, might avoid the "invested capital" determination; businesses would be taxed only on their war period profits in excess of their actual, "peace" profits.

A WPT, however, introduced its own administrative difficulties. Some businesses — including those created to serve war needs — had not existed prior to the war, or had unrepresentative earnings during that period. In addition, prior to passage of the 1913 Act, only corporations had reported their income to the BIR (pursuant to the Tariff Act of 1909). Thus, if businesses organized as partnerships or sole proprietorships were also to be included in the WPT, some method had to be devised to determine their peacetime income.[40] Finally, a WPT would need to take into account changes in the capital structure of a business between the pre-war and war periods. For example, a business which doubled in size during the war, but was no more profitable than prior to the war, arguably did not reap extraordinary profits as a result of the war and therefore might properly be excluded from a WPT.

After extended debate, Congress compromised the issue by incorporating *both* an excess-profits *and* war-profits component into the "War Excess Profits Tax" approved as part of the WRA of 1917.[41] In the process, Congress created a hybrid tax which greatly exacerbated its administrative difficulties.

Under the WRA of 1917, "normal" profits were generally determined based on the average profit *rate* of the business during the pre-war period (1911-13). By focusing on the pre-war profit rate, rather than absolute level of profits, Congress provided a war-profits test that could take into account changes in the capital structure of the business since the earlier period. But "profit rate" required a comparison of the business's profits to its *invested capital* during the pre-war period. Moreover, once the pre-war profit rate was determined, it still had to be multiplied by the

business's invested capital in the current, taxable year to ascertain the amount of exempt, normal profits.[42] Thus, far from eliminating reliance on "invested capital," the new statute actually expanded its significance and increased the circumstances in which it had to be determined.[43] Further, the statute introduced all of the administrative difficulties for firms without pre-war experiences. The final legislation limited the pre-war profit rate to between seven and nine percent, which helped to address concerns that a taxpayer's pre-war experience was unrepresentative, but did not relieve the administrative burdens of the basic test. At least in theory, all businesses still had to determine their pre-war profit rate to see if the limit was binding. As a final complication, individuals and partnerships were required to calculate the amount of their 1911-13 earnings as if the income tax included in the Revenue Act of 1916 had applied to them in those years.[44]

The tax rates of the EPT, ranging from 20-60 percent under the WRA of 1917 and 30-80 percent under the 1918 Act, amplified the problems with the tax base.[45] In addition, perhaps as a precursor to current-law's alternative minimum tax, the 1918 Act required businesses to pay, in effect, the *greater of* an EPT and a WPT (generally calculated using excess-profits and war-profits principles, respectively).[46] Professor Adams urged this modification to tax the largest corporations more heavily since Treasury had found that they had escaped paying much of the 1917 version of the tax.[47] Thus, to determine ultimate liability, taxpayers and the BIR had to resolve all of the complexities inherent in each test. Through explicit and implicit delegations, the law placed tremendous burdens on the BIR to administer the tax fairly across businesses and industries.[48]

By the end of the war, there was a torrent of criticism directed towards the EPT from both businesses affected by the tax and more objective observers. According to Professor Haig:

> The excess-profits tax of 1917 was probably as deservedly unpopular as any tax measure could well be. It was productive of large revenue, but when this favorable statement was made, praise must cease. It was unfair in its scope, uneven in its application and so poorly drafted that only by the boldest administrative action could it be made to function at all.[49]

Although there was some disagreement on the merits of the tax from a policy standpoint, there was little dispute about its enormous administrative burdens.[50] In testimony before the Ways & Means Committee in late 1920, Professor Adams, an original opponent of the tax who supported

it during the war, switched sides again and urged its repeal based on his judgment that continuation of the tax —

> would endanger the life of the income tax itself. No federal administration, in my opinion, is capable during the next five or six years of carrying with even moderate success two such burdens as the income tax and the excess profits tax.[51]

In the Revenue Act of 1921, Congress repealed the tax effective in 1922.[52] As previously noted, however, the tax continued to burden the tax system for another two decades.

E. Depletion and war-related losses.

The sharp increase in income tax rates and enactment of the excess-profits tax, along with the possibility that either or both changes would prove to be short-lived, dramatically raised the stakes of the determination of "net income," the starting base of both levies. An especially challenging issue was defining the proper allowance for depletion of natural resources. Large allowances permitted during the war would, at a minimum, allow taxpayers to shift some of their income to post-war years when tax rates might be much lower (and the EPT repealed).[53]

A fundamental question was whether taxpayers should recover through depletion the *initial market value* of the natural resource being exploited or merely the *cost* of discovering and developing that resource. Under views still prevalent at the time, "capital" constituted the property interest in the ground — the "tree" in the famous fruit-and-tree metaphor of Justice Holmes[54] — and therefore a deduction representing an exhaustion of capital might naturally start from the native value of the property interest being exploited.[55] For many capital investments, such as a building or equipment, the conceptual question doesn't arise; because additional units of the same good can be easily produced at the same or similar cost, there is ordinarily little difference between cost of production and initial value. But where additional production is both uncertain and likely more costly — such as discovery of a valuable natural resource — initial value of the resource may significantly exceed its cost.[56] The depletion allowance thus presented at the birth of the modern income tax an especially difficult question regarding the proper definition of income.

In 1913 and 1916, Congress passed statutes crudely introducing "value" into the proper allowance for depletion. In each case, however, the Treasury interpreted the rule essentially to limit the taxpayer's deduction to cost.[57]

With the increase in tax rates and enactment of the EPT, Congress reconsidered the depletion issue in 1918. In a Ways & Means Committee hearing, oil industry representatives objected primarily to a peculiar aspect of the EPT that they claimed discriminated against undercapitalized smaller producers.[58] The depletion allowance permitted by the Treasury under the 1916 Act was described as "perfectly satisfactory."[59] In initial hearings before the Senate Finance Committee, industry representatives took a similar stance.[60]

Once the House passed its bill, the Finance Committee held another round of hearings primarily to hear from the U.S. Fuel Administration (USFA) (an emergency federal agency established during the war to regulate the production, distribution, and consumption of certain energy resources in order to ensure adequate war supplies) on the impact on oil supplies of the House's proposed $.02/gal. excise tax on gasoline.[61] Norman Beecher, counsel to USFA's oil division (and a New York maritime lawyer with little background in the oil and gas industry or tax), spent most of his time testifying on the broader tax issues affecting the energy industry.[62] In his view, it was critical to consider the impact of the tax laws on independent prospectors (sometimes termed "wildcatters").[63] He noted that many wildcatters incurred significant costs drilling "dry holes" before discovering a specific, productive wellhead. Since no tax benefit was then provided to taxpayers with a net loss in a year (such as a wildcatter with "dry hole" expenses in excess of income),[64] he argued that it was proper to include all of the explorer's costs from unproductive ventures in the depletable amount of the productive wellhead.[65] According to Beecher, the aggregate costs of all wildcatters roughly equaled the value of their discoveries.[66]

Beecher also raised two "lock-in" concerns. He explained that high tax rates deterred sales of discoveries by wildcatters who did not have the resources to develop them. Further, high rates discouraged wildcatters (and others) from developing their discoveries — even if they had the resources — until taxes had been reduced.[67] Beecher thus was fearful that because of the tax laws, discoveries either wouldn't be made or would lay idle during the critical period when the country

needed adequate resources.[68] He urged the Committee to reduce taxes on sales and development of natural resources, with the latter achieved through a depletion allowance based on the *value* of the discovery.[69] Beecher assured the Committee that there would be no great difficulty in determining the value of discoveries.[70] When Sen. Jones (D.-N.M.) (who was sympathetic to Beecher's position) pointed out that the proposal had the effect of exempting wildcatters on the value of their discoveries, Beecher appeared to be confused.[71] By the end of his testimony, Beecher's proposals — which went beyond anything urged by the oil and gas industry at the hearings — had been endorsed by the industry.[72] Although Beecher did not defend his proposal based on an initial-market-value view of "capital," his proposal was certainly congenial to those who subscribed to that view.

The Treasury Department, represented by Professor Adams, criticized Beecher's depletion proposal as "wrong in theory and bad and difficult administratively to handle." He also warned the Finance Committee that the rule might have unintended consequences and would raise difficult valuation questions.[73] Nevertheless, in the 1918 Act, Congress approved a depletion allowance based on the value of the discovered property on the date of discovery (or within 30 days thereafter). This provision, known as the "discovery depletion" allowance, applied to certain mines and oil and gas wells discovered by the taxpayer on or after March 1, 1913.[74] Congress approved the rule in recognition of the problems of the prospector who "expends many years and much money in fruitless search," and also "to stimulate prospecting and exploration."[75] Congress also reduced the tax on certain sales of natural resources.[76] Although these provisions were debated during the war and were intended to help with the war effort, Congress did not revisit them when their enactment (as part of the 1918 Act) was delayed until February, 1919, or three months after the Armistace.

In retrospect, a fateful decision was to authorize the discovery depletion allowance for purposes of *both* the excess-profits tax (the main concern of the industry)[77] *and* the income tax. If the special provision had applied only to the excess-profits tax, it might have been repealed when that tax was terminated in 1921. Instead, the provision was continued after 1921, became in 1926 the "percentage depletion" allowance that was the bête noire of tax reformers throughout the middle of the twentieth century, and remains in the law today (although with diminished effect).

Under percentage depletion, tax benefits are allowed so long as a natural resource remains productive, uncapped by *either* the cost *or* the discovery value of the resource.

Finally, Congress also added a provision in the 1918 Act to compensate taxpayers who suffered losses from capital investments made to produce articles for the war. An example was a taxpayer that constructed or acquired a factory during the war to produce munitions, and then saw it lose value after the war due to its reduced utility. The "amortization" provision allowed taxpayers in certain circumstances to write off the post-war loss in value against their income and excess profits reported during the war.[78] Here again, a prime impetus for the rule was the high (and temporary) taxes in effect during the war; because of the subsequent losses, taxpayers argued that some of the income and excess profits reported during the war had been illusory, and that recovery of the losses in the ordinary course (such as through depreciation deductions) to offset future income would be inadequate.[79] Thus, just as certain profits obtained as a result of the war were specially taxed, so too were certain losses arising from the war given a special allowance. As we shall see, like the discovery depletion allowance and the EPT, the special amortization provision for war investments produced enormous administrative difficulties for the BIR. By 1939, the BIR was still litigating 1917 and 1918 cases involving the amortization provision.[80]

II. THE HOUSE'S PROPOSED JOINT *COMMISSION* ON TAXATION.

Troubled by its tax legislative experiences during the war and confronted by many complaints about the burdens and unfairness of the tax system, Congress initially took steps to develop and strengthen tax administration. When it realized that the law itself, and not just its administration, was part of the problem, Congress undertook modest efforts to simplify the law, including a House proposal in 1926 to create a "Joint *Commission* on Taxation."

Congress's most significant action was to appropriate enough funds to increase the size of the BIR from 4,000 employees in 1913 to over 21,000 by 1922.[81] The BIR, however, had difficulty finding qualified workers during the war and assimilating such a large increase in staff. In addition, at the same time taxpayers were clamoring for more help from the BIR, they increased demand for private-sector assistance. As a result, the BIR suffered considerable turnover as many of its top

employees, once trained, left the agency for much more lucrative positions outside of government.[82] Thus, despite the increase in personnel, the agency was unable to keep up with its obligations to provide guidance to taxpayers and monitor compliance.[83] In 1915, the Treasury estimated that it would take 3½ years to complete examination of approximately 300,000 individual and corporate returns from FY 1915. By 1922, Treasury reported that there were over 2.5 million unaudited individual and corporate returns from prior years.[84]

Pursuant to a broad grant of authority in 1917, the BIR formed the "Excess Profits Advisory Board," headed by Cong. Hull (D.-Tenn.) and Professor Adams, to help resolve some of the daunting questions relating to the new excess-profits tax.[85] In 1918, Congress created a temporary "Advisory Tax Board," also headed by Adams (and modeled after the Excess Profits Board), to provide taxpayers with interpretations of both the income and excess-profits tax laws.[86] The new Board was disbanded after seven months, but its role was continued by the Committee on Appeals and Review within the BIR.[87] Eventually, in 1924, Congress replaced this Committee with the Board of Tax Appeals ("BTA"), a forum independent of the BIR that could resolve taxpayer disputes prior to assessment of tax deficiencies.[88] The initial plan was to reduce the size of the BTA once it resolved a backlog of disputes, but Congress eventually expanded the BTA and made other important changes in 1926 when it realized the amount of work outstanding.[89] The BTA was renamed the "Tax Court of the United States" in 1942, and became an Article I court (the current "U.S. Tax Court") in 1969.[90]

In 1918, Congress also created the "Legislative Drafting Service" to help draft legislative bills.[91] Up until then, the House Ways & Means Committee, which provided the initial draft of all tax bills, had received drafting assistance primarily from volunteers or persons hired by individual members. With the complexity of legislation and the "constantly increasing necessity of dealing with problems never heretofore within the [scope] of congressional action," the Committee urged creation of a permanent office made up of nonpartisan staff to help with legislative drafting.[92] In 1924, the Service became the House and Senate Offices of Legislative Counsel, which continue to serve Congress today.[93]

Creation of the Drafting Service was a double-edged sword from the standpoint of addressing the tax system's administrative problems. The Service promised to bring greater clarity and internal coherence to the statutes enacted. Poorly drafted statutes, however, are only one cause of administrative difficulties; the substance of a rule may be an even more important factor.[94] For example, a rule determining the depletion allowance based on the "fair market value of property at the date of discovery" can be expressed clearly and easily, yet produce enormous administrative difficulty. By further removing legislators from the statutes they approved, the Drafting Service potentially made legislators less sensitive to the substantive consequences of their rules. Still, the Service at least recognized the role the law can play (as opposed to its administration) in producing administrative problems for the tax system.

Congress took another modest step towards simplification in 1921 when it created a temporary "Tax Simplification Board" within the Treasury Department. The purpose of this Board, consisting of three BIR employees and three members of the public (all serving without compensation), was to "investigate the procedure of and the forms used by" the BIR in administering the tax law, and to recommend how such procedure and forms might be simplified.[95] Not surprisingly, given this structure and limited mandate, the Board had a minimal impact. The Board assisted with regulations dealing with the excess-profits tax, and recommended ways to simplify the income tax return and auditing process.[96] In its one report, the Board included a handful of suggestions for the BIR and three legislative recommendations: creation of the BTA (enacted in 1924), location of the BIR in its own building, and exclusion of capital gains and losses from the income tax.[97] The last recommendation, which was not followed by Congress, was an example of the Board trying to step beyond its limited mandate.

In 1925, the ubiquitous Professor Adams testified (in his private capacity) before the Ways & Means Committee and tried to refocus interest in simplifying the substance of the law. His principal idea was to replace all existing deductions with something like a large standard deduction. He also suggested that this change (or others) might be made by creating an independent, temporary, and uncompensated commission to study and report on simplification.[98] This idea was welcomed by Cong. Treadway (R.-Mass.), who had sponsored and been disappointed with the Simplification Board. With Treadway's support, the House included in its 1926 tax bill a proposal to create a

temporary (through 1927) Joint Commission on Taxation, consisting of members of the House and Senate and the public, "to investigate and report upon the operation, effects, and administration of the Federal [tax system] . . . and upon any proposals or measures which . . . might be employed to simplify or improve the operation or administration of the [tax system]."[99]

The proposed Joint Commission on Taxation was broader than the Tax Simplification Board in two respects. First, the Commission included members of Congress. This made it more likely that simplification proposals might involve changes to the substance of the law, as opposed to its form, style, or manner of administration. Second, the Commission's mandate was much more expansive than the Simplification Board's narrow focus on simplifying the BIR's "procedure and forms." In other respects, however, the proposed Commission represented a continuation of earlier, limited efforts to address the tax system's problems. The proposal merely solicited advice from a small group of outsiders who would serve without compensation for a temporary period.[100] The circumscribed nature of this and earlier proposals reflected the view that the problems of the tax system were largely a byproduct of the war. Thus, with the war over, the administrative crisis could be resolved with the help of limited (and temporary) advice to make a few careful changes.[101] Moreover, although one House member hoped that the Commission would lead to "a study of our whole internal-revenue system,"[102] others continued to think of the duties of the proposed Commission in very narrow terms. Simplification, to these members, meant streamlining the tax return filing process, improving the law's "phraseology" (Cong. Treadway's specific interest), and simplifying the tax return forms and instructions.[103] The structure and purposes of the House's proposed new Commission would change, however, once the Senate's interest was added to the mix.

III. THE SENATE'S PATH TO THE JCT.

The Senate's interest in the JCT developed from both its war-time tax legislative experiences and the outcome of an investigation of the BIR led by Senator James Couzens, a Republican from Michigan. The genesis of that investigation was a policy disagreement between Couzens and Treasury Secretary Andrew Mellon that evolved into a bitter, public feud.[104]

A. The Couzens-Mellon feud.

In early 1924, Couzens was a junior member of the Senate, having been appointed a little over a year earlier to fill the remaining term of Republican Senator Truman Newberry. Newberry had resigned due to a controversy involving illegal campaign contributions during his 1918 election to the Senate. Newberry's Democratic opponent in that election, Henry Ford, provided the critical evidence leading to Newberry's conviction (later overturned by the U.S. Supreme Court) and subsequent resignation.[105] Couzens also had a connection to Ford; prior to entering public service, Couzens had been vice-president and treasurer of the Ford Motor Company, and his financial leadership was instrumental in the company's success.[106] He left the company in 1915 owning more shares than anyone other than Henry Ford, and sold his shares to Henry Ford in 1919 for $29.3 million (over $380 million today). Including the dividends he received, Couzens obtained about $40 million from an investment of less than $45,000.[107] He subsequently served as Detroit's Police Commissioner and Mayor, and reportedly became the wealthiest member of Congress when he was appointed in late 1922.[108]

During the same period, Mellon was one of the richest people in the entire country whose extensive interests included banking, oil, coal, steel, aluminum, distilleries, and utilities.[109] Mellon had been appointed Treasury Secretary in 1921 by President Harding and continued to serve in that capacity under Presidents Coolidge and Hoover. Mellon was widely considered one of the best members of the Harding and Coolidge cabinets.[110]

The disagreement between Couzens and Mellon initially centered on Mellon's 1924 proposals to reduce the surtax rates. Mellon had been largely unsuccessful in getting Congress to reduce those rates in the 1921 Act (Congress had agreed to drop the top surtax rate only to 50 percent beginning in 1922), and he therefore continued his efforts following that Act.[111] His main argument was that high tax rates discouraged business initiative and fostered tax avoidance and evasion. He provided evidence of a significant decline in both the number and reported income of high-income taxpayers between 1916 and 1921, despite a general tripling of taxable income of all taxpayers over the same period.[112] He also showed that a growing share of the estates of high-wealth individuals consisted of tax-exempt securities. Mellon concluded that high income tax rates

inhibited productive business activity and tended instead to direct large amounts of capital into less productive investments, such as tax-exempt securities. He urged Congress to reduce the top surtax rate to 25 percent, and to repeal the tax exemption on interest from state and local securities (with approval of a Constitutional amendment, if necessary).[113] These ideas were part of his campaign for "scientific taxation" — the use of economic theory to identify the tax rates that would maximize revenue yet burden productive capital as little as possible.[114] Although the ideas are associated with Mellon — and foreshadow debates about "supply-side economics" much later in the century — surtax reduction had been supported by the last two Treasury Secretaries of the Democratic Wilson Administration, and Mellon relied upon carryover staffers from the Wilson Treasury to help develop the proposals.[115]

At first noncommittal, Couzens soon opposed Mellon's ideas in correspondence that would be published prominently in the national press.[116] It might seem odd that Couzens would serve as Mellon's foil on this issue, given the similarity of their backgrounds; they were both Republicans who had accumulated tremendous wealth from successful business ventures before entering public service. But early in his tenure in the Senate, Couzens had exhibited an independent streak that sometimes put him at odds with the establishment of his party. For example, at the very start of his Senate career, Couzens had helped to derail a ship subsidy bill supported by the Harding Administration. According to one report:

> This was the most novel experience the Senate has had in many years. Here were two senators who had hardly acquainted themselves with the methods of getting in and out of the Senate chambers and yet they had become leaders in fact in the subsidy fight, if not in name.[117]

In addition, although he refused to be specifically identified with them, Couzens tended to vote with the progressive wing of the Republican Party.[118] During the 1920s, the Progressives and a partially overlapping group of Senators representing agricultural states (sometimes known as the "Farm Bloc") occasionally held the balance of power in the Senate between the Republican majority and the Democratic minority. The Progressives had supported the sharp rise in surtax rates and enactment of the excess-profits tax during the war, and had generally teamed up with the Farm Bloc and Democrats to block some of the surtax reductions and other changes sought by Harding and Mellon in 1921.[119]

In January, 1924, in his initial responses to Mellon's proposals, Couzens argued rather dismissively that far from preventing business initiative, high surtax rates tended to *ensure* such activity by encouraging corporations to retain, rather than distribute, their profits. This argument was a curious twist of a tax issue that had plagued the modern income tax from the beginning — how to prevent corporations from accumulating profits without good business justification so that their shareholders could avoid paying dividend taxes on those profits. As the gap between the top surtax rate and the corporate rate grew, the problem had become more severe, and Congress took a series of steps (none successful) to curb the practice.[120] Couzens' argument suggested that Congress's efforts may have been misguided all along.

Couzens also questioned why capital invested in tax-exempt securities, which helped to finance public expenditures by state and local governments, should be considered wasteful or unproductive.[121] He disclosed (in a letter he released to the press) two important facts about his own tax situation. First, he indicated that he had paid over $8 million in income tax during the first ten years of the modern income tax, including over $7 million of tax resulting from the transfer of certain property in 1919. (This was later shown to refer mostly to his sale of Ford stock in 1919.) Second, he explained that wealthy individuals, like the late William Rockefeller (younger brother of John D. Rockefeller), invest in tax-exempt securities —

> not from any desire or concern to escape taxes, but rather from a desire to escape business responsibilities and risks and to insure the future income of their families. *This is my own experience, as I have largely invested my capital in State, county and municipal bonds*, on which I really prepaid the taxes by taking a greatly reduced return from what I would have secured had I taken investments in new industries with the possibility of securing returns such as are made by original investors in motor stocks, bank stocks, and other more or less hazardous undertakings.[122]

Couzens was apparently oblivious to how revealing his last statements were. Disregarding the tax paid on the one-time sale of property in 1919, Couzens indicated that he had paid a total of about $1 million in income tax between 1913 and 1922, not an especially large sum given the amount of his wealth (and presumed level of income) and the applicable income tax rates during a portion of that period.[123] Moreover, his letter explained exactly *why* his taxes had been so low; he had "largely invested" his wealth in tax-exempt securities, earning a "greatly reduced return" relative to that provided by more "hazardous undertakings." This investment choice by a person of

great wealth was, of course, precisely what Mellon feared about the effect of high surtax rates. In addition, whether Couzens realized it or not, his revelation gave him a very personal reason to oppose the Administration's legislation. If surtax rates were reduced significantly, or the tax exemption on existing state and local securities was repealed, Couzens' tax-exempt investments stood to lose considerable value. These points were not lost on Mellon.[124]

Mellon responded with additional arguments supporting his policy position and then turned to the personal tax information revealed by Couzens:

> It is reported in the newspapers that all your capital is now in tax exempt securities, and I have not seen any denial from you. This means, if it means anything, that you pay no income tax.
>
> Now it is a most unusual thing that a man of wealth and business experience should put his entire fortune into one class of security which some change in the law might render less valuable. It has usually been considered prudent that investments be diversified, and you might have selected, as well as tax exempt securities, United States Government and sound utility and industrial bonds, the care of which would bring no more business worry than tax exempts. If, as you say, high surtaxes are immaterial, it would be interesting to know what influenced you in your selection of tax-exempted securities to the exclusion of all others.[125]

Mellon ended his letter with the provocative question: "Must a system of taxation which permits a man with an income of over $1,000,000 a year to pay not one cent to the support of his Government remain unaltered?"[126]

Couzens disputed Mellon's assertion that he owned *only* tax-exempt securities, claiming that he also owned millions of dollars' worth of real estate investments. In addition, he argued that at least his investments precluded a conflict of interest, in contrast to Mellon's own situation.[127] Couzens also disagreed with a statement Mellon had made about Couzens' 1919 taxes, and suggested that Mellon had "only used part of the Treasury record" in making the statement. Couzens then threw the issue back at Mellon: "So long as you have entered into the record of my securities, will you please tell us what your securities are, how much you own of each, and how much you will benefit by the reduction of surtaxes as proposed by you?"[128] Mellon declined this invitation, but did state in subsequent correspondence that "had you [Couzens] yourself not seen fit to discuss your own case, I should not, of course, have mentioned it."[129] Mellon also declined Couzens' invitation to a public debate on the issues.[130]

As noted, Couzens early on suggested that the confidentiality of his tax information had been breached by Mellon. It was a charge Couzens would repeat. During the period he was engaged in his exchange with Mellon, Couzens appeared startled when Sen. David Reed (R.-Pa.), a Mellon confidant,[131] pointedly asked him on the Senate floor whether he had "paid any income tax whatever" in the prior four years, and if so, how much? Reed ostensibly wanted to know whether Couzens confirmed Reed's view that the wealthy largely escaped paying high surtaxes, but Reed clearly may have had an additional reason for his inquiry.[132] Calling the question "impudent and irrelevant," Couzens charged that Mellon had violated the law by going into his tax records. Later, Couzens told Reed and the Senate that although he had not paid any tax in 1924, he *had* "paid taxes within the last four years."[133]

Couzens may well have felt vulnerable in this discussion even though he, of course, had been the one to introduce his personal tax situation into the debate. Prior to disclosing his taxes in his letter to Mellon, Couzens had learned from his general secretary that he had reported *no* taxable income for 1920-22 (the three years following the Ford stock sale).[134] It was later revealed that Couzens paid tax of only $5,676 for 1923.[135] Thus, Couzens' answer to Reed in 1924 was technically correct — he *had* "paid taxes" for 1920-23 — but he may have been embarrassed that his great wealth had contributed so little to the fisc during those years. (When information about his 1923 taxes was publicly disclosed, he tried to brush off the significance by claiming absurdly that it showed he had no personal interest in the level of the surtax rates.[136]) *If* Mellon had discovered all of this information after examining Couzens' tax returns, it may help to explain the specificity of his and Reed's questions to Couzens in 1924.[137] Regardless, it was perceived by some in Congress that Mellon had consulted the returns, and (as we shall see) this perception contributed to both a change in the law in 1924 and the JCT's creation in 1926.[138]

In February, 1924, Couzens shifted his attention to proposing a Senate investigation of the BIR. Couzens claimed that because of his public disagreement with Mellon, he had received many complaints criticizing the conduct of the agency.[139] According to Couzens, an investigation was justified because the BIR had failed to resolve all of its 1917 cases, the delay was an "indication of improper organization or gross inefficiency," and "the Government has . . . lost millions of dollars,

taxpayers have been and still are oppressed, and corruption or the opportunity of corruption still exists."[140]

For at least two reasons, the proposed investigation presented a serious threat to Mellon. First, an investigation of the BIR went to the core of Mellon's administrative responsibilities as Secretary of the Treasury. In addition, depending upon how open-ended the investigation became, it might delve into the BIR's tax treatment of companies associated with Mellon, such as Gulf Oil, the Standard Steel Car Co., and Alcoa. The taxes of these companies had likely been affected by the tax provisions known to have given the BIR much difficulty, such as the special depletion and amortization rules enacted in 1918 as well as the excess-profits tax.

The grounds for an investigation were somewhat dubious. As we have seen, the BIR was known to have accumulated a large backlog of unresolved cases, including ones dating back to 1917. But other than some general criticisms (which Mellon dismissed as "sensational general charges made by discharged employees"), there was little to suggest that the backlog was due to any serious impropriety on the part of the BIR, let alone corruption.[141] By early 1924, however, Congress was in the midst of "investigation hysteria."[142] Over half of the Senate, working on 16 special committees, was investigating Harding Administration scandals concerning the Interior and Justice Departments, the Navy, and the Veterans Bureau.[143] The most noteworthy was the "Teapot Dome" scandal, involving the leasing of public oil fields to private interests in exchange for bribes of government officials. The Senate approved Couzens' resolution and appointed a five-member investigative committee, consisting of three Republicans (Watson (Ind.), Ernst (Ky.), and Couzens) and two Democrats (Jones (N.M.) and King (Ut.)).[144] All were members of the Senate Finance Committee except for Couzens. Watson (who was appointed chair) and Ernst were known to be Administration loyalists, but the composition of the committee potentially gave Couzens the key vote.

Watson later explained that Couzens was included only after he gave his assurance that the investigation would not be used to further his personal disagreement with Mellon. Watson said that once the committee had received testimony on the BIR's problems, he expected Professor Adams (who had agreed to serve as an advisor to the committee) to head some type of commission

to make recommended changes.[145] Those plans changed, however, when Couzens was allowed to handle much of the initial committee work by himself (because the other four members were tied up with the 1924 tax bill and other matters).[146] One of the committee's first actions was to obtain the files of 38 large mining, oil, and manufacturing corporations in which Mellon had either a current or prior financial interest.[147] Mellon initially welcomed this inquiry and obtained permission for the committee to examine the tax returns of the companies, out of the belief that the examination would show no favoritism from the BIR. Indeed, he claimed that the tax issues concerning his companies had all been resolved by the BIR under the prior (Wilson) Administration, but that the agreement for some of them had simply not been finalized by the time he became Treasury Secretary.[148]

As the hearings began, it became clear that the committee needed help with its work. This created a problem since the Senate resolution authorizing the investigation had stripped out permission to employ any assistants other than a stenographer, purportedly out of a concern about expenses.[149] Couzens circumvented the problem by agreeing to use his personal funds to hire Francis Heney as counsel (which represented a possible violation of the law). The decision, approved by Couzens and the two Democrats, caught Watson by surprise.[150]

Heney's selection set off a storm of protest from the Administration. Heney was a progressive Republican who had previously served as a federal prosecutor in Oregon and San Francisco, and his selection foreshadowed a shift in the purpose of the committee from fact-finding to prosecution.[151] Mellon complained that a Heney-led investigation would have a detrimental effect on the BIR's efficiency and morale. Mellon also charged that the sole purpose of such an investigation was to vent a personal grievance against him, and that the committee's work had already shown that none of his companies had received any tax favors.[152] As Couzens later pointed out, however, this latter assertion was somewhat disingenuous since the committee's investigation was just 17 days old and Mellon had welcomed the examination of his companies.[153] An additional objection to Heney stemmed from his having been recommended by Gov. Gifford Pinchot (R.-Pa.), a Mellon nemesis, whose interest was in investigating the BIR's lax enforcement of prohibition.[154] At Mellon's strenuous urging, in which he intimated that he might be forced to resign, President Coolidge sent a strongly-worded special message to the Senate protesting the continuation of the

BIR investigation and the use of private funds to investigate a government agency. Coolidge included Mellon's letter to him, and charged that the attack on the Treasury was not legitimate, the Senate's rights "ought not to be used as a subterfuge to cover unwarranted intrusion," and "instead of a Government of law, we have a Government of lawlessness."[155]

The *New York Times* described the President's message as "one of the most sensational utterances that have come from a President of the United States in years." It characterized the members present in the Senate chamber as initially "dumfounded" when the message was first read.[156] Eventually, after much partisan wrangling, the Senate approved a resolution to continue the investigation and fund the hiring of assistants, but Heney was not retained as counsel.[157]

The events surrounding the Heney fight led Professor Adams to resign his involvement with the committee. As he explained, the recent developments indicated that the possibility of "constructive work" coming from the committee was "likely to be postponed indefinitely." He deplored what he perceived as an apparent effort to demonize the BIR. In his view, the problems of the BIR were "grave" but "obvious." "To exploit them gratuitously, to probe for the sake of probing, impresses me — if I may say so without offense — as a particularly demoralizing form of child's play." He explained that the real work was to devise solutions. He acknowledged that any investigation could easily find "mistakes in judgment, instances of favoritism, and sporadic cases of actual graft." But, based on his experience working with the Bureau since 1917, he thought that the personnel were "singularly clean"; the responsible officials, with few exceptions, "zealous and intelligent"; and the leaders vigorous in insulating the Bureau from "politics and politicians of the undesirable type." He attributed the Bureau's problems largely to "the complexity of the law and the fundamental condition of public service in the United States," and rued the injurious effect on the Bureau of the wrong type of investigation.[158]

In July, 1924, Couzens replaced Watson as chair of the committee. In the few months since the Heney episode, the investigation had stalled because of Couzens' serious illness, his focus on his upcoming Senate campaign, and Watson's failure to call the committee together, and there was apparently some thought to dropping the investigation altogether. According to Watson, the situation changed when Couzens and the two Democrats demanded resumption of the inquiry, and

Watson then resigned in protest.[159] Mellon's undersecretary, however, provided Mellon (who was in Europe) with a different account of what transpired. "[B]oth [BIR Commissioner Blair and I] are firmly of the opinion," he wrote to Mellon, "that, reading between the lines, we can thank *Senator Watson* for the renewal of this investigation."[160] Watson reportedly had a confrontation with Mellon for his (and the Pennsylvania delegation's) failure to support Watson for Vice-President during the Republican National Convention in June, and Watson also had a dispute with the Administration over a BIR appointee from his home state of Indiana. Subsequent news stories lent some support to the undersecretary's speculation.[161]

B. Proposed tax deficiency against Couzens.

In March, 1925, the fight between Couzens and Mellon took another incredible twist. Couzens was summoned from the Senate chamber by BIR Commissioner David Blair and his deputy, Charles Nash, who presented Couzens with a request to waive the statute of limitations relating to a possible $10-11 million tax deficiency.[162] The deficiency concerned his 1919 sale of Ford stock to Henry Ford (when the top normal tax and surtax rates totaled 73 percent). The law required Couzens to report gain equal to the difference between the amount received from the sale and the value of the stock on March 1, 1913 (the date the 1913 income tax first went into effect). The BIR wanted to investigate information included in a memo handed to Couzens that suggested his claimed 1913 stock value had been too high (and resulted in an understatement of gain).[163] Because the five-year statute of limitations for assessing a deficiency for 1919 was due to expire within a week, the BIR asked him to extend the period. If he refused, Blair and Nash indicated that the BIR would be forced to make a jeopardy assessment against him even though its investigation had just begun.

Couzens refused to sign the waiver. Shortly thereafter, he electrified the Senate by announcing what had occurred and claiming that it was revenge for undertaking the BIR investigation.[164] His statement soon led to an extremely heated debate, reportedly including a fear of violence. As the *New York Times* reported, "[n]oted as it is for bitter scenes, the Senate will long remember today's outbreak."[165]

There was broad perception in Congress that the BIR's action was retaliation by Mellon against Couzens. Senator Glass (D.-Va.), who briefly served as Treasury Secretary under Wilson, had defended Mellon's integrity during the Heney fight in the prior year, and specifically noted at that time that if Mellon had been acting with improper political motives, he would have threatened Couzens with a tax adjustment.[166] Now, faced with the revelation that Mellon appeared to have done exactly that, Glass was outraged and concluded that Mellon and Couzens "apparently hate one another and . . . would go to any extreme to discredit the other."[167]

There is a similar consensus among commentators who have reported on this episode, including Couzens' biographer and two of Mellon's biographers.[168] David Cannadine (one of Mellon's biographers) has further asserted that the action established the precedent of government using taxes for political purposes, something that came back to haunt Mellon personally during the Roosevelt Administration.[169] Cannadine, however, overlooked the fact that Mellon may have *already* consulted Couzens' tax returns in connection with their quarrel, and that Couzens had seemingly challenged the taxes of Mellon's companies for political purposes. In any event, if the BIR action simply represented a continuation of their vendetta, it clearly ended badly for Mellon. The Board of Tax Appeals eventually found that Couzens slightly *overpaid* his 1919 taxes (due to his slight understatement of the 1913 value of the Ford stock), and in the process, he garnered some sympathy and support.[170] The case was widely reported — it was described by one newspaper as the "greatest tax suit in the history of the world"[171] — because of the prominence of the taxpayer, the size of the proposed deficiency, and a background setting involving the origins of a famous American success story (the development of the Ford Motor Co. between roughly 1908 (when the first Model T was sold) and 1913) and two of the three richest persons in the country at the time (Henry Ford and Mellon).[172]

The amount of gain Couzens reported from the sale was based on a letter he and the other minority Ford shareholders received from then-BIR Commissioner Roper in 1919 advising on the March 1, 1913, value of the Ford stock (the "Roper valuation").[173] Couzens, therefore, knew immediately that the BIR letter handed him in 1925, stating that there was nothing in the agency's files to support his return position, was mistaken.[174] Commissioner Blair also told Couzens when they met that the BIR had not received waivers from any of the other shareholders who sold Ford

stock in 1919.[175] Thus, Couzens had an inkling, and confirmed quickly from the other former shareholders, that a directly contrary public statement made by the Treasury when the waiver request was presented, was also incorrect.[176] These errors led to speculation that the Treasury and BIR were improperly pressuring him into signing the waiver.[177]

Couzens' principal evidence of retaliation was the timing of the BIR request. Couzens soon learned from his attorney, Arthur Lacy, that a memo substantially similar to the one given to him by Blair — also claiming an overvaluation of the Ford stock and resulting understatement of gain — had been received by the BIR *in 1922*. From two sources, Lacy related the "rather remarkable trip" this memo had taken in 1922 to reach the BIR, having passed through the hands of Sen. Newberry (the Michigan Republican accused by Henry Ford of accepting illegal campaign contributions), Cong. Fordney (also a Michigan Republican who was then chairman of the Ways & Means Committee), and Treasury Assistant Secretary Elmer Dover (a Harding appointee who tried to politicize the Treasury (including the BIR), clashed repeatedly with Blair and Mellon in doing so, and resigned after Mellon personally appealed to Harding).[178]

According to Lacy, it was widely believed in 1922 that Henry Ford, although the purchaser of the stock held by Couzens and the other sellers, was the party responsible for any taxes due on the sale.[179] Thus, if more taxes were owed (as the 1922 memo claimed), then Henry Ford would suffer the consequences, and Lacy indicated that Newberry, Fordney, and Dover all became involved with that expectation.[180] Newberry's and Dover's interest stemmed from Ford's previous charges against Newberry. Fordney was involved because of the claim (which he could not verify) of improper pressure by Henry Ford on the BIR to issue the favorable Roper valuation. Ford's purported interest in obtaining a high 1913 stock value was to induce the minority shareholders to sell (and to save taxes).[181] The author of the 1922 memo was M. W. Thompson, a New York accountant who may also have had a grudge against Ford. Lacy believed that Thompson had been fired from doing income tax work for the Ford Motor Company.[182]

Since the BIR had the information questioning the claimed stock value as early as 1922, Couzens asked why it had waited until 1925 — just days before the expiration of the statute of limitations — to present it to him?[183] In his view, the answer was self-evident — the action was in

response to damaging revelations about the agency that his committee was beginning to unveil.[184] His position was buttressed by the finding during his tax trial that the BIR had extensively investigated the valuation issue in 1922 and concluded that the memo provided no useful information.[185]

Mellon countered by claiming that the BIR acted based on information he himself had first obtained from a "responsible person" in *early 1925*. The initial contact occurred in February, 1925, when the Senate was debating whether to extend the BIR investigation past the 68th Congress (which was about to end). According to Mellon, he refrained from taking any action on the information at that time to avoid interfering with that debate. Subsequently, after continuation of the investigation had been approved, Mellon received a memo with detailed information questioning the Ford stock value that was "entirely new to me," and this memo was given to Couzens by Commissioner Blair the next day just prior to expiration of the statutory period. Mellon, thus, argued that the BIR action was a necessary and responsible step to protect the nation's fisc, and was unrelated to the Couzens' investigation.[186] Although the Treasury soon conceded the existence of the 1922 memo, it claimed that neither Mellon nor his undersecretary had any knowledge of it when the BIR took its action in 1925.[187]

Couzens' tax trial confirmed the existence of *two* separate (though similar) memos, one received by the BIR in 1922 and one in 1925. The 1922 memo implicated yet another principal, Sen. Watson (the Indiana Republican who was the initial chair of the BIR investigative committee), who had sent the memo to Blair.[188] According to Couzens' biographer, Watson's purpose was also to retaliate against Henry Ford for both the Newberry episode and an earlier, successful libel action Ford had brought against the *Chicago Tribune*.[189] It was never established at trial whether the others identified by Lacy were also involved, although by 1928 (after the tax decision was issued), Couzens still believed that Dover had played a role.[190] As to the 1925 memo, the BTA identified its author as M. W. Thompson, the same person who had prepared the 1922 memo.[191]

Although the trial, therefore, found some support for each version of the events, neither explanation is fully satisfactory. Mellon's "restraint" in not raising the tax issue while the Senate considered continuation of the BIR investigation — apparently offered to demonstrate his fairness

to Couzens[192] — might simply show that he delayed taking action until it became necessary (because Congress agreed to continue the investigation).[193] Moreover, he gave no justification for the BIR's reliance on the 1925 memo, even assuming that it was received at the time and in the manner described. The flimsiness of the memo is evident from first reading; it relied strictly on hindsight — post-1913 facts not necessarily reasonably expected in 1913 — to determine the stock's value as of that date. Couzens and Lacy immediately found the computations and approach in the memo to be "ridiculous,"[194] the BIR had previously analyzed and rejected the similar approach of the 1922 memo,[195] and at trial, neither side was willing to endorse its analysis or conclusions.[196]

Mellon also offered no explanation for why the memo was forwarded to him in 1925. The memo, after all, dealt with matters that were 12 and six years old (the 1913 stock value and the 1919 sale), and its arrival just days prior to expiration of the statutory period should have aroused some suspicion. In private correspondence, Couzens, Lacy, and Henry Morgan (Couzens' general secretary) speculated about a grudge Thompson had against Couzens as a result of Thompson's failure to secure a $500,000 fee for working on a separate tax suit involving Couzens.[197] Even if true, it may not have been the complete explanation. At trial, all of the principals seemed to believe that there had been an intermediary between Thompson and Mellon who had solicited the new memo from Thompson and then passed it on to Mellon.[198]

Finally, perhaps the most puzzling aspect of Mellon's version was the behavior of Commissioner Blair, who apparently was extremely close to Mellon.[199] Blair received the earlier, 1922 memo at his personal residence, and testified that he discussed it with Watson at that time.[200] In addition, Lacy's information indicated that Blair had opposed Dover's attempted use of the memo in 1922 to get back at Henry Ford.[201] Given this, as well as the high profile of the transaction (and its principals) and the amount of tax at issue, it seems unlikely that Blair could have completely forgotten about the 1922 memo by 1925. Although Blair indicated that he was not in DC when the 1925 memo arrived and did not participate in the jeopardy assessment against Couzens, he nevertheless personally presented it to Couzens and discussed it with him.[202] Why did he fail to connect the two memos before taking action in 1925? And if (as he testified) he wanted to handle the matter quietly, why did he travel to Capitol Hill to present the waiver request in person?[203]

Couzens' version of the story is also incomplete. He never adequately explained how the waiver request constituted revenge or an effort by Mellon and the BIR to thwart the investigation. The request, of course, merely asked for time to investigate, and did not require Couzens to concede any liability or wrongdoing. Blair testified that he assured Couzens the BIR would handle the matter quietly, drop the case if no additional tax was due, and provide Couzens with a hearing if there were any tax asserted.[204] Despite these assurances, Couzens said years later that he had been fearful a signed waiver might have been used as a "club" to halt his investigation,[205] but how could that have occurred? If he had signed the waiver and Blair's promises proved false, Couzens still retained the ability to "go public" with the BIR action to prevent any interference. Couzens' claim of intimidation is also somewhat inconsistent with a statement he wrote to his general secretary just days after receiving the waiver request from Blair: "[T]here is much more back of [the waiver request and claimed tax deficiency] than appears on the surface and we will probably have a lot of fun out of it before we get through."[206]

For the same reasons, it is difficult to understand how Mellon and the BIR could have thought the waiver request would get back at Couzens or have any impact on his work.[207] For one thing, to gain any public leverage over Couzens, they would have had to overcome his confidentiality protections. Moreover, given the personal nature of the feud, the extent of Couzens' wealth, and the size of the potential tax liability, they surely knew that any assertion of a tax deficiency would be thoroughly challenged, which would likely expose all of the initial misstatements, the existence of the 1919 Roper valuation, the 1922 memo and its rejection by the BIR, and the flimsiness of the 1925 memo. Further, merely making the request exposed them to the type of charge Couzens immediately launched. As one reporter wrote right after the trial (but before the BTA decision), "it is almost incredible that [Mellon] should not have seen what the appearance of the [BIR action] would be, and . . . even more incredible that he or anyone else should have thought Jim Couzens would sign a waiver under the circumstances."[208]

Indeed, the view of the 1925 events as a planned, retaliatory act by Mellon and the BIR against Couzens may be sufficiently incredible to justify imagining an alternative explanation predicated on extraordinarily clumsy and disorganized tax work carried out by the agency. At trial,

the government's position was so confused that the BTA described it as "contending for no specific value and for no specific method of valuation; its sole contention is that the [Roper valuation] is grossly excessive."[209] The findings by the BTA relating to the BIR's handling of the Ford stock transaction — showing multiple tips received by the BIR, multiple investigations and stock valuations performed (all very crude), and repeated audits of the same tax years — all present the same picture described by Professor Adams in 1924 (upon resigning from the Couzens investigation) of an agency still struggling mightily to cope with its daunting tax administration responsibilities.[210]

C. Findings of the Couzens investigation and impact on the Finance Committee.

Despite its controversial origins, the Couzens investigation ended up playing an important role in defining the need for and functions of the JCT. L.C. Manson, counsel to the Couzens committee, reported to the Senate Finance Committee that the investigation had not uncovered any fraud, corruption, or gross incompetence at the BIR.[211] Instead, the main criticism of the committee's majority related to the agency's failure to treat taxpayers in an even-handed way.[212] According to the committee, the problem lay in the BIR's not establishing principles in advance, for the benefit of both taxpayers and its own employees, concerning how the law should be applied to specific cases. The committee also attributed some of the inconsistent treatment to bureaucratic disorganization.[213]

Manson described a number of problematic cases for the Finance Committee. Spanning 2½ days, the hearing occurred immediately prior to the Finance Committee's markup of its 1926 tax bill (which was conducted in executive session). This juxtaposition of Committee functions was fortuitous, as the members spoke candidly during the hearing about some of the issues that would be decided in the markup, and seemed to forget that the hearing was in open session (and not part of the closed markup). The hearing proceeded more like a Supreme Court oral argument, with members constantly interrupting witnesses (and sometimes clashing with each other), rather than the highly scripted presentation of views common in Congressional hearings today. Senator Couzens and most members of the Finance Committee (including the other four members of his investigative committee) attended almost all of the hearing, which had just two principal witnesses: Manson and Alexander W. Gregg, solicitor of the BIR. Another unusual aspect of the hearing was

that Manson and Gregg, frequently antagonistic to each another, were permitted to interrupt and question one another. Taken all together, the hearing disclosed much information that is helpful to understanding the legislative origins of the JCT.

Manson spent most of his time discussing just two of the issues investigated — the BIR's administration of the amortization and depletion allowances. The amortization provision required the BIR to determine the amount of a taxpayer's post-war loss from a war-related capital investment that could be deducted against the taxpayer's income during the war.[214] The most challenging cases involved taxpayers that still owned their facilities after the war, but with a reduced use. The investigative committee concurred with the BIR's legal conclusion that such taxpayers were entitled to some allowance. The committee, however, sharply criticized the manner in which the BIR determined the allowances in particular cases, and the somewhat haphazard distribution of tax benefits to different taxpayers.[215]

Another problem concerned the type of investment eligible for the amortization allowance. The statute defined eligible investment to include "facilities . . . acquired . . . on or after April 6, 1917" (the date the U.S. formally entered the war).[216] The apparent intent was to limit the amortization benefit to investments made for war purposes. In one case, a corporation transferred certain facilities to its wholly-owned subsidiary after April 6, 1917, in exchange for stock of the subsidiary. The question was whether the subsidiary was entitled to the amortization benefit since it had "acquired" war facilities after the pertinent date. The Couzens committee criticized the BIR's conclusion that although Congress had probably not intended to cover the case (because the facilities were owned by the parent corporation prior to the U.S.'s entry into the war and, thus, there were no facilities created or acquired *as a result of* the war), the statute seemed to permit the subsidiary to obtain an allowance.[217] When this case was presented to the Finance Committee, the members disagreed among themselves regarding whether the case was covered or not. One Senator noted that the transfer to the subsidiary was not a "fraudulent" step to qualify for the amortization provision because the transfer occurred prior to enactment of the 1918 Act that authorized the amortization allowance.[218]

The "discovery depletion" allowance required the BIR to determine the value of natural resource discoveries often many years after the fact. The Couzens committee was again critical of some of the BIR's determinations and the resulting inequitable treatment of taxpayers.[219] In one case, which highlighted bureaucratic disorganization within the BIR, five co-owners of the same oil property were provided with dramatically different discovery depletion allowances based upon multiple (and inconsistent) valuations of the property. The situation arose because the tax returns of each owner were audited independently, different BIR engineers therefore valued the same property (and reached different conclusions), and the BIR failed to discover and coordinate all of the overlapping work.[220]

The Couzens committee documented one other common problem with the administration of this provision. In addition to value, the rule required the BIR to determine the *date* of a discovery since the value *on that date* was the critical fact. Because the value of a discovery could not easily be determined upon the mere finding of a trickle of oil or a few valuable minerals, the BIR provided that the proper date of discovery was when a "commercially valuable" deposit had been established with reasonable certainty.[221] This rule, however, introduced additional controversy since taxpayers ordinarily benefitted from a delay in the discovery date (to increase the value of the discovery that would be depletable).[222] It also produced an unintended result (as anticipated by Professor Adams in the Finance Committee's 1918 depletion hearing).[223] As we have seen, the intended purpose of the discovery depletion allowance was to benefit wildcatters and not large oil and gas producers.[224] But wildcatters frequently sold their discoveries to producers *before* the discovery was determined to be "commercially valuable." This meant that the principal beneficiaries of the discovery depletion allowance were the large producers, once they were able to establish the commercially valuable nature of the discovery whose rights they had acquired. Furthermore, producers rarely incurred exploration expenses that could not be deducted against other income — the specific, potentially sympathetic, circumstance (typical of a wildcatter) that Congress had identified as justifying the discovery depletion allowance in the first place.[225] In summary, the Couzens investigation vividly exposed to the Finance Committee members the enormous administrative difficulties and unintended effects of the laws Congress had previously approved.

Gregg defended the BIR's actions. He claimed that almost all of the criticisms merely second-guessed the exercise of discretion granted by Congress, and that the BIR's judgments were within the range of permissible interpretations.[226] In an especially telling moment, he reminded the Finance Committee that the House version of the amortization provision had limited the permissible benefit to 25 percent of the taxpayer's net income in order to restrict the amount of discretion granted to the BIR. That limitation, however, had been *removed* by the Finance Committee, and Congress ultimately approved the provision without any limitation.[227] According to Gregg, "[t]he Congress removed the limitation with the desire to place unlimited discretion in the hands of the [BIR] in the computation of this allowance."[228]

D. Publicity of BIR policies and taxpayer information.

One other area of criticism from the Couzens committee related to secrecy issues. Manson testified that the BIR had published only about 15 percent of its income tax rulings.[229] According to the committee, the lack of transparency of the BIR's principles and practices allowed discrimination among taxpayers, advantaged former BIR employees (who marketed their knowledge of the "secret" law being administered), delayed resolution of cases (because taxpayers sought reconsideration when they discovered previously unknown BIR practices), and generally frustrated effective Congressional oversight of both the agency and the law.[230] Gregg responded that any lack of transparency resulted from a former BIR policy, since reversed, not to publish its rulings. He claimed that under existing policy, any rulings laying out new principles were published. He also said that the BIR had tried to identify and publish older, previously unpublished, rulings if the BIR continued to rely upon them.[231]

In a separate section, the committee also criticized the confidentiality of taxpayer information generally. While it recognized that there were objections to allowing such information to be completely open, it attributed most of the "unsound settlements" it had found to "the belief that they would never become public." The committee recommended that any member of Congress be given access to any tax return at any time, and that settlements should not be finalized until publication of the principles upon which they were based.[232]

In 1926, the general question of publicity of taxpayer information was a hotly debated issue in Congress with a long history. The first Civil War income tax acts permitted publicity of such information. One reason was to allow tax collectors to inform taxpayers of their liabilities through public postings, but another reason was to discourage fraudulent returns.[233] This policy was eventually reversed in 1870, thanks to leadership from Congressman (and future President) James Garfield (R.-Oh.), to respect the countervailing privacy interests of taxpayers.[234] Confidentiality continued as the general rule in the short-lived income tax act of 1894 and the first acts of the modern income tax. The principal exception during this period occurred in the Tariff Act of 1909, which permitted the corporate income returns to be available for public inspection.[235] This publicity rule, modified in 1910 to permit inspection only upon order by the President under rules prescribed by the Treasury, appears to have been for corporate regulatory purposes rather than to further any tax policy objective.[236]

Throughout the early years of the modern income tax, the Progressives and certain other members of Congress urged full publicity of tax return information. A principal reason was to prevent fraud by taxpayers. Supporters argued that full publicity would let people monitor the accuracy of tax filings submitted by their neighbors and other persons they knew. The potential scrutiny, in turn, would encourage taxpayers to be more honest in the first place. Advocates often drew an analogy to local property tax records, whose publicity facilitated such citizen enforcement of the laws.[237] As one Progressive wrote during the Teapot Dome investigation, "[p]ublicity brings respect for law, whereas secrecy sits on the lid of sizzling teapots."[238]

Until 1924, these arguments had proved unavailing. Even if so inclined, few persons (other than those already performing information reporting) would likely be in a position to detect errors of others.[239] Moreover, real property tax records contained much less private information than a typical income tax return, and the ownership (and approximate value) of such property were generally known without regard to those records. Finally, as Cong. Hull (D.-Tenn.) noted, property tax systems had largely broken down and suffered from considerable evasion and avoidance, despite the publicity provided.[240] The *New York Times* editorialized ominously against the "malicious tittle-tattle" emanating from income tax publicity, which might "convert[] the whole community into a horde of spies or detectives."[241]

In the 1924 Act, the Progressives finally achieved a measure of success when Congress approved three important exceptions to confidentiality. The tax bill was debated in the midst of the opening phase of the Couzens-Mellon fight, and each exception seems to have had some connection to that controversy. The first change came from the House, which granted tax return access to the tax-writing committees, a special committee of the House or Senate, and their examiners or agents (a provision later described by the *New York Times* as the "Peeping Tom amendment").[242] In suggesting this change on the House floor, Cong. Garner (D.-Tx.), who was ranking member of the Ways & Means Committee, spoke in favor of general tax return publicity but also legislative prerogatives: "I think the House of Representatives ought to have the power to ask the Secretary of the Treasury for these returns and get them."[243] Not surprisingly, his position resonated with the other members and Cong. Green (R.-Iowa), Chairman of the Ways & Means Committee and floor leader of the bill, quickly indicated his assent.[244] The floor debate occurred soon after the Couzens-Mellon exchange of letters and one day after Couzens introduced his resolution to investigate the BIR. In expressing support for the Garner amendment and the general publicity of returns, Cong. Browne (R.-Wisc.) specifically invoked the dispute, including the belief that Mellon had breached the confidentiality of Couzens' returns:

> Just the other day, when a distinguished United States Senator got into a controversy with the Secretary of the Treasury, the [latter] . . . made the income returns of this Senator public. He, of course, had access to all the income returns and he used the information and made it public. Why give him any more rights in making these facts public than the rest of the people of the United States? Why did not the Secretary of the Treasury give the same publicity to his own income returns?[245]

The second exception came from the Senate Finance Committee, which reported a 1924 tax bill requiring the BIR to provide public lists of the name, address, and amount of income tax paid by all taxpayers.[246] No official explanation was given for this rule, but it also may have been attributable partly to the Couzens-Mellon controversy.[247] At the committee's hearings just prior to the reporting of the bill, Mellon was asked how his personal situation would be affected by the Administration's tax recommendations, including the proposed reduction in the surtax rate, and Mellon gave a partial response off the record. Following his testimony, Sen. Jones (D.-N.M.), who was also a member of the Couzens investigative committee (which by then had begun its work), moved that the Finance Committee obtain from Mellon specific information about both his

personal taxes and those of his corporations. The purported reason was to determine Mellon's possible conflict of interest with the legislation, but like the question Sen. Reed (R.-Pa.) had posed to Couzens on the Senate floor 2½ months earlier, Jones may well have had an ulterior purpose. Although Jones' motion was defeated 9-7, the committee's subsequent recommendation might be seen as a compromise worked out to obtain the information without specifically targeting Mellon.[248] When the taxpayer list requirement was considered by the House as part of the 1924 Conference Report, Cong. Frear (R.-Wisc.), a strong proponent of full publicity, expressed support because it would reveal the "personal interest" in proposed legislation: "We would then know what influences Mellon bill advocates and how much is involved in taxes on them."[249]

Two final exceptions were added on the Senate floor, although only one ultimately survived the Conference. Despite the amendments already contained in the bill, Sen. Norris (R.-Neb.) renewed an effort to provide full publicity of tax returns. In addition to fraud prevention, Norris argued that full publicity was essential for Congress to perform both its investigative and law-making functions.[250] This time, his arguments had special meaning because just a few weeks earlier, in response to one of President Coolidge's accusations during the Heney episode, Sen. Jones had explained to the Senate how confidentiality had prevented the investigative committee from examining anyone's tax returns (ironically, other than those of a few companies for which permission had been obtained through Mellon).[251] Thus, very recent experience had borne out exactly one of Norris's arguments. Interestingly, little attention was paid during the debate to the House provision giving certain committees access to the returns.[252]

The Senate approved the Norris amendment and one other making tax adjudications more transparent (another area of concern of the Couzens investigation).[253] The Norris amendment was dropped in Conference, but the remaining three changes — Congressional committee access, taxpayer lists (including amount of tax paid), and greater publicity of tax adjudications — were enacted in 1924.[254] As described in the next part, the committee access provision became the critical link to the JCT.

IV. SENATE AND CONFERENCE COMMITTEE CHANGES TO THE HOUSE'S 1926 PROPOSAL.

On the final day of its hearing on the Couzens investigation, the Finance Committee members and Couzens assembled to reflect on what legislative responses might be appropriate to address the problems the hearing had revealed. As previously noted, the discussion, which might ordinarily have taken place in the closed markup scheduled to begin immediately after the hearing, provides a revealing glimpse into the thinking of the committee. Sen. Jones (D.-N.M.) (a senior Democrat on the Finance Committee and part of the Couzens committee majority) began the discussion by describing assistance needed by the tax-writing committees to oversee the operations of the BIR:

> [T]he result of the examinations of the Couzens' committee . . . requires an effort on our part to keep in touch with what is going on in the [BIR]. . . . Congress . . . should devote very earnest consideration to the remedy to bring us in touch with the operations of our own legislation. . . . [T]he Finance Committee of the Senate and the Ways and Means Committee of the House should have some joint agency to keep in touch with the workings of [the BIR]. Here we are collecting each year . . . about four billion dollars from the people of this country. Everything . . . is done in secret. [T]hat [joint] agency . . . should keep in touch with what is going on [at the BIR], and . . . the Congress ought not to be dependent absolutely on what may be reported to it by the officials and people engaged in the administration side alone.

At this point, a Senator interjected that the 1926 House tax bill (reflecting changes approved in 1924) granted certain committees, including the Finance Committee, with access to tax returns. Jones responded:

> Yes; but, Senator, take our Finance Committee; we cannot do this work. I am not an expert engineer; I am not an expert auditor; nor have I the time to do the work myself. . . . [T]his committee ought to have in its employ . . . some . . . staff . . . to do the very kind of work which the Couzens' committee has been doing.

Following up on the comment about tax-return access, Jones then said that "[i]f this committee had a continuing agency . . . I think it would do away . . . with this demand for general publicity about which we hear so much." In addition, he said the committee should be "composed of experts, and . . . ought to be made up in such fashion that it cannot be said that it is a whitewashing committee or anything of that sort; not to be subject to any such criticism as that." Finally, Jones made clear that the assistance should be independent and help the tax-writing committees with their law-making function as well as their investigative responsibilities:

> As to recommendations for legislation, . . . Congress . . . up to the work of this Couzens' committee, has had to rely solely upon recommendations which came from the Secretary of the Treasury. I

> submit that that is not a proper basis for the framing of legislation. You only see one side of it. . . . [U]nless this committee has an agency on the job all the time to see what is going on [at the BIR], we will not get very far. We become mere rubber stamps in a sense and we ought not to be such. . . .
>
> [The staff agents] should represent the taxpayer as well as the collecting agency; in the main, of course, to furnish information to this committee . . . and the Ways and Means Committee. . . . I want an independent body, something selected wholly separate from any influence . . . [with] no feeling of hesitancy in looking at things and reporting. We want an agency under our jurisdiction so we know what is going on.[255]

Jones' statements contain several ideas that would eventually be included in the Senate's JCT proposal: the need for expert, independent staff serving both tax-writing committees to provide oversight of the BIR, discover and inform the committees of the BIR's secret practices, and assist in the formation of legislation based on information learned from its investigations. The initial comment about tax-return access was not clearly related to Jones' initial thoughts, but the Couzens committee had raised that issue, and the other members of the Finance Committee soon picked up on it. Their initial reaction to Jones was practical: how could they get the Senate to approve Jones' ideas, given the likely claim by other committees that they also needed expert assistance? Eventually, Couzens returned to the general confidentiality of returns and the provision granting the tax-writing committees access to them, and it became the essential point distinguishing the responsibilities of the Finance Committee from those of other committees. He noted that the committee-access provision authorized the Finance Committee to appoint "examiners or agents" to review the tax returns, and said that the committee should do so. When Sen. Reed (R.-Pa.) wondered whether other committees would also want to appoint assistants to review the records of the executive agencies under their jurisdiction, Couzens answered:

> I do not think so, because in every other executive department the records are open. I am not here advocating publicity of returns; I am not here advocating the throwing open of all individual records of each taxpayer, but I submit that there is not another department in which you or any citizen cannot go and ask to see the records. . . . I can go to the State Department and get the Secretary to show me things within the law. I can go to the Department of the Interior, the Department of Agriculture, and find out anything I want to. Any citizen can. But you cannot do that with the [BIR].[256]

It was somewhat ironic that Couzens, the only Senator at the hearing who was *not* on the tax-writing committee, should be the one to point out the possibly unique circumstances of that committee. The members soon also recognized that because the law already authorized the hiring of examiners or agents, all that was needed was funding.[257]

At that point, Reed mentioned the House's proposed "Joint Commission on Taxation" and asked Couzens whether it represented "the sort of commission or investigating body that you have in mind?"[258] Couzens' initial reaction was quite dismissive — he said the proposal "accomplishes nothing except perhaps the simplification of the law. . . [and] does not provide . . . [authority] to investigate and study individual returns."[259] But the members then discussed possible changes to the House's proposal to accommodate their objectives. These modifications included establishing a permanent committee (because investigation of the BIR and review of tax returns would be ongoing obligations), supported by appropriate funds, and not including any members of the public.[260] They also agreed that the committee should have representatives from both the majority and minority parties.[261]

The Finance Committee's (and ultimately, the Senate's) revision of the House proposal contained the essential elements just discussed. It provided for the establishment of a permanent, ten-member "Joint Committee on Internal Revenue Taxation" (renamed the "Joint Committee on Taxation" in 1976[262] (and both abbreviated "JCT" in this article)), consisting of five members each from the Finance and Ways & Means Committees (each group to include three from the majority and two from the minority). The JCT's principal functions were to investigate the operation and effects of the Federal tax system (including the BIR's administration of the law) and to help frame legislation to simplify the law and its administration. In addition, the JCT was explicitly granted authority to examine confidential tax return information. The committee would carry out its functions through the appointment of experts and other assistants.[263] The House ultimately receded to the Senate's amendment with the modification that the JCT prepare and publish simplification proposals, including one report by the end of 1927.[264] In general, the structure and functions established for the JCT in 1926 have remained in the law to this day.[265]

Importantly, the 1926 legislation did not delegate any specific legislative jurisdiction to the JCT.[266] This feature is not explained in the legislative background, but it is fairly easy to speculate on the reason. Any jurisdiction for the JCT would likely have come at the expense of the two tax-writing committees. Since only senior members of those committees would likely be members of the JCT, the losers of any jurisdictional shift would have been the more numerous junior members

of the tax committees. There was also no interest shown in deviating from the bicameral nature of the legislature. The bottom line is that the main consequence of the 1926 legislation was to authorize the JCT's *staff* to carry out the legislative support functions.

Two other changes made in 1926 were also connected to the JCT's creation. One concerned tax return publicity. After two years of experience, even proponents of publicity conceded that the publication of lists of taxpayer tax liabilities had been a huge mistake. The lists violated taxpayer privacy, provided information potentially useful to the unscrupulous, and served no fraud-prevention purpose.[267] In its 1926 tax bill, the House proposed to repeal the taxpayer list and the Senate Finance Committee agreed.[268]

When debate on this issue reached the full Senate, Sen. Norris renewed his effort for full publicity of tax returns. Just two years earlier, the Senate had approved the same Norris proposal by a 48-27 vote.[269] In 1926, however, Republican and Democratic opponents offered a new reason to reject the Norris amendment — they argued that the proposed creation of the JCT made full publicity unnecessary.[270] This same point had been made earlier by Sen. Jones at the Finance Committee's 1926 hearing when he said that his idea for a JCT "would do away . . . with this demand for general publicity."[271] The link between the two provisions, however, was really quite limited. As we have seen, one of the main arguments for full publicity was to permit scrutiny of tax returns by those with enough inside information to be able to challenge a particular taxpayer's position.[272] The JCT proposal, however, did not serve that purpose at all, since the JCT and its staff would likely have even less information about particular taxpayers than the BIR, which was in theory already scrutinizing all returns. But the different effect of the two provisions was rarely noted,[273] and the Norris amendment was defeated by a 49-32 vote.[274]

The other 1926 change connected to the JCT proposal was replacement of the discovery depletion allowance for oil and gas wells with a deduction equal to 27½ percent of the gross income produced by the well. This proposal, developed by the Finance Committee, was one of the most contentious issues decided by the Senate in 1926, and was resolved only at the very end of the debate. The recommendation came out of Manson's testimony regarding the huge administrative difficulties with the discovery depletion allowance. When pressed to provide an alternative,

Manson suggested an allowance based on a percentage of income.[275] Although this substitute seemed likely to reduce, if not eliminate, the administrative difficulties with the prior provision, it had a serious flaw: it made the benefits provided to the oil and gas industry potentially *too* transparent, something clearly beyond anything received by any other taxpayer or industry. As a result, in defending the Finance Committee's proposal before the full Senate, Sen. Reed (R.-Pa.) concentrated on the history of the provision and its development from the Couzens investigation and findings. He described the proposal as an administrative improvement rather than a change in policy or effort to provide any special allowance to the industry.[276] He also claimed that the "percentage of gross income" formula would especially benefit "owners of these little wells which barely pay the cost of pumping and keeping cleaned out."[277] This statement related to another problem uncovered by the Couzens investigation — that the bulk of the discovery depletion allowance had been claimed by large oil and gas producers. Although Reed never specifically invoked it in his presentation, the JCT proposal may have lent credibility to the Finance Committee's serious consideration of all of the investigation's findings (including its recommendation on depletion).[278]

V. CONCLUDING OBSERVATIONS.

This part provides some concluding observations about the Couzens-Mellon disagreement, including its effect on inter-branch competition, inter-chamber cooperation, and creation and certain key aspects of the JCT.

A. Increasing conflict between the legislative and executive branches.

Three aspects of the Couzens-Mellon saga — the perception that Mellon examined Couzens' tax returns, President Coolidge's attempt to terminate the BIR investigation following Heney's selection, and the tax action against Couzens that was thought to be in retaliation for his official duties — helped transform a fairly ordinary policy disagreement between two strong-willed political leaders into a clash between the branches that contributed to ongoing conflicts at the time. Creation of the JCT can be seen as one response in that larger fight — an assertion of Congressional prerogatives in the area of tax policy. In the Finance Committee's 1926 hearing, Sen. Jones emphasized the need for Congress not to be "mere rubber stamps" of the Treasury. Formation of

the JCT followed other steps Congress had taken to strengthen the legislative branch, including creation of the Legislative Reference Bureau (now the Congressional Research Service) in 1914, the Legislative Drafting Service (now the Offices of Legislative Counsel) in 1918, and the General Accounting Office (now the Government Accountability Office) in 1921.[279]

Coolidge's protest during the Heney episode was interpreted by Congress as a challenge to one of its *formal* rights — its responsibility for seeing that laws were being administered as intended.[280] In contrast, the tax action against Couzens represented an area of *personal* vulnerability for each of the legislators vis-à-vis the executive branch. As a former Treasury Secretary, Sen. Glass (D.-Va.) respected the responsibilities of the executive branch, but he was aghast at the perceived abuse of executive authority.[281] Creation of the JCT was one way for Congress to protect taxpayers and (perhaps more importantly) themselves.

Finally, the tax return controversy implicated both the institutional rights of the legislature *and* the personal interests of the legislators. Under the law at the time, tax returns were generally confidential except as ordered by the President under rules specified by the Treasury Secretary. Aside from the formal rights, the BIR had physical control over all of the returns. Thus, it appeared that the legislators were excluded entirely from access to information of potential importance for both official and personal reasons. If information is power, there seemed to be an imbalance.

Congress, however, was not actually as disabled as the above rule might suggest. Nothing precluded the Treasury Secretary's rules from permitting Congressional access to tax returns. Indeed, precisely that had occurred in March, 1924 (soon after the Couzens-Mellon exchange of letters but prior to Senate debate and passage of the 1924 Act). Pursuant to a request contained in a Senate resolution, the Treasury modified its rules to allow the President to release certain returns to the Senate committee investigating the Teapot Dome scandal.[282]

Internal documents reveal some of the Treasury's thinking when this request was made. Mellon's undersecretary recommended that the Treasury comply with a "general" request for tax returns, but not one targeted to specific individuals or companies. The example he offered was

Edward Doheny, who was accused at the time of some of the impropriety in the scandal.[283] According to the memo —

> Doheny is not looked upon favorably by many people, but he has yet to be indicted, tried and convicted. His rights are as much entitled to protection as those of any other citizen. If we are stampeded into exposing Doheny's return to the public, on what possible ground can the inspection of anybody's return be denied, and then what becomes of the secrecy of returns?[284]

But the issue of "general" versus targeted requests was not primarily about privacy rights. After all, disclosure of returns pursuant to a "general" request would, nevertheless, breach the privacy rights of those taxpayers whose returns were revealed. The real issue was the legitimacy of the disclosure. Because the law permitted the President to make disclosures only pursuant to rules set out in advance by the Treasury, it provided some protection against illegitimate disclosures. If this protection could be bypassed by the President simply complying with any request from Congress (no matter how targeted), then, as the memo stated, it would open up the possibility of "the President [selecting] his political enemies and expos[ing] their returns to the public."[285] The unstated — but obvious — implication is that the same technique could be used *against* the President *by* his political enemies. Hence, the memo concluded that the President should not comply with a request made "simply to satisfy the curiosity of Congress."

Mellon had a letter to the Senate prepared for the President's signature which generally followed the undersecretary's recommendation. Because the request from the committee investigating the Teapot Dome scandal was targeted towards selected individuals and corporations, the draft letter explained the President's reasons for denying the request. The draft letter, however, offered a compromise: since special counsel for the government had already been appointed for the investigation and the existing rules allowed disclosure of returns to government attorneys in matters of interest to the government, the letter allowed the special counsel to inspect the requested returns.[286]

Mellon, however, did not use the letter and it was not sent to the Senate. Instead, the President eventually released the requested returns to the Senate committee under authority of a revised Treasury rule permitting disclosure if requested by a Congressional committee pursuant to a Congressional resolution enumerating the particular returns desired.[287] It is not clear why the

Administration changed its position. The requirements of the revised rule — a committee request authorized by a resolution identifying the returns — perhaps precluded a complete fishing expedition by Congress. For example, it would not have allowed what the Couzens committee urged one year later — a release of any return to any requesting member at any time.[288] Yet the conditions were probably not stringent enough to prevent the type of unwarranted disclosure the undersecretary had been concerned about.

The issue largely became moot when, later in 1924, Congress granted tax return access to certain Congressional committees. With the new law, the Treasury revoked the special authority added to accommodate the Teapot Dome-related request.[289] In debating the need for the new exception, no mention was made of the existing authority — already exercised in the Teapot Dome matter — to inspect returns permitted by the Treasury's rules. In certain respects, the new law was narrower than the prior authority since the law gave access only to *certain* committees. In other respects, however, the new law was clearly broader. The provision eliminated any need for Congress to make a public request of the President. More importantly, it gave the committees access to *anyone's* returns, not just those publicly enumerated to the President. Given the perception that Mellon had examined Couzens' returns, one consequence of the new law was to put Mellon on notice that the tables could be turned, if necessary. Mellon's undersecretary certainly understood this implication. After passage of the law, he advised Mellon that a request to examine his personal income tax returns pursuant to the new authority would "so obviously expose [those making the request] to the charge of partisanship that I am inclined to think they will refrain from such request, although if they demand it we have no recourse."[290]

B. The importance (or unimportance) of the confidentiality of tax records.

The foregoing discussion shows how the tax return publicity issue contributed to the atmosphere leading to Congress's creation of the JCT. But the issue also had a more direct effect on the legislation. The perceived breach of Couzens' confidentiality rights by Mellon influenced adoption of the committee access provision in 1924, and that provision, together with the general confidentiality of tax returns, became the specific basis for the Finance Committee's 1926 recommendation to establish the JCT. This background, therefore, provides a direct explanation for

why Congress created a JCT only in the tax area, and gave it the important authority to access tax returns directly.[291]

Yet it is not clear that the distinction between tax and non-tax responsibilities drawn by Couzens and the Finance Committee in its 1926 hearing was justified. For one thing, other agencies and Congressional committees, such as those dealing with national security matters, worked with highly confidential materials. More importantly, the problem the Finance Committee sought to address with the JCT did not relate to the confidentiality of the underlying agency records. Rather, it involved the volume and difficulty of the material to be reviewed. As Sen. Jones explained at the hearing when he was told the tax-writing committee had access to tax returns, the problem was not access but time and expertise: "I am not an expert engineer; I am not an expert auditor; nor have I the time to do the work myself."[292] The same point had surfaced earlier to explain both the authorization of the Couzens investigative committee (because the Senate Finance Committee was too busy dealing with the 1924 tax bill) and appointment of Heney as counsel (because of the large volume of work encountered by the BIR investigation).[293] When Couzens confidently proclaimed in the Finance Committee hearing that "I can go to the State Department and get the Secretary to show me things within the law,"[294] no one offered the obvious rejoinder that he probably had neither the time nor the expertise to understand all of the "things" that might be available to him.

True, the confidential nature of tax records meant that the persons handling them should have an appropriate level of professionalism, and perhaps be nonpartisan (although, as explained later, there may be a better explanation for why the JCT was created with nonpartisan staff). But the basic need for assistants to help with the substantive work of Congressional oversight would seem to have been a universal one — certainly not a problem limited to tax or the tax-writing committees. Nevertheless, no significant professional resources were provided to the committees until 1946 (two decades after the JCT was created), when modest authorizations were approved for all committees (including the tax-writing committees), and the special joint committee (and staff) structure used for the JCT has never been replicated outside of the tax area.[295]

One possible explanation is that despite the views of Sen. Jones and others, enough legislators still believed that they were fully capable of handling all legislative responsibilities by

themselves. Sen. Bacon (D.-Ga.) expressed this attitude well in 1913 when he spoke against a proposal (which was defeated) to establish a bill-drafting service in Congress:

> I think it is the most astonishing piece of legislation I have ever heard proposed in this body. If the time has come, or is likely to come, when Senators are going to need a schoolmaster to teach them how to draft a bill, I think it is about time that the Senators who are in such need should retire to their homes, resume their seats on their school benches, and let somebody else come here who is capable of doing such work.[296]

A decade later, at least some members of Congress continued to hold this view.[297] Indeed, to some members, the hiring of professional staff assistants was an "implied slur" upon the abilities of the members receiving the assistance.[298] Thus, in 1926 and subsequent years, the "norm" to some extent may have been to resist professional staff help, with the deviation in the tax area explained by the peculiar circumstances leading up to the JCT's creation that showed a special need to monitor the BIR. The next section describes an additional possible reason why professional aid was given only to the tax committees.

C. Improving cooperation between the House and Senate.

In general, House members tend to be better informed than Senators about the technical details of legislation they consider and approve. There are many reasons for this, but one simple explanation is the broader responsibility of each Senator because of their fewer numbers. As described by one Representative, "if the Senate has been the nation's great forum, the House has been its workshop."[299] In the tax area, the difference between the House and Senate may be especially pronounced because of the House's constitutional responsibility to originate all revenue-raising legislation.[300] During the early years of the modern income tax, the House generally seemed more attuned than the Senate to the nature of the tax system's problems, with virtually all of the steps taken in that period to simplify the law and improve tax administration, including the Legislative Drafting Service (in large part to help with the drafting of tax statutes),[301] Advisory Tax Board,[302] Tax Simplification Board,[303] Board of Tax Appeals,[304] and tax simplification commission proposed in 1926, being ideas developed and proposed by the Ways & Means Committee. The Senate, of course, had received much feedback from constituents and in hearings about the tax law's difficulties, but it is unclear how well it understood the nature of the problems. The attitude of some Senators may have been best captured by Couzens (of all people) when he was asked

about the House's 1926 tax commission recommendation. Perhaps because he was not a member of the Finance Committee (and, therefore, had limited exposure to the formation of tax legislation) and remained focused on the BIR (or somewhat blinded by a goal of getting back at Mellon), Couzens initially dismissed the idea as "accomplish[ing] nothing except perhaps the simplification of the law."[305]

Other Senators involved in the hearing on the investigation, however, understood the importance of such an accomplishment (if it could be achieved). Just days after the hearing, Sen. Reed (R.-Pa.) (who had been an active participant) took to the Senate floor to explain what he viewed as the source of the law's problems.[306] He began by describing the country's experience during the war with the excess-profits tax:

> No government functions well in war time; and we had to write up this excess profits tax law. We did not realize it when we did it, but when we said that no taxpayer should earn more than 8 percent on the fair value of his property without paying an additional tax it meant, practically, that we had to value all the property in the United States. . . . By that hastily drawn war time excess profits tax law we put on this already overworked [BIR] the job of valuing all the mills and mines and factories of this big land. Of course, they could not do it satisfactorily. Of course, they had to take the corporation's own estimate and receive taxes according to what the corporation thought was just in the valuation. That meant a tremendous amount not only of reauditing but of reexamination of all those properties.

A Senator interrupted at this point to note that the excess-profits tax had been repealed for many years. Reed responded:

> Oh, yes; but wait a minute. The cases are not repealed. The law is repealed, but the cases are still pending; and that matter of valuation is still torturing the department and is responsible for these old 1917, 1918, 1919, and 1920 cases. That law brought in money, which was the one object we were seeking in war time; but it did not bring it in very fairly, and the administrative cost was terrific.

Reed then briefly related the history of the amortization provision — the desire to grant taxpayers a reasonable allowance for losses incurred from constructing war-related facilities that became less useful after the war. The allowance, Reed said, "sounds simple enough" —

> but when you try to calculate what part of a battery of coke ovens a taxpayer wanted and needed for his general business, and what part he built just to take care of war-time emergencies, and when you try to figure a comparison between what the value was at the moment they were built and what their value is in use today you have a problem upon which no two engineers will ever agree.

Again, a Senator interrupted to ask, "[t]hat has all disappeared now since the war, has it not?," and Reed answered:

> No; it has not. That is just the point I want to make, because we all think that when we repealed those laws we abolished all the difficulties. We did draw the line in time so that future years would not be harassed by such calculations; but they are still laboring over those amortization claims and those excess-profits tax calculations just as hard as they were five years ago.

Finally, Reed turned to the discovery depletion allowance Congress had approved:

> In order to calculate what part . . . [the taxpayer] can charge off to depletion the [BIR] has been estimating the quantity of oil in the property, which is just about as hard as estimating the quantity of air over the property. Then, on top of that estimate, they try to estimate what that oil will be worth in the market in future years, which multiplies the first uncertainty by a second uncertainty, and of, of course, no two people ever agree on that.

Reed concluded: "*Those things are our fault.* We have put the [BIR] up against an impossible task, and we owe it to the bureau and we owe it to the people of the country to simplify this law by every means in our power. . . ."[307]

Thus, an important contribution of the Couzens investigation was to make the source of the tax system's problems more salient to the Senate. They learned that the difficulties were due not just to the failings of the BIR, but also to the laws Congress had approved, and that lesson is reflected in the Senate taking the initiative to propose the JCT in 1926. The Couzens investigation also had an impact in the House. The tax simplification commission proposed by the Ways & Means Committee in 1926 was in part a response to criticisms contained in the Couzens report.[308] Later, after the Senate passed its bill and it was being considered in Conference, Chairman Green and the Ways & Means Committee met with Couzens and were persuaded by the need for a permanent organization.[309] In short, by providing a common base of information to each House of Congress, the Couzens investigation helped bring them together and enabled them to overcome the traditional resistance to creation of a joint committee.[310] The results of the investigation also provide another reason why Congress was willing to devote special resources to the tax area in 1926.

D. A law-making role, not just an investigative role.

The Couzens investigation had one other important consequence — it helped lead Congress to make the critical decision in 1926 to have the JCT perform general *law-making* activities as well

as investigative work. The tax-writing committees did not simply need aid examining returns, investigating the BIR's practices and administration of the law, and monitoring the agency's enforcement activities.[311] As Sen. Jones said during the Finance Committee's 1926 hearing, the committees also needed help with the formation of legislation.

This idea was quite novel at the time. As previously noted, the principal consequence of the 1926 legislation was to delegate to the JCT's *staff* the legislative support functions. Yet most committees (other than the Appropriations committees) had few staff, and they were almost all clerical or secretarial aides. For example, in 1913, there was a total of only about 300 mostly nonprofessional aides in the House and Senate spread among 135 standing committees, and the number and type of staff remained largely unchanged for the next three decades.[312] The few professional staff employed by Congress generally performed either specialized tasks (such as bill-drafting) or activities peripheral to the law-making function (such as research or investigations).[313] The JCT proposal, therefore, helped establish the precedent of professional staff assisting the committees with their general law-making duties. While such service is now common, the JCT staff has throughout its history uniquely provided that assistance as a nonpartisan organization of a joint committee.

The legislative background does not clearly explain why Congress chose to have nonpartisan staff of a joint committee. At the Finance Committee's 1926 hearing, Sen. Jones spoke of the need for a "joint agency" that would be "independent."[314] His reason might have related to the investigatory function he envisioned for the proposed staff, including their examination of tax returns. But given the novelty of professional staff for the committees, another explanation may simply have been cost-savings. The Finance Committee members surely understood that any staff approved for their committee had to be matched by similar aid given to the Ways & Means Committee. Joint and nonpartisan staff would avoid duplication of both investigative and legislative activities, and therefore might have been more acceptable to Congress.[315] Of the two conditions, "nonpartisan" was probably uncontroversial; to the extent Congress used professional staff at that time, it was clearly the norm to hire on a nonpartisan basis.[316] Approval of a "joint" staff, however, was contrary to the decision made in 1918 when the House rejected a "joint agency" in favor of separate offices for the new Legislative Drafting Service. The House's concern was that the Senate

would obtain a disproportionate amount of the services of a joint office.[317] The Origination Clause (as well as the somewhat smoothed relations between the House and Senate) may have provided the House with enough assurance that no similar worry was necessary for the JCT.[318]

E. Refund review.

[This section will examine possible links between the JCT's refund review responsibility and the Couzens-Mellon saga. The obligation to review all refunds above a certain amount (currently, over $2 million) has always been a strange responsibility. Presumably, it is one way for Congress to monitor the IRS and "to bring [Congress] in touch with the operations of [its] legislation" (in Sen. Jones' words). But the vast majority of refunds involve noncontroversial matters, such as the application of a net operating loss carryback. Meanwhile, other, possibly questionable, practices of the IRS, such as a failure to challenge vigorously aggressive tax positions claimed by taxpayers, may completely escape scrutiny if no refund arises. The JCT, thus, may become apprised of certain issues (such as an unusual application of the carryback rules) but completely miss other, potentially cutting-edge, questions until there is some controversy or litigation. What is the origin of the refund review requirement?

My research is not complete, but it appears that to some extent, the focus on refunds resulted from the amortization provision and revised interpretations of the excess-profits tax, both of which produced refunds for affected taxpayers. When these refunds were awarded to some of Mellon's companies, it aroused some suspicion in Congress. Refunds were also especially visible to Congress; even though in every year, the additional tax assessments and collections made by the BIR greatly exceeded any refunds made to taxpayers, the gross amount of refunds had to be separately appropriated. The result was a sense of money flowing out of the Treasury, at the BIR's authorization, to some large taxpayers (including ones associated with Mellon). Some in Congress may also have not understood the difference between a refund and an outlay. (I do not believe there was any provision like the EITC in those years.) There is a lot of complaint about refunds in the period leading up to the 1926 legislation, and the JCT was eventually given the refund review responsibility in 1928.]

F. Was creation of the JCT intended as a serious proposal?

A final question is whether the JCT proposal, borne of a controversy seemingly filled with political intrigue and backstabbing, might itself have been a type of double-cross to achieve an ulterior objective. Might it have been a trick played on Couzens and other rivals by the Old Guard Republicans (dominant in 1926),[319] perhaps to assist in defeating the Norris full publicity amendment or securing adoption of the percentage depletion allowance? Couzens apparently had become quite attached to the JCT proposal — it has been described as his "personal monument"[320] — but was the intention of Congress's leaders to hand him a monument of sand?

The possibility cannot be completely ruled out. During the Senate debate, Couzens was sufficiently worried to seek out assurance from the leaders of the Finance Committee about the JCT. Not being a member of the Finance Committee, he was ineligible to serve on the JCT and therefore had to rely on others to carry out the committee's purpose. In making his inquiry on the Senate floor, Couzens referenced "intimations" that, because the leaders of the tax-writing committees had not been sympathetic to his investigation of the BIR, "we may not expect [the JCT proposal] to be carried out in good faith."[321] Sen. Jones had seemed to anticipate a similar worry when he described in the Finance Committee's 1926 hearing a structure for the JCT that would prevent it from being "a whitewashing committee or anything of that sort."[322] In response to his query, Couzens received the expected assurances from three prominent Finance Committee Republicans, including Chairman Smoot. But writing in 1926, Professor Blakey indicated that he thought Couzens had genuine reasons to be worried.[323]

Aside from his policy differences with the Old Guard, Couzens' insecurity may have stemmed from his irascible personality and uneven relationships with some of the Senate's leaders, including Senators Smoot and Watson (who would serve as Majority Leader of the Senate beginning in 1929). According to his biographer, when Couzens first joined the Senate, he had deliberately insulted Watson.[324] The various stages of his fight with Mellon had also led Couzens into almost continual conflict with Watson. Smoot's role in the Couzens-Mellon dispute had been less visible, but he had not supported the Couzens investigation and reportedly had kept Couzens off of the Finance Committee in 1925 because of his fight with Mellon.[325]

As illustrated by the feud and his insult of Watson, Couzens also had a history of acting impulsively and personalizing his policy disagreements with others.[326] During the 1926 Act debate, Couzens repeatedly clashed in a personal way with Smoot and other Senators.[327] Indeed, in what would seem to be a remarkably impolitic act, just moments after receiving Smoot's assurance about the JCT proposal, Couzens charged on the Senate floor that Smoot had "tricked" him on a procedural matter, and Couzens vowed never to fall for the ploy again.[328] According to Professor Blakey, the charge and rebuttal produced "great excitement" in the Senate chamber, and it was reported by the major newspapers.[329] The ultimate trick, of course, would be to offer up a sham provision in exchange for a person's vote or other concession. Perhaps reflecting his lack of interest in the JCT proposal, Smoot did not serve as either the Chair or Vice-Chair of the first JCT; instead, two Ways & Means Republicans filled those positions.[330]

There is less reason to doubt the House's serious interest in the JCT proposal. As noted, the Ways & Means Committee's proposed simplification commission arose in part because of the Couzens report, and the committee's agreement with the Senate proposal followed a meeting with Couzens.[331] Furthermore, in a subsequent interview, Ways & Means Chairman Green indicated that the problems at the BIR during Mellon's time at the Treasury were well known.[332] Thus, Green and his committee may well have appreciated the need for an organization such as the JCT.

Moreover, although he was not a Progressive, Green was hardly an Administration loyalist. Among other things, he led the House's successful effort in 1924 and 1926 to block Mellon's attempt to repeal the estate tax, and opposed the sharp surtax cuts sought by Mellon.[333] His nomination for a judgeship on the U.S. Court of Claims in early 1928 — an appointment he accepted — was reportedly an effort by the Administration to remove him from Congress before it renewed its effort later that year to repeal the estate tax (which again failed).[334] Thus, Green seems like an unlikely candidate to have gone along with the JCT proposal, and to have agreed to serve as the committee's first chairman, if it was intended all along to be a sham.

More generally, there was really little reason for any of the tax-writing members not to have intended the JCT provision seriously. Stated baldly, it provided them with taxpayer-funded assistance to do the work — legislate and exercise oversight — that they had been elected to do.

This was the immediate reaction of the Finance Committee members when Sen. Jones first described his idea; they saw the proposal as providing help to themselves, and only wondered how they could get the necessary funding. Any general reservation any of them might have had about relying on professional staff help may have been overcome by the difficulty of the tasks they knew confronted them. Professor Brownlee has suggested another, more strategic advantage from the JCT — it promised to help the tax-writers exercise their newfound power (created by the high tax rates) to grant exceptions to special interests — although Smoot's lack of interest in the JCT may at least suggest that not all of the tax-writers saw the committee in that light.[335] Finally, even those members loyal to the existing Administration — who might otherwise have been wary of creating a new organization with investigative powers — may have understood that as a permanent organization, the JCT offered a means to confront *future* Administrations. Thus, there was potentially something in the proposal for both the friends and foes of the existing Administration.

About the only parties who stood to lose from creation of the JCT (aside from taxpayers, if the money was not well spent) were the Mellon Treasury and the BIR, which might find themselves under closer scrutiny as a result. Here again, however, the permanence of the organization may have provided some reassurance. The purpose of the JCT was not to carry out a one-time investigation; rather, it promised to open up another line of communication with Congress that might prove useful to the agencies in the future.

Mellon strongly opposed the Couzens investigation, but he may have understood the difference between that one-time intrusion and the JCT. Once the JCT was authorized, Mellon was apparently accepting of a meaningful organization within Congress. In July, 1926, Mellon wrote to Chairman Green, who was in the process of organizing the JCT and selecting its first staff:

> I am particularly interested in seeing that the experts who are called in to assist your Joint Committee on Taxation are constructive and not destructive. The Treasury has suffered enough through the Couzens' Committee investigation, the details of which were handled by Mr. Manson, to convince me that the administration of the [BIR] can be seriously hurt by the wrong type of investigation. I have no names to suggest for an expert to conduct this investigation for your Committee, but if we could get someone of the same constructive type of mind as Professor Adams, or Professor Adams himself, I think both you and I would feel satisfied that the work would be properly done and would be helpful. . . .[336]

Mellon's suggestion of a staff person like Adams, or Adams himself, may have been somewhat self-serving since Adams had previously worked within the Treasury for many years and was quite familiar with its operations. At the same time, Adams was a well-respected professional who could be expected to provide independent judgments. Thus, the suggestion of Adams reflected Mellon's expectation that the JCT would serve a real legislative purpose in the future.

Green ended up complying with Mellon's suggestion only in part. Adams did not serve on the JCT staff, but was invited to be (and served as) a member of the first JCT advisory group in 1928. The initial staff was divided into a "simplification division" (headed by Charles Hamel, who had previously been the first chairman of the BTA) and an "investigations division" (headed by Lovell Parker) to reflect the two main purposes of the organization envisioned by Congress. When the two divisions were combined in XX, the first chief of the entire staff was Parker, who had previously served as a mining engineer for both the BIR and the Couzens investigation. The staff apparently made a positive impression from the beginning. About a year after the JCT was formed, Mellon wrote President Coolidge about the JCT and commented favorably on the Treasury's interaction with the new organization.[337]

[end]

Abbreviations for Notes

Collections	
LOC-Couzens	Library of Congress (Washington, DC), Manuscript Division, Papers of James Couzens
LOC-Finley	Library of Congress (Washington, DC), Manuscript Division, Papers of David E. Finley (for relationship between Mellon and Finley, see CANNADINE (2006) at 314)
NARA-JCT	National Archives & Records Admin. (Washington, DC), RG 128, Ch. 23, Records of the Joint Committee on Internal Revenue Taxation (1926-75)
NARA-Treasury	National Archives & Records Admin. (College Park, Md.), RG 56, Entry No. A1 191, General Records of Dept. of Treasury, Central Files, 1917-32, Ofc. of Treasury Secretary
Statutes	
1864 Act	Act of June 30, 1864, ch. 173, 13 Stat. 223 (1864)
1867 Act	Act of Mar. 2, 1867, ch. 169, 14 Stat. 471 (1867)
1870 Act	Act of July 14, 1870, ch. 255, 16 Stat. 256 (1870)
1894 Act	Tariff Act of 1894, ch. 349, 28 Stat. 509 (1894)
1909 Act	Tariff Act of 1909, Pub. L. No. 61-5, 36 Stat. 11 (1909)
1910 Act	Appropriations Act of June 17, 1910, Pub. L. No. 61-213, 36 Stat. 468 (1910)
1913 Act	Tariff Act of 1913, Pub. L. No. 63-16, 38 Stat. 114 (1913)
1914 Act	Act of Oct. 22, 1914, Pub. L. No. 63-217, 38 Stat. 745 (1914)
1916 Act	Revenue Act of 1916, Pub. L. No. 64-271, 39 Stat. 756 (1916)
March, 1917 Act	Revenue Act of March 3, 1917, Pub. L. No. 64-377, 39 Stat. 1000 (1917)
WRA of 1917	War Revenue Act of October 3, 1917, Pub. L. No. 65-50, 40 Stat. 300 (1917)
1918 Act	Revenue Act of 1918, Pub. L. No. 65-254, 40 Stat. 1057 (1919)
1921 Act	Revenue Act of 1921, Pub. L. No. 67-98, 42 Stat. 227 (1921)
1924 Act	Revenue Act of 1924, Pub. L. No. 68-176, 43 Stat. 253 (1924)
1926 Act	Revenue Act of 1926, Pub. L. No. 69-20, 44 Stat. 9 (1926)
1928 Act	Revenue Act of 1928, Pub. L. No. 70-562, 45 Stat. 791 (1928)
1934 Act	Revenue Act of 1934, Pub. L. No. 73-216, 48 Stat. 680 (1934)
1935 Act	Revenue Act of 1935, Pub. L. No. 74-407, 49 Stat. 1014 (1935)
Second 1940 Act	Second Revenue Act of 1940, Pub. L. No. 76-801, 54 Stat. 974 (1940)
1942 Act	Revenue Act of 1942, XX
1969 Act	Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487 (1969)
1975 Act	Tax Reduction Act of 1975, Pub. L. No. 94-12, 89 Stat. 26 (1975)
1976 Act	Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 (1976)
I.R.C.	Internal Revenue Code of 1986, as amended
Other Government Materials	
Conf. Rep. (1916)	H. Conf. Rep. No. 64-1200, 64th Cong., 1st Sess. (1916)
Conf. Rep. (1926)	H. Conf. Rep. No. 69-356, 69th Cong., 1st Sess. (1926)
Couzens Rep. (1926)	Select Comm. on Investigation of the Bureau of Internal Revenue, Partial Report, S. Rep. No. 69-27, 69th Cong., 1st Sess. (1926)
CRS (1974)	Congr. Res. Serv., Legislative History of Tax Return Confidentiality: Section 6103 of the Internal Revenue Code of 1954 and Its Predecessors, Pub. No. 74-211A (1974)
CRS (1992)	Congr. Res. Serv., Congressional Staff: An Analysis of Their Roles, Functions, and Impacts, Pub. No. 92-90 S (1992)
House History (1994)	History of the United States House of Representatives, 1789 – 1994, H. Doc. No. 103-324, 103rd Cong., 2d Sess. (1994)
Interior (1952)	U.S. Dept. of Interior, Bur. of Mines, Ofc. of Chief Economist, Federal Mineral Taxation (1952)
JCT Depletion History (1950)	Staff of Jt. Comm. on Int. Rev. Tax'n, Staff Data: Legislative History of Depletion Allowances (Mar. 1950)
JCT Depletion Rep. (1929)	Preliminary Report on Depletion: Reports to the Jt. Comm. on Int. Rev. Tax'n from Its Staff, Vol. I, Part 8 (1929), available at https://www.jct.gov/publications.html?func=select&id=68 (JCT-15-12)

Reg. No. 33 (1914)	Regulations No. 33, 16 Treas. Dec. Int. Rev. 29 (1914)
Reg. No. 33 (1918)	Regulations No. 33, T.D. 2690, 20 Treas. Dec. Int. Rev. 126 (1918)
Reg. No. 45 (1919)	Regulations No. 45, T.D. 2831, 21 Treas. Dec. Int. Rev. 170 (1919)
Reg. No. 62 (1922)	Regulations No. 62, T.D. XX (1922)
Reg. No. 65 (1924)	Regulations No. 65, T.D. 3640, 26 Treas. Dec. Int. Rev. 745 (1924)
SFC Hearings I (1918)	Hearings before Senate Comm. on Finance to Provide Revenue for War Purposes (Part 1), 65th Cong., 2d Sess. (1918)
SFC Hearings III (1918)	Hearings before Senate Comm. on Finance to Provide Revenue for War Purposes (Part 3), 65th Cong., 2d Sess. (1918)
SFC Hearings (1924)	Hearings before Senate Comm. on Finance on H.R. 6715 (Rev. Act of 1924), 68th Cong., 1st Sess. (1924)
SFC Hearings (1926)	Hearings before Senate Comm. on Finance on H.R. 1 (Rev. Act of 1926), 69th Cong., 1st Sess. (1926)
SFC Rep. (1916)	S. Rep. No. 64-793, 64th Cong., 1st Sess. (1916)
SFC Rep. (1917)	S. Rep. No. 65-103, 65th Cong., 1st Sess. (1917)
SFC Rep. (1918)	S. Rep. No. 65-617, 65th Cong. 3d Sess. (1918)
SFC Rep. (1921)	S. Rep. No. 67-275, 67th Cong., 1st Sess. (1921)
SFC Rep. (1924)	S. Rep. No. 68-398, 68th Cong., 1st Sess. (1924)
SFC Rep. (1926)	S. Rep. No. 69-52, 69th Cong., 1st Sess. (1926)
T.D. 1571 (1909)	T.D. 1571, 12 Treas. Dec. Int. Rev. 131 (1909)
T.D. 1675 (1911)	T.D. 1675, 14 Treas. Dec. Int. Rev. 16 (1911)
T.D. 2446 (1917)	T.D. 2446, 19 Treas. Dec. Int. Rev. 28 (1917)
T.D. 2447 (1917)	T.D. 2447, 19 Treas. Dec. Int. Rev. 31 (1917)
T.D. 3566 (1924)	T.D. 3566, 26 Treas. Dec. Int. Rev. 54 (1924)
T.D. 3638 (1924)	T.D. 3638, 26 Treas. Dec. Int. Rev. 735 (1924)
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[1] See I.R.C., § 8002(a); Oleszek (1974) at 81 (the JCT "functions mainly as a holding company for staff"). Some of the information in this section is from the JCT's website, available at https://www.jct.gov/about-us/overview.html.

[2] See 2 U.S.C. § 601(f).

[3] See I.R.C., § 6405(a).

[4] See id., § 6103(f)(1), (2), (4)(A).

[5] See Bank (1996) at 396-97. The income tax title was section II of the 1913 Act. The tax resembled a flat *income* tax, not the version of a flat tax popularized by Professors Hall and Rabushka that is a form of consumption tax. See HALL & RABUSHKA (1995).

[6] See BROWNLEE (2004) at 57. During the fiscal year ending June 30, 1914, 23,175 taxpayers reported net income of $20,000 or more, the starting threshold for the surtax. They represented about 0.02 percent of the total population (around 100 million). The Treasury believed that but for noncompliance, more taxpayers would have paid the surtax. See Treas. Rep. (1915) at 32, 221.

[7] This feature of the income tax law proved short-lived. Congress authorized a deduction for certain charitable contributions in 1917 and an exclusion of up to $3,500 in military pay (in lieu of providing a cash bonus to soldiers) in 1918. See WRA of 1917, § 1201(2) (adding paragraph nine to section 5(a) of the 1916 Act); 1918 Act, § 213(b)(8); WALTMAN (1985) at 69, 77.

[8] Shareholders whose dividends were exempt were potentially overtaxed by the corporate tax.

[9] The high threshold for tax liability and tax return filing was supported by President Wilson to minimize the number of people affected by what was expected to be an unpopular new law. See BAKER (1968) at 111-12; HINTON (1942) at 130. The high threshold also was intended to allow the necessary institutions in support of the new tax to develop gradually. See Hull (1914) at 131; HINTON (1942) at 141.

[10] See Hull (1914) at 124; HULL (1948) at 48-50, 65-66, 70-71; [check Hull floor statements]; HINTON (1942) at 135; BLAKEY & BLAKEY (1940) at 502-03.

[11] See Blakey (1914) at 27 (reporting that "the press of the whole country has been flooded with statements of lawyers, bankers, and others to the effect that the provisions of the [1913 Act] are intricate, inconsistent, and incomprehensible"); PAUL (1954) at 102-03. A modern-day observer has described the first statute as "a poorly drafted hodgepodge that seems to have reflected none of the more-principled approaches to a fundamental definition of income that is now taken for granted." Crane (2010) at 17. Part of the reason was that Hull and a couple of assistants drafted the initial legislative proposals themselves (as well as the initial bills of certain later tax Acts). See HULL (1948) at 64-65, 80. The Legislative Drafting Service, which eventually became the Legislative Counsel offices used by the House and Senate today for legislative drafting, was not established until 1919, after which the quality of the statutes improved. See infra text accompanying notes 91 - 93; BLAKEY & BLAKEY (1940) at 246.

[12] See 1913 Act, § II.B (2d paragraph). In 1915, the Treasury recommended a clarifying amendment. See Treas. Rep. (1916) at 99-100.

[13] See Blakey (1914) at 38 (claiming that the 1913 Act was the "first step" of a vast and complex system that might be made "more comprehensive, . . . more remunerative, and . . . more equitable" as the "administrative machinery is developed"); Hull (1914) at 131 ("[t]o suddenly apply to ninety million people a comprehensive income tax law . . . might result in the breaking down of its administration"); HINTON (1942) at 141.

[14] See BROWNLEE (2004) at 58 ("[w]ithout the intervention of the United States in World War I and the management of that intervention by the leaders of the Democratic Party, the development of federal taxation would have proceeded far more incrementally").

[15] See 1914 Act, § XX; BLAKEY & BLAKEY (1940) at 105.

[16] Citation (Ratner 375 (Compl 23b))

[17] In Statutes at Large, the income tax titles of the 1913 and 1918 Acts represent only about XX and 33 percent, respectively, of the pages devoted to the entire Act. In terms of revenue legislation, Congress also spent considerable time debating, but ultimately rejecting, proposals to impose various retroactive taxes and consumption taxes. See Taussig (1917) at 5-6; Miller (1921) at 225, 227-28.

[18] See BROWNLEE (2004) at 62 (changes during World War I "transformed the experimental, rather tentative income tax into the foremost instrument of federal taxation"). Despite the changes, the income tax remained very much a "class tax" in 1918. Less than one percent of individuals (reporting income of over $20,000) paid 70 percent of the income tax. Of the 106 million total population, and 42 million persons in the labor force in that year, only 5.5 million persons filed income tax returns. See PAUL (1954) at 122. In addition to helping finance the country's war needs, the new revenue helped to offset the loss of about $500 million in revenue from alcohol excise taxes when the Eighteenth Amendment (prohibition) was ratified in January, 1919. See Blakey & Blakey (1919) at 213-14. The 1918 Act was not signed into law until Feb. 24, 1919.

[19] See PAUL (1954) at 104 (1913 income tax "was one of the most opportune statutes ever passed by Congress"); BLAKEY & BLAKEY (1940) at 560; Adams (1924a) at 317. In 1910, Cordell Hull supported an income tax in part because it would produce revenues during a war when customs revenues might dry up. See HULL (1948) at 61.

[20] See BROWNLEE (2004) at 80-81.

[21] See Treas. Rep. (1915) at 293; Treas. Rep. (1919) at 543.

[22] See BLAKEY & BLAKEY (1940) at 534-35; Second 1940 Act, Title II. A small excess profits tax was enacted in 1934 and 1935 to supplement the capital-stock tax. 1934 Act, § 702; 1935 Act, § 106.

[23] Citation.

[24] See Plehn (1920) at 285.

[25] Seligman (1918) at 25.

[26] See 1916 Act, Title III; Mehrotra (2010) at 184 n.25 (claiming that about 90 percent of the munitions tax revenue in 1916 was paid by the DuPont Company).

[27] See March, 1917 Act, Title II.

[28] See WRA of 1917, Title II.

[29] For background on the Treasury's decision to hire Adams in 1917, see Brownlee (1990) at 407-11.

[30] See Adams (1918a) at 152. Adams had opposed the EPT before joining the Treasury, and his support was apparently critical to Congress's approval of the tax. See Brownlee (1990) at 409-11; Brownlee (1993) at 331 (claiming that most of the country's economists opposed the EPT).

[31] See Adams (1918a) at 153; BANK ET. AL. (2008) at 66. The 1916 munitions tax was explicitly established as a temporary levy to expire one year after the end of the war. See 1916 Act, § 301(2). When the EPT was approved, the munitions tax was reduced and repealed effective Jan. 1, 1918. See WRA of 1917, § 214.

[32] Brownlee (1993) at 328; see ARNETT (1937) at 250-56, 259-70, 289-92.

[33] See March, 1917 Act, §§ 201, 202. Exempt profits were eight percent of invested capital plus $5,000.

[34] Bogart et al. (1919) at 24.

[35] PAUL (1954) at 110.

[36] See BLAKEY & BLAKEY (1940) at 122, 129. Cong. Kitchin had received assurance from the Canadians that the EPT could be administered, but neither Ways & Means nor Treasury had had time to investigate. See ARNETT (1937) at 263 (check).

[37] See BLAKEY & BLAKEY (1940) at 135-36; WALTMAN (1985) at 43.

[38] See WALTMAN (1985) at 43-45.

[39] See SFC Rep. (1917) at 5-6; 55 Cong. Rec. 6001-02 (XX, 1917) (YY); Blakey (1917) at 795, 809; Taussig (1917) at 29.

[40] Corporations and partnerships were both subject to the March, 1917 Act version of the EPT, and individuals were added in the version enacted in the WRA of 1917. See March, 1917 Act, § 203; WRA of 1917, § 201. Since partnerships were taxed for regular income tax purposes on a passthrough basis, the business income of sole proprietors and partners was potentially taxed at over 100 percent (as a result of the EPT, normal tax, and surtax applying to the same income). See WALTMAN (1985) at 45; BLAKEY & BLAKEY (1940) at 127; 54 Cong. Rec. 3678, 4274 (XX). The Revenue Act of 1918 limited the EPT to corporations. See 1918 Act, § 301.

[41] See WRA of 1917, Title II.

[42] In addition, profits of $3,000 ($6,000 in the case of individuals and partnerships) were treated as exempt from the EPT. See id., § 203(a) and (b).

[43] See Taussig (1917) at 33-34.

[44] See WRA of 1917, § 206 (2d paragraph).

[45] citation.

[46] See 1918 Act, § 301. The statute provided for a single tax with three "brackets," but the effect of the provision was to require taxpayers to pay the greater of an excess-profits levy (the sum of the first two brackets) and a war-profits levy (the amount of the third bracket) for 1918. Cf. Plehn (1920) at 290-91 n.7; RATNER (1980) at 395. The law repealed the war-profits levy for 1919.

[47] See Brownlee (1990) at 417-20; Brownlee (1993) at 358-60; Mehrotra (2010) at 212-13, 216-17; Treas. Rep. (1919) at 47-49, 51-52.

[48] As just one illustration, the Act substituted an EPT generally equal to eight percent of net income for businesses with no or only "nominal" amounts of invested capital. See WRA of 1917, § 209. This rule was supposed to limit the impact of the EPT on service businesses. It, however, placed huge consequences on the BIR's interpretation of "nominal," since businesses not qualifying for the exception had to pay tax at the much higher, general EPT rates. See Bogart et al. (1919) at 25; SFC Rep. (1918) at 14-15; 57 Cong. Rec. 3134-35 (Feb. 11, 1919) (Cong. Simmons (D.-N.C.)) (emphasizing broad and comprehensive discretion granted by Congress to BIR to help mitigate unfairness in view of high income and excess-profits taxes imposed by 1918 Act). According to Professor Brownlee, Professor Adams urged even greater delegations of authority to the BIR. See Brownlee (1993) at 334-35; Brownlee (1990) at 411.

[49] Haig (1919) at 382; see Brownlee (1993) at 355-56 ("[p]robably no other single issue aroused corporate hostility to the Wilson Administration as widely or as deeply as excess-profits taxation").

[50] See Treas. Rep. (1921) at 32 ("the excess-profits tax is so complex that it has proved impossible to keep up to date the administrative work of audit and assessment"); Miller (1921) at 231 (EPT is "the most difficult one of all the war taxes for the Treasury to administer, and the most expensive and vexatious one to taxpayers"). Despite his criticisms, Professor Haig concluded that the EPT should be continued if the revenue was needed, the rates could be reduced, and "we are prepared to take radical action in the direction of the improvement of [its] administration." See Haig (1920) at 13-14. In a similar vein, Professor Blakey acknowledged the tax's administrative problems but stated that "[t]he tax is correct in principle, however." Blakey (1922) at 106. For a description of some of the debate regarding repeal, see RATNER (1980) at 409-11; Brownlee (1990) at 421-29.

[51] See W&M Hearings (1920) at 38 (check – wrong page cite); Treas. Rep. (1921) at 32-33, 38-42; Adams (1921a) at 370; BLAKEY & BLAKEY (1940) at 197; Brownlee (1990) at 409-11.

[52] citation.

[53] See 57 Cong. Rec. 549 (Dec. 17, 1918) (Sen. Penrose (R.-Pa.)) (explaining that because taxes had "reached such staggering dimensions," it was necessary to resolve questions such as the depletion allowance); Holmes (1921) at 146. In U.S. v. Ludey, 274 U.S. 295 (1927), the taxpayer claimed unsuccessfully that he was not entitled to depletion of his oil reserves through 1916 (when tax rates were low), and therefore had less gain upon sale of the reserves in 1917 (when tax rates were higher). The Court stated that the taxpayer "cannot choose the year in which he will take a reduction." Id. at 304.

[54] See Lucas v. Earl, 281 U.S. 111, 115 (1930); Kornhauser (1985) at 886 (indicating that metaphor was meaningful at the beginning of the modern income tax began).

[55] See SELTZER (1951) at 25, 30-34; Kornhauser (1985) at 887; Johnson (2009) at 492-93. In 1926, Sen. Reed (R.-Pa.) described the position thusly: "if I pay $10 [for an acre of land] and then, by hard work, discover a rich deposit of gold in it, the calculation of my depletion on the original $10 basis would not allow me any adequate return for my *real capital.*" 67 Cong. Rec. 3762 (Feb 11, 1926) (emphasis added); see also id. at 3773 (Sen. Smoot (R.-Ut.)); Baker & Griswold (1951) at 369, 378 (explaining that discovery of natural resource "creates" new capital).

[56] See LICHTBLAU & SPRIGGS (1959) at 30-31; cf. MILL (1871) at 234-35. Thus, for natural resources, cost of production and replacement cost may be different. Depletion based on initial value of the deposit might be justified if depletion is considered a type of reserve to fund replacement of the wasting resource.

[57] The 1913 Act permitted a reasonable allowance for depletion not in excess of five percent "of the gross value at the mine of the output for the year." See 1913 Act, §§ II.B (2d paragraph, 6th clause), II.G(b) (2d clause). The Treasury interpreted this rule as allowing taxpayers to deduct their "actual cost" (spread over the number of years estimated to exhaust the deposit), with the five-percent provision serving as a further limitation on the permissible deduction. See Reg. No. 33 (1914) at 72-73 (Arts. 141, 142); see also id. at 69 (Art. 129) (basing depreciation deduction on "cost" and assumed life of property), 70 (Art. 130) (limiting aggregate depreciation deductions to "original cost"). The 1916 Act gave taxpayers, in the case of oil and gas wells, "a reasonable allowance for actual reduction in flow and production to be ascertained not by the flush flow, but by the settled production or regular flow." Although there was some confusion about the meaning of this rule when it was added on the Senate floor, its principal sponsor apparently believed it permitted depletion to be based on the *value* of any oil and gas discovery. See 1916 Act, §§ 5(a) (clause 8(a)), 12(a) (clause 2(a)); 53 Cong. Rec. 13287 (Aug. 28, 1916) (Sen. Chilton (D.-W.Va.)). The Treasury interpreted this law as generally allowing depletion based on the taxpayer's cost (or March 1, 1913 value, in the case of purchases before that date), with the percentage reduction in regular flow during the year being the measure of the portion of the taxpayer's cost that could be deducted in that year. See T.D. 2446 (1917); T.D. 2447 (1917); Reg. No. 33 (1918) at 205 (Art. 170).

[58] See W&M Hearings (1918) at 438-39 (John Shea), 456-57 (S.W. Hayes), 473-74 (Oil & Gas Assns.); SIMON (1979) at 103-05. The industry also urged that the measure of "normal profit" exempt under the EPT be liberalized to take into account the risky nature of the oil and gas business. See W&M Hearings (1918) at 439-42 (Shea), 475, 480 (Oil & Gas Assns.).

[59] Id. at 479 (Oil & Gas Assns.); see also id. at 450, 454 (Shea). The industry urged that both lessors and lessees of producing property be allowed to claim a portion of the depletion allowance, and the Ways & Means Committee bill made this change. See id. at 450-51, 454-55 (Shea), 479 (Oil & Gas Assns.), 517-20 (Walter Kelley); W&M Rep. (1918) at 10. An industry brief also urged faster write-off of the cost to reflect how quickly the resource being exploited was exhausted. See Oil Industry (1917b) at 38.

[60] See SFC Hearings I (1918) at 362-63 (Harry Covington), 369-70 (National Petroleum War Service Comm.), 380 (Shea); [Check]

[61] See id. at 364-65 (Sen. Penrose); SFC Hearings III (1918) at 31 (Chmn. Simmons).

[62] See id. at 44 (Beecher identifying himself as "stranger" to oil business); Interior (1952) at 80. Beecher had joined the agency to help with issues concerning the transport of energy resources during the war. He was a grandnephew of famed author Harriet Beecher Stowe and was involved in the litigation arising from the sinking of the Titanic in 1912. See "Norman Beecher, 87, Lawyer for Titanic," N.Y. Times, Jan. 30, 1965, p. 27. Mark Requa, general director of the Oil Division, also testified, and he had a background in petroleum engineering and was active in the industry after the war. See NASH (1968) at 30; SIMON (1979) at 22, 95 n.10, 138 n.24.

[63] See SFC Hearings III (1918) at 44-45; see also id. at 91 (T. S. Adams); SFC Hearings I (1918) at 356-57 (Covington).

[64] Under the 1916 Act, taxpayers were allowed to deduct their expenses from drilling nonproductive wells, but it was not until the 1918 Act that taxpayers could use a net loss for a year to offset income of the preceding or succeeding year. See T.D. 2447 (1917) at 35; 1918 Act, § 204(b). Treasury regulations under the 1918 Act gave taxpayers the choice of deducting or capitalizing (and depleting) their expenses from nonproductive wells. See Reg. No. 45 (1919) at 232 (Art. 223).

[65] See SFC Hearings III (1918) at 44; WALTMAN (1985) at 74; cf. SFC Hearings (1926) at 163 (L. C. Manson); Martin (1957) at 260-63; Baker & Griswold (1951) at 372. Earlier witnesses had testified that "dry hole" expenses should be treated as part of "invested capital" for purposes of the EPT, and the same argument was made to justify a successful House floor amendment liberalizing the treatment of the oil industry under the EPT. See 56 Cong. Rec. 10539 (Sep. 20, 1918) (Cong. White (D.-Oh.)); W&M Hearings (1918) at 466 (Joseph Bouton), 497 (Olandus West); Trammell (1952) at 18-19. Of course, many taxpayers suffered the same unfairness as the wildcatter without obtaining any special tax consideration. See 67 Cong. Rec. 3762 (Feb. 11, 1926) (Sen. Couzens (R.-Mi.)).

[66] See SFC Hearings III (1918) at 46, 89; WALTMAN (1985) at 75; cf. 67 Cong. Rec. 3773 (Feb. 11, 1926) (Sen. Smoot (R.-Ut.)). Beecher offered no evidence to support his assertion, which has been described as a mere hunch. See SIMON (1979) at 113. Moreover, even if correct, the statement obviously did not justify his proposal since overtaxing some taxpayers was no reason to undertax others. See id. at 132. When pressed, Beecher indicated that even a lucky prospector who made a strike on his first attempt (and therefore had no expenses exploring unproductive wells) should be provided with additional tax benefits. See SFC Hearings III (1918) at 50.

[67] See SFC Hearings III (1918) at 54-55, 86-88; see also W&M Hearings (1918) at 447, 451-52 (Shea), 456-57 (Hayes), 460-61 (W. V. Thraves), 479 (Oil & Gas Assns.); SFC Hearings I (1918) at 368 (National Petroleum War Service Comm.), 382 (Shea).

[68] Beecher claimed that because of high taxes, it was more profitable for an oil producer "to let his oil remain in the ground," and let his property "lie[] fallow until after the war" rather than to sell or develop it. SFC Hearings III (1918) at 55, 88. Under the "rule of capture," however, the party who brings oil out of the ground is treated as its owner, regardless of where it originates. See Westmoreland Natural Gas Co. v. DeWitt, 18 A. 724, 725 (Pa. Sup. Ct. 1889); Hardwicke (1935) at 393. Given the fugacious nature of oil, any discovery, if undeveloped, might potentially be poached away by an owner of a neighboring property. Thus, delaying development (or sale) of a discovery really wasn't an option. See W&M Hearings (1918) at 457 (Hayes); SFC Hearings I (1918) at 360 (Sen. Gore); SIMON (1979) at 100 n.24, 132. High taxes, however, might have deterred discovery efforts in the first place. See W&M Hearings (1918) at 447 (Shea).

[69] See SFC Hearings III (1918) at 46, 82-83. Beecher's proposal thus treated discoveries after March 1, 1913, comparably to those before that date (whose depletion was determined by the greater of cost or value of the discovery on that date). Although some have suggested that this was Congress's reason for adopting Beecher's rule (see Cassanos (2012) at 613; Mielke (1966) at 160; Shows (1974) at 1127), Beecher did not make that point and it was raised only cryptically during the hearings. See W&M Hearings (1918) at 497-98 (West), 504 (A. E. Kenney).

[70] See SFC Hearings III (1918) at 46, 88. Earlier witnesses had provided similar assurances. See W&M Hearings (1918) at 458 (Hayes); SFC Hearings I (1918) at 378 (Shea). During Senate debate on the 1916 Act, however, the floor leader of the tax bill explained that one reason for the committee's proposal was that "[n]o living human being would know how to [value an oil and gas deposit in the ground]." 53 Cong. Rec. 13286 (Aug. 28, 1916) (Sen. Williams (D.-Miss.)). For description of the difference between the "market value" of a deposit (based on the "willing-buyer/willing-seller" test) and its "theoretical value" (based on "scientific" analysis of the amount of the deposit, the cost of production, and the likely sales price), and some of the problems encountered by the government and industry in performing the valuations, see Shulman (2011) at 293-300.

[71] See SFC Hearings III (1918) at 47; cf. Interior (1952) at 32-33 (exempting native value of the find); 53 Cong. Rec. 13287 (Aug. 28, 1916) (Sen. Chilton)) (exempting profits prior to refining and development of resource).

[72] See SFC Hearings III (1918) at 90. Shulman and Starkman both suggest that the industry was behind the proposals. See Shulman (2011) at 291; Starkman (2011) at 186. Neither author, however, mentions Beecher's role. Moreover, during the hearings, the committee asked Beecher to comment on several possible amendments, including those promoted by the industry. In general, the amendments provided less generous tax benefits than Beecher's proposals, and he thought they were inadequate. See SFC Hearings III (1918) at 48-50, 52-55; but see Oil Industry (1918) (describing position similar to Beecher's in industry publication).

[73] See SFC Hearings III (1918) at 93-94.

[74] See 1918 Act, §§ 214(a)(10), 234(a)(9), 320(a)(3) (applying rule for purposes of individual and corporate income tax and excess-profits tax). The 1918 Act retained the rule specified in 1916 that properties acquired prior to March 1, 1913, were depleted based on the value of the property on that date.

[75] SFC Rep. (1918) at 6, 8; see JCT Depletion Rep. (1929) at 11; JCT Depletion History (1950) at 1-3. To tailor the rule to benefit wildcatters (and not large oil and gas producers), the allowance was available only if the natural resource was "not acquired as the result of purchase of a proven tract or lease," and only if "the fair market value of the property is materially disproportionate to the cost." It was expected that large oil and gas producers that acquired their properties from a wildcatter would simply claim depletion allowances based on their cost. See 1918 Act, §§ 214(a)(10), 234(a)(9), 320(a)(3); cf. SFC Hearings III (1918) at 44, 48, 82-83, 85, 100.

[76] See 1918 Act, §§ 211(b), 337. This provision was also intended to benefit only wildcatters. Cf. SFC Hearings III (1918) at 55, 86 (Beecher). Several witnesses other than Beecher had urged this specific change. See SFC Hearings I (1918) at 359 (Covington), 368-69 (National Petroleum War Service Comm.), 376 (Shea).

[77] See supra note 58; Oil Industry (1917a); Oil Industry (1917b); Oil Industry (1918). An amendment approved on the House floor provided a special tax benefit to the oil industry only with respect to the EPT. See 56 Cong. Rec. 10539 (Sep. 20, 1918) (Cong. White (D.-Oh.)).

[78] See 1918 Act, §§ 214(a)(9), 234(a)(8); W&M Rep. (1918) at 10; SFC Rep. (1918) at 7-8; 57 Cong. Rec. 3132 (Feb. 11, 1919) (Sen. Simmons (D.-N.C.)); Holmes (1921) at 153-57. A similar provision had been included in the 1916 Act for purposes of the munitions tax. See 1916 Act, § 302(f).

[79] See Couzens Rep. (1926) at 134. According to the Couzens Report, the purpose of the provision was "to stimulate the production of articles contributing to the [war]." Given that enactment of the provision did not occur until after the Armistace, a better explanation was that it provided relief to the affected taxpayers.

[80] See BLAKEY & BLAKEY (1940) at 186-87 n.119; Roper (1921) at 164 (check).

[81] BLAKEY & BLAKEY (1940) at 540 (table 32). See, e.g., 1918 Act, § 1301; W&M Rep. (1918) at 38-39. In 1926, Congress also authorized creation of the Office of General Counsel for the BIR as well as other high-ranking positions within the BIR. See 1926 Act, § 1201. These were part of the "modern staff of [government] experts" assembled to implement the tax laws passed during the war and to gather information necessary to determine future policy. See BROWNLEE (2004) at 69-72; Brownlee (1990); Mehrotra (2010).

[82] See W&M Hearings (1920) at 41 (statement of T.S. Adams) (reporting over 100 percent turnover each year at BIR); SFC Hearings (1926) at 137 (statement of A.W. Gregg, Solicitor of BIR); Adams (1926) at 29-30; Adams (1924a) at 314-15; 67 Cong. Rec. 523 (Dec. 8, 1925) (Cong. Green (R.-Iowa), Chmn. of W&M Comm.); Mehrotra (2010) at 195. [Mention initial restrictions placed on turnover of BTA personnel in 1924 and 1926.]

[83] See JCT-1-12, pp. 77, 81, for some data on caseload backup in BIR [get title]; PAUL (1954) 127; Blakey (1928) at 116; BLAKEY & BLAKEY (1940) at 533-34; WALTMAN (1985) at 60; 67 Cong. Rec. 3012-13 (Jan. 30, 1926) (Senators Reed (R.-Pa.) and King (D.-Ut.)).

[84] The number of individual income tax returns during the war increased by a factor of 14. See Treas. Rep. (1916) at 17; Treas. Rep. (1919) at 945-49 (describing problems faced by BIR to audit returns from taxable years 1915-17); Treas. Rep. (1923) at 30; BLAKEY & BLAKEY (1940) at 530-32.

[85] See WRA of 1917, § 213; Treas. Rep. (1919) at 937-38, 940-41; HULL (1948) at 93; Brownlee (1993) at 335, 349-51 (claiming that Board "marked the first significant shift of tax policy away from Congress, and toward the executive branch").

[86] Upon request of any interested taxpayer, the Commissioner was required to "submit to the Board any question relating to the interpretation or administration" of the income tax and EPT. 1918 Act, § 1301(d)(2); see Treas. Rep. (1920) at 145-46, 499, 1104-06; BLAKEY & BLAKEY (1940) at 168, 188.

[87] See Treas. Rep. (1921) at 1486-87; SCHMECKEBIER & EBLE (1923) at 57.

[88] See 1924 Act, § 900; W&M Rep. (1924) at 7-8; SFC Rep. (1924) at 8-9; BLAKEY & BLAKEY (1940) at 544; Selko, pp. 276-78 [get full cite]; Talbert (1921) at 250-61; 1921 Act, § 228 (giving taxpayers the right to appeal proposed deficiency in tax prior to assessment). The idea for the BTA was raised in the Senate right after its final vote on the 1921 Act. See BLAKEY & BLAKEY (1940) at 217.

[89] See 1926 Act, §§ 1000-1005; W&M Rep. (1926) at 17-21; SFC Rep. (1926) at 34-38.

[90] See 1942 Act, § XX; 1969 Act, § XX.

[91] See 1918 Act, § 1303; BLAKEY & BLAKEY (1940) at 169, 188.

[92] See W&M Rep. (1918) at 39.

[93] See 1924 Act, § 1101; SFC Rep. (1924) at 46-47. The idea for a drafting service grew out of a program sponsored by Columbia University under which Middleton Beaman and several others began working as volunteer aides in Congress in 1916 to help with legislative drafting. Beaman's first assignment was for the House Committee on Merchant Marine and Fisheries, with House majority leader and Ways & Means Committee Chairman Kitchin initially reluctant to utilize the help of "university professors." Soon, however, the duties of Beaman (and the others) became "for sheer lack of time confined for the most part to revenue matters before the Ways & Means Committee." Lee (1929) at 385-86. In that capacity, the assistants helped draft the 1916 Act, both of the 1917 Acts, and the 1918 Act. When Congress finally approved the drafting service in 1918 (and appointed Beaman to head the office), Kitchin was a strong supporter and specifically referenced the extreme difficulty with the excess/war profits tax title as justification. See 56 Cong. Rec. (App.) 661, 701-02 (Sep. 7-8, 1918); HULL (1948) at 80; Brownlee (1993) at 332-33 n.22. Beaman eventually served as House Legislative Counsel for 30 years.

[94] See Jones (1952) at 442 ("[t]he finest draftsmanship in the world cannot bring about the adoption of wise legislative policies if the elected members of a representative body are mediocrities or worse").

[95] See 1921 Act, § 1327; W&M Rep. (1921) at 16; SFC Rep. (1921) at 33; SPAULDING (1927) at 205-06; BLAKEY & BLAKEY (1940) at 209, 218-19, 222.

[96] See Treas. Rep. (1925) at 59-60.

[97] See H. Doc. No. 103, 68th Cong., 1st Sess. (1923). The Board terminated October 24, 1924.

[98] See W&M Hearings (1925) at 1003. Adams had written about this idea one year earlier, and had described the commission as including representatives of labor, agriculture, big business, tax experts, and Congress. See Adams (1924a) at 312, 318. In the same year, in a strongly worded "open letter" to Cong. Green, Chairman of the Ways &

Means Committee, he stated that unless the income tax was reformed within the next four or five years, it would be beyond reform. See Adams (1924b) at 131.

[99] H.R. 1, 69th Cong., 1st Sess. § 1203 (1925) (as passed by the House); see W&M Rep. (1926) at 23; W&M Hearings (1925) at 1003 (Treadway); 67 Cong. Rec. 696 (Dec. 11, 1925) (Treadway); BLAKEY & BLAKEY (1940) at 258.

[100] As Ways & Means Committee Chairman Green stated in the House debate on the bill, "[i]t was not in the minds of the committee that this commission would be permanent or that eventually the members of the commission would be put on a salary basis." 67 Cong. Rec. 525 (Dec. 8, 1925).

[101] In a 1923 address to the National Tax Association, Professor Adams understood this view but was unsure whether it was correct:

> Obviously, the present administrative congestion and the delay which accompanies it are in part temporary. They are caused in large part by the abnormal difficulties presented by the excess profits tax and by provisions . . . such as those relating amortization, inventory losses, valuation for depletion . . ., which are either temporary or which, once properly settled, will not have to be re-done. But this is not the whole of the picture.

Adams (1924a) at 313; see also Taussig (1917) at 27 (war problem); 67 Cong. Rec. 3503 (Feb. 8, 1926) (Sen. King (D.-Ut.)) (describing BIR administrative problems as "a condition largely superinduced by reason of the war, supplemented by reason of the vast accumulation of returns and the chaos which followed the failure to have a proper organization, and the drifting into the [BIR] of many men of a low moral character"); SFC Rep. (1926) at 14.

[102] 67 Cong. Rec. 744 (Dec. 12, 1925) (Cong. Chindblom (R.-Ill.)).

[103] See id. at 670-71 (Dec. 10, 1925) (Cong. Bacharach (R.-N.J.)), 697 (Dec. 11, 1925) (Cong. Treadway (R.-Mass.)), 712 (Dec. 11, 1925) (Cong. Lazaro (D.-La.)).

[104] In 1928, when he reviewed his version of the events for the Senate, Couzens disputed the characterization of his disagreement with Mellon as a "feud." See 69 Cong. Rec. 6253 (Apr. 12, 1928). I gratefully acknowledge the help of Professor Christopher Hanna in providing some initial leads about the feud.

[105] Newberry vacated his Senate seat following his conviction, but was reseated after the Supreme Court's decision in Newberry v. U.S., 256 U.S. 232 (1921). Newberry's supporters then barely defeated a Senate resolution to unseat him. See 62 Cong. Rec. 1116 (Jan. 12, 1922). Following the November, 1922 elections, when it appeared that a renewed effort in the new Congress to unseat him would be successful, Newberry resigned. Newberry's opponents coined the term, "Newberryism," to refer to the buying of public office. See HAYNES (1938) at 137-44; BARNARD (1958) at 134-38; MURRAY (1973) at 82. ERVIN (1935) provides an extended defense of Newberry. DUNBAR (1970) at 543-45 describes the unusual campaign in 1918 between Newberry and Ford and its possible impact on President Wilson's failed League of Nations initiative.

[106] See BARNARD (1958) at 6-8, 67-69, 89-94, 167; WATTS (2005) at 91-101; LACEY (1986) at 68-69, 76-80; SWARD (1948) at 43-46; TUCKER & BARKLEY (1932) at 238-39.

[107] See LACEY (1986) at 176; Couzens v. Comm'r, 11 B.T.A. 1040, 1055-56 (1928). Couzens may have sold too cheaply. A few years after the 1919 sale, Ford received a $1 billion offer for the entire company, representing a share value of four times what he paid Couzens. See LACEY (1986) at 176; SWARD (1948) at 73; infra note 181.

[108] See BARNARD (1958) at 106, 113, 116, 149 (wealthiest person in Senate); CANNADINE (2006) at 345; Kent (1927) at 49 (Mellon and Couzens are "two richest men in public life in this or any country, at this or any time").

[109] David Cannadine, one of Mellon's biographers, has estimated that Mellon's wealth in 1921 was roughly $135 million (about $1.7 billion today). See CANNADINE (2006) at 255. An earlier biography, written in 1929, estimated his wealth at that time as between $600-800 million ($7.7-10.3 billion today). See LOVE (1929) at 37.

[110] See CANNADINE (2006) at 310, 322; see also FERRELL (1998) at 168-69; HERSH (1978) at 223; LEUCHTENBURG (1958) at 96; MURRAY (1973) at 31; SCHRIFTGIESSER (1948) at 107 (Harding "completely awed by" Mellon), 170.

[111] The 1921 Act reduced the top surtax rate from 65 percent (on income over $1 million) to 50 percent (on income over $200,000). See 1921 Act, § YY. The top rate was further reduced to 40 percent (on income over $500,000) in 1924 and 20 percent (on income over $100,000) in 1926. See 1924 Act, § YY; 1926 Act, § YY.

[112] See Treas. Rep. (1924) at 6-12, 376-92; MELLON (1924) at 13; Blakey (1924) at 483. It is unclear how much of Mellon's information simply reflected tax system loopholes that were being exploited by well-advised, high-income taxpayers.

[113] Mellon had made essentially the same arguments in 1921 and continued to make them after passage of the 1924 Act. See Treas. Rep. (1922) at 14-21, 25-26, 353-54, 367, 372; Treas. Rep. (1923) at 12-17, 318-24; Treas. Rep. (1925) at 4-11, 264-67; Treas. Rep. (1926) at 350-51.

[114] See MELLON (1924) at 9-10; Murnane (2004) at 820-21; Smiley & Keehn (1995) at 294-95.

[115] See Treas. Rep. (1920) at 24; Treas. Rep. (1921) at 33-34, 36-38; Murray (1978); Rader (1971) at 421; CANNADINE (2006) at 286-87, 315; W&M Hearings (1920) at 10-11 (Adams' statement); Murnane (2004) at 821, 826-31, 837. In 1919 and

1920, the Treasury recommended that the applicable surtax rate be determined after inclusion of any interest income from tax-exempt securities. See Treas. Rep. (1920) at 24-25; Treas. Rep. (1921) at 38. The principal carryover staffers were S. Parker Gilbert, who first served as an Assistant Secretary of the Treasury in the Wilson Administration and then served as Undersecretary of the Treasury until November, 1923, and Thomas Sewall Adams, who was hired as a key Treasury advisor in 1917 and continued under Mellon. See Treas. Rep. (1924) at xix, xxii; Brownlee (1990) at 408, 427-31; Murray (1978).

[116] The disagreement was touched off by a solicitation the *New York Times* made to Couzens and many other lawmakers. See BARNARD (1958) at 158; "Trend in Congress Is to Mellon Plan," N.Y. Times, Nov. 14, 1923, p.1; "Lawmakers Express Views on Tax Cuts," N.Y. Times, Nov. 17, 1923, p.4.

[117] BARNARD (1958) at 144-45. Couzens also opposed Harding's positions on government ownership of the railroads and prohibition, and there was uncertainty (which Couzens seemed to fuel) about whether he was even a Republican. See id. at 137, 148-53, 169-70.

[118] See BARNARD (1958) at 147, 155, 168; PAUL (1954) at 138-39; Olssen (1980) at 247 (Table 2), 254. Steven Watts attributes some of Couzens' progressive attitudes to "pangs of guilt over his wealth." See WATTS (2005) at 189-91. Couzens, however, did not agree with the pacifism and isolationism favored by some Progressives. See BARNARD (1958) at 154. His eventual split with Ford apparently turned on that issue. See WATTS (2005) at 226-27; LACEY (1986) at 166-67.

[119] See CANNADINE (2006) at 281; GOLDBERG (1999) at 50; MURRAY (1973) at 45, 53-58; RATNER (1980) at 407-08; BURNER (1968) at 162-63; Murnane (2004) at 828; Rader (1971) at 422-23, 426-27.

[120] See 1913 Act, § II.A(2) and 1916 Act, § 3 (required flow-through of certain corporate gains and profits for purposes of the surtax); WRA of 1917, § 1206(2) (corporate tax on certain undistributed income in excess of the reasonable requirements of the business); 1921 Act, § 220 (corporate tax on net income of certain corporations with improper accumulations). This last rule turned out to be very flawed because Congress overlooked the fact that "net income" specifically excluded dividends received from other corporations. Thus, taxpayers could form holding companies to invest passively in, and receive and accumulate dividends from, other corporations — perhaps the prime example of surtax avoidance that Congress was trying to stop — and suffer no penalty. The main weakness of all of the rules was the difficulty identifying which corporations should be subject to the special treatment.

[121] See "Couzens Contests Mellon's Figures," N.Y. Times, Jan. 11, 1924, p.2; "Couzens Invites Mellon to Debate," N.Y. Times, Jan. 13, 1924, p.3; Blakey (1924) at 485-86.

[122] "Couzens Invites Mellon to Debate," N.Y. Times, Jan. 13, 1924, p.3 (emphasis added).

[123] By contrast, Andrew Mellon reportedly paid $1.9 million in income tax for each of 1919 and 1924 and $1.2 million for 1923. See CANNADINE (2006) at 256; BROWNLEE (2004) at 73 n.13; 67 Cong. Rec. 216 (Mar. 14, 1925) (Sen. Ernst).

[124] Cf. FERRELL (1998) at 172 (characterizing Couzens' disagreement with Mellon as "a peculiar mixture of public and private concern"). Couzens later supported repeal of the tax exemption of state and local bond interest. XX Cong. Rec. 8005 (May 27, 1936) (check).

[125] "Mellon Reproves Couzens on Taxes," N.Y. Times, Jan. 16, 1924, p.2.

[126] Id. Both Mellon and Couzens showed an understanding of the implicit tax imposed on state and local interest. Mellon emphasized, however, that the implicit tax paled in comparison to the explicit tax that would have applied if Couzens had made taxable investments. See id.; "Challenges Mellon to Tell Surtax Gain," N.Y. Times, Jan. 20, 1924, p.5; "Mellon Again Cites High Surtax Losses," N.Y. Times, Jan. 26, 1924, p.2.

[127] See CANNADINE (2006) at 345. Before he accepted the Treasury position, Mellon had been advised that he would have to resign his directorships but could continue to own stock in companies other than banks. There is some question, however, whether Mellon contravened the spirit of this rule by continuing to engage, directly or indirectly, in the business of his companies while serving as Treasury Secretary. See id. at 271-74, 297-99, 323, 348.

[128] "Challenges Mellon to Tell Surtax Gain," N.Y. Times, Jan. 20, 1924, p.5.

[129] "Mellon Again Cites High Surtax Losses," N.Y. Times, Jan. 26, 1924, p.2.

[130] See 1/23/24 letter from Mellon to Couzens in LOC-Finley (box #65) ("James Couzens" file). Mellon reiterated the point that he would not have discussed Couzens' personal investments had Couzens not mentioned them himself.

[131] See CANNADINE (2006) at 106, 294.

[132] See 65 Cong. Rec. 1203-04 (Jan. 21, 1924).

[133] See id. at 1203-04 (Couzens); "Chiefs Sound Out President on Tax Compromise Plan," Wash. Post, Jan. 22, 1924, p.1. It is not clear what Couzens meant by his reference to 1924 since the Senate colloquy occurred on January 21, 1924.

[134] See 1/4/24 letter from Henry Morgan (Couzens' general secretary) to Couzens in LOC-Couzens (box #26).

[135] See 67 Cong. Rec. 216 (Mar. 14, 1925) (Sen. Ernst); id. at 220 (confirmed by Couzens). The revelation was permissible because the 1924 Act had made the information public. See infra note 254.

[136] See 67 Cong. Rec. 220-21 (Mar. 14, 1925). Couzens made a very large charitable contribution in 1919 and his taxes in later years may have been affected to some extent by the carryover of that deduction or additional contributions. See Couzens v. Comm'r, 11 B.T.A. 1040, 1055 (1928); "Challenges Mellon to Tell Surtax Gain," N.Y. Times, Jan. 20, 1924, p.5.

[137] See O'CONNOR (1933) at 134 (claiming (without providing any specific evidence) that Mellon had his subordinates examine Couzens' tax returns).

[138] Senators McKellar (D.-Tenn.), Reed (D.-Mo.), and Carraway (D.-Ark.) all suggested that Mellon had disclosed Couzens' confidential tax information. See 65 Cong. Rec. 1204-11 (Jan. 21, 1924); text accompanying infra note 245.

[139] See 65 Cong. Rec. 4017 (Mar. 12, 1924); 69 Cong. Rec. 6253 (Apr. 12, 1928).

[140] S. Res. 168, 65 Cong. Rec. 2881 (Feb. 21, 1924) (introduced by Couzens).

[141] See "Income Tax Graft Alleged in Bureau," N.Y. Times, Mar. 22, 1924, p.1; 3/22/24 Treasury press release in NARA-Treasury (box #198) ("BIR investigation, 1923-32" file).

[142] MURRAY (1969) at 479-82; see, generally, FERRELL (1998) at 43-51; MURRAY (1973) at 102-29;

[143] See BLAKEY & BLAKEY (1940) at 542; HAYNES (1938) at 565.

[144] See 65 Cong. Rec. 4023 (Mar. 12, 1924); MCCOY (1967) at 224.

[145] See 65 Cong. Rec. 6187-88 (Apr. 12, 1924). Adams wrote about the commission in 1924 and suggested it to the Ways & Means Committee in 1925. See supra note 98.

[146] See 65 Cong. Rec. 6187 (Apr. 12, 1924) (Watson); "Couzens, Deserted by Colleagues, Has Inquiry by Himself," Wash. Post, Apr. 3, 1924, p.3.

[147] See 67 Cong. Rec. 217 (Mar. 14, 1925) (Sen. Ernst); BARNARD (1958) at 161.

[148] See 3/22/24 Treasury press release and 3/25/24 letter from Mellon to Sen. Watson, both in NARA-Treasury (box #198) ("BIR investigation, 1923-32" file); "Mellon Offers Aid in Revenue Inquiry, N.Y. Times, Mar. 25, 1924, p.33; "Took No Tax Favors, Declares Mellon," N.Y. Times, Mar. 26, 1924, p.32.

[149] See 65 Cong. Rec. 7904 (May 6, 1924) (Sen. Keyes). Couzens' original resolution had authorized the hiring of assistants. See S. Res. 168, 65 Cong. Rec. 2881 (Feb. 21, 1924); 69 Cong. Rec. 6254 (Apr. 12, 1928) (Couzens). The purpose of the omission may have been to incapacitate the investigation before it even began.

[150] See "Hires Heney to Push Tax Bureau Inquiry," N.Y. Times, Apr. 10, 1924, p.1; 65 Cong. Rec. 6102 (Apr. 11, 1924) (Sen. Jones); 65 Cong. Rec. 6188-89 (Apr. 12, 1924) (Sen. Watson). Couzens later conceded that his act was in violation of the law, but claimed that none of the other four members of the committee, all lawyers, had indicated that the action was illegal and that not being a lawyer, he "knew nothing about it." See 69 Cong. Rec. 6254 (Apr. 12, 1928); BARNARD (1958) at 162.

[151] See "Hires Heney To Push Tax Bureau Inquiry," N.Y. Times, Apr. 10, 1924, p.1. For background on Heney, see O'CONNOR (1933) at 145; HERSH (1978) at 228; FERRELL (1998) at 172. At the start of his work, Heney reportedly told Couzens, "I've never started an investigation with so much good material. . . . This is worse than Teapot Dome." O'CONNOR (1933) at 145.

[152] See 65 Cong. Rec. 6087-88 (Apr. 11, 1924) (reproducing Mellon letter to President Coolidge); "Mellon Assails Private Inquisition," N.Y. Times, Apr. 12, 1924, p. 1; 4/12/24 text of speech delivered by Mellon to Pittsburgh Chamber of Commerce in NARA-Treasury (box #198) ("BIR investigation, 1923-32" file); "Treasury's Morale Gone, Says Mellon," N.Y. Times, Apr. 13, 1924, p. 1.

[153] See 69 Cong. Rec. 6254-55 (Apr. 12, 1928) (Couzens); see also 65 Cong. Rec. 6196-97 (Apr. 12, 1924) (Sen. McKellar).

[154] See id. at 6189-90 (Watson), 6197 (McKellar); "President Backed by G.O.P. Senators in New Onslaught," Wash. Post, Apr. 13, 1924, p.2; 65 Cong. Rec. 7911-13 (May 6, 1924) (Watson); BARNARD (1958) at 162; MCCOY (1967) at 224; HERSH (1978) at 228. For Mellon's relationship with Pinchot during this period, see CANNADINE (2006) at 294-95, 341-42; "Pinchot," Balt. Sun, Apr. 24, 1924, p.10.

[155] 65 Cong. Rec. 6087 (Apr. 11, 1924); see HERSH (1978) at 228-29; O'CONNOR (1933) at 145-47.

[156] "Sharp Rebuke by Coolidge," N.Y. Times, Apr. 12, 1924, p.1. Some Senators soon responded in similarly hyperbolic terms. See 65 Cong. Rec 6358-73 (Apr. 15, 1924); "Coolidge's Message of Rebuke Assailed in Senate by Glass," N.Y. Times Apr. 16, 1924, p.1; 65 Cong. Rec. 6449-54 (Apr. 16, 1924); "Lodge Tells Senate Coolidge Is Right," N.Y. Times, Apr. 17, 1924, p.1; HAYNES (1938) at 563-64, 982 (describing how Coolidge message "called forth a storm of denunciation in the Senate").

[157] See 65 Cong. Rec. 6102 (Apr. 11, 1924) (Sen. Jones) (introducing S. Res. 211); 65 Cong. Rec. 7934 (May 6, 1924) (approving S. Res. 211). The resolution was silent as to Heney's status and there was uncertainty whether he would be retained, but he eventually was replaced. See "Coolidge Accused by Senator Norris of Playing Politics," N.Y. Times, May 7, 1924, p.1 (Heney to be replaced); MCCOY (1967) at 226 (same); BARNARD (1958) at 164-65 (same); but see "Senate Is Plunged in Stormy Debate by Liquor Charges," Wash. Post, May 7, 1924, p.1 (Heney to be hired); "Senate Routs Coolidge;

To Pay Dry Unit Quizzer," Chi. Daily Tribune, May 7, 1924, p.2 (same). According to Haynes, the public sided with Coolidge. See HAYNES (1938) at 563-64.

[158] See 4/11/24 letter from Adams to Sen. Watson in NARA-Treasury (box #198) ("BIR investigation, 1923-32" file).

[159] See "Couzens Forces Revenue Inquiry," N.Y. Times, July 26, 1924, p.3; "Biparty Coalition Forces Resumption of Revenue Inquiry," Wash. Post, July 26, 1924, p.1; "Mellon Dry Inquiry To Be Staged While Campaign Is Fought," Wash. Post, July 27, 1924, p.1.

[160] See 7/28/24 letter from Undersecretary Winston to Mellon in NARA-Treasury (box #198) ("BIR investigation, 1923-32" file) (emphasis added); 7/31/24 letter from Winston to Mellon in NARA-Treasury (box #261) ("letters sent to Mellon in Europe, 1924-27" file).

[161] "Start Revolt on Butler," N.Y. Times, Jun. 12, 1924, p.1 (describing Watson's campaign for VP); "'Civil Service' in Indiana," N.Y. Times, July 24, 1924, p.12 (describing controversy involving Indiana Prohibition Director); "Revenue Inquiry Will Resume Sept. 2," N.Y. Times, July 27, 1924, p. 13 (mentioning alternate explanation); "Watson Opens Fire on Mellon in Washington," N.Y. Sun, July 29, 1924, p.XX in NARA-Treasury (box #261) ("letters sent to Mellon in Europe, 1924-27" file) (describing how Watson "angrily reproached Mellon" at Republican Convention); "Did Watson Do It?," N.Y. Times, July 31, 1924, p. 12 (describing alternate explanation).

[162] See Couzens v. Comm'r, 11 B.T.A. 1040, 1086-87 (1928); "Ask Couzens to Pay $10,000,000 in Taxes; He Charges Revenge," N.Y. Times, Mar. 10, 1925, p.1.

[163] The BIR's letter stated erroneously that the attached memorandum "makes out a prima facie case of *too low* a March 1, 1913, value." See *Couzens v. Comm'r*, supra at 1086-87 (emphasis added).

[164] See 67 Cong. Rec. 59-61 (Mar. 9, 1925); "Ask Couzens to Pay $10,000,000 in Taxes; He Charges Revenge," N.Y. Times, Mar. 10, 1925, p.1.

[165] "Ernst Starts Bitter Row," N.Y. Times, Mar. 15, 1925, p. 1; see 67 Cong. Rec. 193-94 (Mar. 13, 1925); 67 Cong. Rec. 220-28 (Mar. 14, 1925); BARNARD (1958) at 177-78.

[166] See 65 Cong. Rec. 6363 (Apr. 15, 1924).

[167] 67 Cong. Rec. 224 (Mar. 14, 1925).

[168] See CANNADINE (2006) at 347-48; BARNARD (1958) at 166 (describing "incredibly vindictive counterattack"); HERSH (1978) at 231 (asserting Mellon made Couzens "wriggle"); TUCKER & BARKLEY (1932) at 232 (claiming those within Administration denounced action as "spite work"); STOKES (1940) at 176-77; Kent (1927) at 50-51. Later authors have used the incident to stress the outrageous behavior of the tax authorities generally. See BURNHAM (1989) at 291-96; DAVIS (1997) at 175-76; STARKMAN (2008) at 210-13.

[169] See CANNADINE (2006) at 348. [mention Mellon's tax case.]

[170] See *Couzens v. Comm'r*, supra at 1172 (finding that value of stock was $10,000 per share (more than Couzens claimed)). After the tax decision was issued, Couzens called for Mellon's resignation. See 69 Cong. Rec. 5145 (Mar. 22, 1928) (introducing S. Res. No. 173). According to Cannadine, "Couzens's hatred of Mellon was now incandescent: he was more determined than ever to bring the secretary down." CANNADINE (2006) at 348.

[171] "U.S. Tomorrow Begins Defense in $31,000,000 Claim on Ford Shares," Wash. Post, Feb. 13, 1927, p.4. Less hyperbolically, the same story also described the case's hearings as "last[ing] longer than any other tax case," with the reader being reminded that the BTA was created less than three years prior to the hearing. Counsel for the taxpayers included such luminaries as Joseph E. Davies (first chairman of the Federal Trade Commission and eventual Ambassador to the former Soviet Union) and John W. Davis (U.S. Solicitor General under Wilson, Democratic presidential nominee in 1924, and prominent advocate before the U.S. Supreme Court). In contrast, the lead counsel for the government, Alexander W. Gregg (the BIR's solicitor), was only 27 years old at the time of the trial. See "Opening of Ford Tax Trial Bares Epic of Business," Chi. Daily Tribune, Jan. 12, 1927, p.8; "A Youthful David Tilts for Uncle Sam," N.Y. Times, Jan. 30, 1927, p.SM9.

[172] The third person was John D. Rockefeller. See MURRAY (1969) at 179. The BTA made extensive findings on the origins of the Ford Motor Company. See *Couzens v. Comm'r*, supra at 1094-1146.

[173] See id. at 1052-53.

[174] See id. at 1086; 67 Cong. Rec. 59-60 (Mar. 9, 1925); 69 Cong. Rec. 6258 (Apr. 12, 1928).

[175] See 3/17/25 and 3/20/25 letters from Couzens to Henry Morgan (his general secretary), both in LOC-Couzens (box #144) ("income taxes" file).

[176] See 3/9/25 Treasury press release in LOC-Finley (box #78) ("taxation: tax refunds" file #2) (making claim); 3/14/25 letter from Arthur Lacy (Couzens' attorney) to Couzens and 3/27/25 Couzens press release, both in LOC-Couzens (box #144) ("income taxes" file).

[177] See 3/17/25 letter from Lacy to Couzens in LOC-Couzens (box #143) ("Ford Motor Co. stock sales" file #1).

[178] See 3/10/25 and 3/17/25 letters from Lacy to Couzens, both in LOC-Couzens (box #143) ("Ford Motor Co. stock sales" file #1); 3/14/25 and 3/31/25 letters from Lacy to Couzens, both in LOC-Couzens (box #144) ("income taxes" file); 1/2/26 letter from Lacy to Couzens in LOC-Couzens (box #41). For background on Dover's brief and controversial tenure at the Treasury, see CANNADINE (2006) at 284-85; HERSH (1978) at 214-18; MURRAY (1969) at 303-04; "Mellon Allays Fears of Revenue Employes (sic)," N.Y. Times, Apr. 6, 1922, p.8; "Demoralizing the Public Service," N.Y. Times, Apr. 7, 1922, p.14; "Fist Fight Marks Treasury Job Row," N.Y. Times, May 26, 1922, p.1; "Dover Resignation in Harding's Hands," N.Y. Times, Jul. 12, 1922, p.10.

[179] Couzens made this assertion when he first met with Blair. See *Couzens v. Comm'r*, supra at 1065-66, 1087. Although there was apparently no explicit agreement by Ford to pay the taxes, the purchase price for the stock was not resolved until *after* the BIR's opinion of the 3-1-13 value of the stock was received and, therefore, the tax liability known. See *Couzens v. Comm'r*, supra at 1045, 1047-48; "Blair Summoned in Ford Tax Case," N.Y. Times, Feb. 6, 1927, p.8; 69 Cong. Rec. 6257 (Apr. 12, 1928) (Couzens); NEVINS & HILL (1957) at 109.

[180] There was considerable interest in Ford's political aspirations during this period, including whether he might oppose President Harding in 1924. See FERRELL (1998) at 53 (in the last moments before he died in 1923, "Harding was thinking of Ford").

[181] See 3/10/25 letter from Lacy to Couzens in LOC-Couzens (box #143) ("Ford Motor Co. stock sales" file #1); 3/31/25 letter from Lacy to Couzens in LOC-Couzens (box #144) ("income taxes" file); NEVINS & HILL (1957) at 105-10 (describing Ford's elaborate scheme to persuade minority shareholders to sell at below fair market value).

[182] See 1/2/26 letter from Lacy to Couzens in LOC-Couzens (box #41); "Tax Tip in Ford Suit Remains a Mystery," N.Y. Times Jan. 18, 1927, p.9 (reporting that Thompson had previously been employed by Ford); infra note 188.

[183] See 67 Cong. Rec. 193-94 (Mar. 13, 1925); "Couzens Assails Treasury's Tactics," N.Y. Times, Mar. 14, 1925, p.23; 3/27/25 Couzens press release in LOC-Couzens (box #144) ("income taxes" file); "Couzens Disputes Mellon Statement," N.Y. Times, Mar. 28, 1925, p.25.

[184] Couzens emphasized a committee disclosure (concerning the taxes of a prominent Republican fundraiser) that became front-page news the same morning of his meeting with Blair and Nash. See 69 Cong. Rec. 6255-56 (Apr. 12, 1928). Any connection between the story and the BIR's subsequent action, however, seems implausible; even assuming that Mellon and the BIR were apprised of and upset by the story, it would have required them to prepare the documentation presented to Couzens in a matter of a few hours.

[185] See *Couzens v. Comm'r*, supra at 1068-72.

[186] See 3/9/25 Treasury press release in LOC-Finley (box #78) ("taxation: tax refunds" file #2); "Ask Couzens to Pay $10,000,000 in Taxes; He Charges Revenge," N.Y. Times, Mar. 10, 1925, p.1; 67 Cong. Rec. 215-16 (Mar. 14, 1925) (Sen. Ernst); "Ernst Starts Bitter Row," N.Y. Times, Mar. 15, 1925, p.1. As if to show the veracity of the claim, there is a copy of the Feb. 19, 1925, issue of Cushing's Survey, with the story about the Senate debate highlighted, attached to the pertinent press release in Mellon's files. See LOC-Finley (box #78) ("taxation: tax refunds" file #2).

[187] See "Couzens Assails Treasury's Tactics," N.Y. Times, Mar. 14, 1925, p.23; 67 Cong. Rec. 223 (Mar. 14, 1925) (Couzens).

[188] See *Couzens v. Comm'r*, supra at 1066-68. The BTA did not name M. W. Thompson as the author of the 1922 memo, although this information had come out earlier and was apparently well known by almost all of the principals at the trial. See 67 Cong. Rec. 193 (Mar. 13, 1925) (Couzens); "Couzens Assails Treasury's Tactics," N.Y. Times, Mar. 14, 1925, p.23; 3/27/25 Couzens press release in LOC-Couzens (box #144) ("income taxes" file); "Couzens Disputes Mellon Statement," N.Y. Times, Mar. 28, 1925, p. 25; 1/17/27 letter from A.W. Gregg to Garrard Winston (Undersecretary of the Treasury) in NARA-Treasury (box #180) (trial transcript file) (explaining that although the attorneys for the taxpayers all knew that the 1922 and 1925 memos were both authored by M. W. Thompson, Gregg didn't realize it until the trial session, but Gregg had no doubt it was correct); "Watson Gave Tip on Ford Stock Tax," N.Y. Times, Feb. 11, 1927, p.2 (misidentifying author of 1922 memo as "W. H. Thompson").

[189] See BARNARD (1958) at 166; 62 Cong. Rec. 1115-16 (Jan. 12, 1922) (describing Watson's support for Newberry). For description of the *Chicago Tribune* dispute, see LACEY (1986) at 197-202.

[190] See 69 Cong. Rec. 6260 (Apr. 12, 1928).

[191] See *Couzens v. Comm'r*, supra at 1083-87; "Watson Gave Tip on Ford Stock Tax," N.Y. Times, Feb. 11, 1927, p.2.

[192] Cf. 1/3/34 Treasury draft memo in LOC-Finley (box #65) ("Couzens-Mellon controversy" file), p. 91.

[193] See 69 Cong. Rec. 6255 (Apr. 12, 1928) (Couzens); HERSH (1978) at 230.

[194] See 67 Cong. Rec. 59 (Mar. 9, 1925) (Couzens); 3/14/25 and 3/24/25 letters from Lacy to Couzens, both in LOC-Couzens (box #144) ("income taxes" file) (describing method as "asinine and ridiculous").

[195] See supra note 185.

[196] See Couzens trial transcript, dkt. no. 10438, Jan. 17, 1927 (AM session), p. 27-28 in NARA-Treasury (box #180) (trial transcript file).

[197] See 3/14/25 letter from Lacy to Couzens, 3/16/25 letter from Couzens to Morgan, 3/20/25 letter from Morgan to Couzens, and 3/23/25 letter from Couzens to Morgan, all in LOC-Couzens (box #144) ("income taxes" file).

[198] The parties eventually stipulated that Thompson was the "responsible person" who made the direct contacts with Mellon in 1925. See *Couzens v. Comm'r*, supra at 1083; Couzens trial transcript, dkt. no. 10438, Jan. 17, 1927 (PM session), p.1 in NARA-Treasury (box #180) (trial transcript file); "Tax Tip in Ford Suit Remains a Mystery," N.Y. Times, Jan. 18, 1927, p. 9. The trial discussion prior to the stipulation, however, suggests the likelihood of an intermediary, who may have been (again) Senator Watson. See Couzens trial transcript, dkt. no. 10438, Jan. 17, 1927 (AM session), pp.26-32 in NARA-Treasury (box #180) (trial transcript file) (suggesting that "responsible person" was *not* person who authored the memo); "Ford's Rise Traced to His Own Vision," N.Y. Evening Post, Jan. 18, 1927, p.1 (reporting that taxpayers' counsel believed that someone had engaged Thompson to "work up the tax case against Couzens"); 1/3/34 Treasury draft memo in LOC-Finley (box #65) ("Couzens-Mellon controversy" file), p. 89 (identifying Watson as having transmitted 1925 memo to Treasury). If Watson was involved, it may have related to Coolidge's nomination of Charles Beecher Warren to be attorney general, which was being considered by the Senate at exactly the same time as the 1925 events involving Couzens. See BARNARD (1958) at 175-77. Warren, a Michigan Republican, was opposed by Couzens, but President Coolidge apparently received Couzens' promise not to oppose Warren openly. Once the nomination began to be considered, however, Couzens changed his mind and the President was reportedly livid. Watson supported Warren and, of course, also had other grievances with Couzens, including their disagreement during the Heney episode. See "G.O.P. Injured by Warren Case, It Is Declared," Balt. Sun, Mar. 17, 1925, p.1; Kent (1927) at 54-55; "New Political Era Dawns," N.Y. Times, Jan. 12, 1925, p.1 (describing Coolidge meeting with Michigan Congressional delegation (including Couzens), who "reluctantly assented to the President's view [towards Warren]"); 67 Cong. Rec. 74-102 (Mar. 10, 1925) (describing Senate's rejection of Warren (by 41-39 vote), with Couzens opposed); 67 Cong. Rec. 250-75 (Mar. 16, 1925) (describing Senate's second rejection of Warren (by 46-39 vote), with Couzens again opposed).

[199] See HERSH (1978) at 213 (quoting view that Blair "just worshiped [Mellon]"); see also CANNADINE (2006) at 579-80 (quoting Blair's message to Mellon's children when Mellon passed away).

[200] See *Couzens v. Comm'r*, supra at 1066; "Testimony in Ford Tax Suit Questions Treasury Motives," Wash. Post, Feb. 11, 1927, p.1; "Watson Gave Tip on Ford Stock Tax," N.Y. Times, Feb. 11, 1927, p.2.

[201] See 3/17/25 letter from Lacy to Couzens in LOC-Couzens (box #143) ("Ford Motor Co. stock sales" file #1); 1/2/26 letter from Lacy to Couzens in LOC-Couzens (box #41).

[202] See "Watson Gave Tip on Ford Stock Tax," N.Y. Times, Feb. 11, 1927, p.2; *Couzens v. Comm'r*, supra at 1086-87.

[203] Blair testified that he did so as a "courtesy" to Couzens, but even a very pro-Mellon summary of events found in the Treasury's files admitted the inadequacy of this explanation. See "Watson Gave Tip on Ford Stock Tax," N.Y. Times, Feb. 11, 1927, p.2; 1/3/34 Treasury draft memo in LOC-Finley (box #65) ("Couzens-Mellon controversy" file), p. 90. Couzens commented upon the unusual procedure to his general secretary shortly after his meeting with Blair and Nash. See 3/11/25 letter from Couzens to Henry Morgan in LOC-Couzens (box #34); 69 Cong. Rec. 6255 (Apr. 12, 1928) (Couzens).

[204] See *Couzens v. Comm'r*, supra at 1087.

[205] See 69 Cong. Rec. 6255 (Apr. 12, 1928) (Couzens); Kent (1927) at 51.

[206] 3/11/25 letter from Couzens to Henry Morgan in LOC-Couzens (box #34).

[207] It is conceivable that Mellon and the BIR were simply giving Couzens a dose of his own medicine since Couzens' investigation had repeatedly urged the reopening of previously settled tax matters. See "U.S. Tomorrow Begins Defense in $31,000,000 Claim on Ford Shares," Wash. Post, Feb. 13, 1927, p.4 (Couzens received dose of own medicine); 67 Cong. Rec. 220 (Mar. 14, 1925) (Sen. Ernst) (pointing out irony). If true, this decision was incredibly stupid given its likely outcome. Another possibility is that the BIR simply felt obligated to present the new information since much of the criticism from the Couzens investigation related to the BIR's failure to prosecute claims vigorously. In his resignation letter, T. S. Adams described how the BIR was vulnerable to criticism regardless of whether it sided with the government or the taxpayer. See 4/11/24 letter from Adams to Sen. Watson in NARA-Treasury (box #198) ("BIR investigation, 1923-32" file).

[208] Kent (1927) at 51.

[209] *Couzens v. Comm'r*, supra at 1160.

[210] See id. at 1048-52, 1059-79, 1081-87, 1090-93; 4/11/24 letter from Adams to Watson in NARA-Treasury (box #198) ("BIR investigation, 1923-32" file). The BIR's best valuation of the Ford stock was the 1919 Roper valuation. It, however, was flawed because the person making the determination took into account post-1913 information, knew that the sale was contingent on a favorable valuation, and also knew the value desired by the taxpayers. The memo conveying the

recommended value to Roper indicated that it was "not too low to prevent the sale . . . [and] not too high to deprive the Government of a very substantial revenue." See *Couzens v. Comm'r*, supra at 1047-53.

[211] See SFC Hearings (1926) at 69-70, 73-74, 103.

[212] See id. at 68, 70-71, 74, 77, 79-80, 94, 139-41; Couzens Rep. (1926) at 5, 130; 67 Cong. Rec. 3772 (Feb. 11, 1926) (Couzens). The committee split 3-2, with Couzens siding with the two Democrats to constitute the majority. See Couzens Rep. (1926) at XX (Minority Views).

[213] See SFC Hearings (1926) at 160-61, 171.

[214] See 1918 Act, §§ 214(a)(9), 234(a)(8).

[215] See SFC Hearings (1926) at 71-72, 104-06, 126-27; Couzens Rep. (1926) at 5, 146-47, 149-50, 154-55, 168-70.

[216] See 1918 Act, §§ 214(a)(9), 234(a)(8).

[217] See SFC Hearings (1926) at 84-85, 109-13; Couzens Rep. (1926) at 137-39.

[218] See SFC Hearings (1926) at 110-12. The statute also limited the provision to capital investment made "for the production of articles contributing to the prosecution of the present war," but this language was so ambiguous as to permit many possible claims. See Holmes (1921) at 156 ("it is difficult to exclude any but the most unessential articles from the broad phrase used in the [amortization] statute"); SFC Hearings (1926) at 109 et seq. (check).

[219] See id. at 158 ("I [Manson] do not think that any method could lead to more discrimination between taxpayers than the method which is now being pursued [by the BIR]"), 177-78; Couzens Rep. (1926) at 3-4, 95-96, 114-16. For a general description of the valuation difficulties, see Shulman (2011) at 293-300.

[220] See SFC Hearings (1926) at 160-61, 166-70; Couzens Rep. (1926) at 95.

[221] See Reg. No. 62 (1922), Art. 219(d); Norris (1921) at 241.

[222] See SFC Hearings (1926) at 156-58; Couzens Rep. (1926) at 24-29.

[223] See supra note 73.

[224] See supra notes 75-76.

[225] See SFC Hearings (1926) at 163, 201; Couzens Rep. (1926) at 3-4, 19-22; JCT (1929) at 12; JCT Depletion History (1950) at 6-7, 14, 31-32; text accompanying supra notes 63-65.

[226] See SFC Hearings (1926) at 102-05, 107-08, 115, 197, 204-05.

[227] See id. at 102; W&M Rep. (1918) at 10; SFC Rep. (1918) at 7-8.

[228] SFC Hearings (1926) at 102; see 57 Cong. Rec. 3134-35 (Feb. 11, 1919) (Sen. Simmons (D.-N.C.)) (emphasizing broad and comprehensive discretion granted by Congress to BIR to help mitigate potential unfairness of high taxes imposed by 1918 Act).

[229] See SFC Hearings (1926) at 140; Couzens Rep. (1926) at 7, 229.

[230] See SFC Hearings (1926) at 94, 139-44; Couzens Rep. (1926) at 7, 229-38; Adams (1924a) at 316.

[231] See SFC Hearings (1926) at 136-42.

[232] See Couzens Rep. (1926) at 8, 238-39.

[233] See CRS (1974) at CRS-1 – CRS-6.

[234] See 36 Cong. Globe 2789 (May 23, 1866) (Garfield) (describing publication of taxpayer information as one of the "odious" features of the tax law).

[235] See 1909 Act, § 38, cl. 6 (providing that tax returns constitute public records available for inspection).

[236] See 1910 Act, 36 Stat. at 494; CRS (1974) at CRS-7 – CRS-10, CRS-27, CRS-55 – CRS-58; Kornhauser (1990) at 113-18, 124-30; Kornhauser (2010) at 125.

[237] See 53 Cong. Rec. 13290-92 (Aug. 28, 1916) (Sen. Hustings (D.-Wisc.); 65 Cong. Rec. 1208 (Jan. 21, 1924) (Sen. Norris (R.-Neb.). [More] [For a contemporary argument in favor of this position, see Kornhauser (2005).]

[238] W&M Rep. (1924) at 75 (providing separate views of Cong. Frear (R.-Wisc.)).

[239] [Reference when information reporting was begun.]

[240] See 65 Cong. Rec. 2957 (Feb. 22, 1924) (republishing Hull's views in 1918).

[241] "Futile Tax Publicity," N.Y. Times, May 23, 1924, p.18.

[242] See H.R. 6715, 68th Cong., 1st Sess. (1924) (as approved by the House), § 257(a); "Mellon Denounces Tax Bill Agreed to; Said to Urge a Veto," N.Y. Times, May 23, 1924, p.1.

[243] 65 Cong. Rec. 2958 (Feb. 22, 1924). Garner first made the suggestion at the beginning of the debate and referenced its potential importance to an ongoing Congressional investigation. See 65 Cong. Rec. 2436 (Feb. 14, 1924).

[244] See 65 Cong. Rec. 2958 (Feb. 22, 1924). Garner's suggestion was ultimately approved as part of an amendment offered by Cong. Moore (D.-Va.). See id. at 2964. There was debate on whether only the tax-writing committees should be granted access. See id. at 2960-64. The same "turf" concern may be reflected in the Couzens committee

recommendation in 1925 to grant access to any member of Congress, since Couzens was not a member of the Senate Finance Committee. See supra note 232.

[245] 65 Cong. Rec. 2959 (Feb. 22, 1924).

[246] See H.R. 6715, 68th Cong., 1st Sess. (1924) (as reported by the Finance Committee), § 257(e). The 1918 Act had required lists of the name and address of all taxpayers, but without the amount of tax paid, and this requirement was continued in the 1921 Act and renewed again in 1926 after the 1924 Act requirement was repealed. See 1918 Act § 257; 1921 Act, § 257, 1926 Act, § XX.

[247] The committee report provided no reason for the change. See SFC Rep. (1924) at 30.

[248] See SFC Hearings (1924) at 307-18. When Reed asked Couzens about his taxes, several Senators argued that full publicity would have made the question unnecessary, and Sen. Norris (R.-Neb.) tied the issue to the forthcoming tax bill. See 65 Cong. Rec. 1204-11 (Jan. 21, 1924).

[249] 65 Cong. Rec. 9542 (May 26, 1924). It is not clear, however, how mere knowledge of the amount of tax paid in a prior year would help to reveal the effect of proposed legislation on a taxpayer.

[250] See XX.

[251] See 65 Cong. Rec. 6102-03 (Apr. 11, 1924). For some of the Senate's reaction to this issue, see id. at 6103-09; 65 Cong. Rec. 6195-96 (Apr. 12, 1924) (Sen. Reed (D.-Mo.)); 65 Cong. Rec. 6300-01 (Apr. 14, 1924) (Sen. Heflin); 65 Cong. Rec. 7908 (May 6, 1924) (Sen. Robinson); id. at 7917 (Norris). The Coolidge message is at 65 Cong. Rec. 6087 (Apr. 11, 1924).

[252] Sen. McLean (R.-Conn.) noted the committee access provision (as well as the required lists of tax liabilities) but was unable to persuade the Senate not to make the broader change. See 65 Cong. Rec. 7687 (May 2, 1924).

[253] See 65 Cong. Rec. 7692 (May 2, 1924) (approving the Norris amendment 48-27); 65 Cong. Rec. 8132-34 (May 8, 1924) (approving by 35-28 vote Sen. Jones' amendment to make BTA proceedings public and to require written opinions that would be publicly available).

[254] See H.R. 6715, 68th Cong., 1st Sess. (1924) (as agreed to in Conference), § 257(a); 1924 Act, §§ 257, 900(h). Norris voted against the Conference Report in part because his full publicity provision had been dropped. He claimed that the committee access provision was insufficient because Congress might need legislative help from committees other than those granted access as well as persons outside of Congress. See 65 Cong. Rec. 9405 (May 24, 1924). The Conference Report was approved by a 60-6 vote in the Senate and 377-9 vote in the House. See id. at 9421; 65 Cong. Rec. 9547 (May 26, 1924). Cong. Mills (R.-N.Y.), who represented New York's 17th "Silk Stocking" District, was one of the few members to criticize sharply the taxpayer list provision. See id. at 9540.

[255] SFC Hearings (1926) at 213-16. Jones' comments follow from some initial thoughts he offered at the very end of the prior day's hearing. See id. at 211-12.

[256] Id. at 219.

[257] See id. at 221 (Sen. Simmons (D.-N.C.)) ("It seems clear to me that the authority to appoint such a committee as Senator[s] Jones . . . and . . . Couzens [have] suggested is given in the act as it now exists.")

[258] Id. at 220.

[259] Id. at 221.

[260] Although not stated, one reason to exclude members of the public was because the committee would be reviewing confidential tax return information. On the Senate floor, Couzens offered another reason: to prevent the committee from having to waste time educating a "layman" on all of the technical developments of the law since 1913. See 67 Cong. Rec. 3021 (Jan. 30, 1926).

[261] See SFC Hearings (1926) at 221-23.

[262] See 1976 Act, § 1907(a)(1).

[263] See H.R. 1, 69th Cong., 1st Sess. (1926) (as passed by the Senate), § 1203; SFC Rep. (1926) at 13-14; 67 Cong. Rec. 2871 (Jan. 28, 1926) (Sen. Simmons (D.-N.C.)); 67 Cong. Rec. 2882 (Jan. 28, 1926) (Sen. Harrison (D.-Miss.)); 67 Cong. Rec. 3502-03 (Feb. 8, 1926) (Sen. King (D.-Ut.)).

[264] See 1926 Act, § 1203(c)(5); Conf. Rep. (1926) at 57-58.

[265] See I.R.C., §§ 8001-8023.

[266] Cf. DEERING & SMITH (1997) at 15.

[267] See 67 Cong. Rec. 2874, 2882 (Jan. 28, 1926) (Senators Smoot (R.-Ut.) and Harrison (D.-Miss.)); 67 Cong. Rec. 3295 (Feb. 4, 1926) (Couzens); 67 Cong. Rec. 3346 (Feb. 5, 1926) (Couzens); 67 Cong. Rec. 3488-90 (Feb. 8, 1926) (Senators Dill (D.-Wash.), Norris (R.-Neb.), and Reed (R.-Pa.)). Mellon termed the taxpayer list "utterly useless." See W&M Hearings (1925) at 8-9. For a description of a few of the real-world consequences of the taxpayer list requirement, see Blank (2011) at 276-77.

[268] Citation; SFC Rep. (1926) at 7.
[269] See supra note 253.
[270] See 67 Cong. Rec. 2868 (Jan. 28, 1926) (Simmons (D.-N.C.); id. at 2870-71(Smoot (R-Ut.)); id. at 2882 (Harrison (D.-Miss.)); 67 Cong. Rec. 3524 (Feb. 8, 1926) (Reed (R.-Pa.)).
[271] See text accompanying supra note 255.
[272] See 67 Cong. Rec. 3485-87 (Feb. 8, 1926) (Norris (R.-Neb.)) [check].
[273] See 67 Cong. Rec. 2962 (Jan. 29, 1926) (Couzens) (questioning whether full publicity would have any impact on the ability of former BIR employees to take advantage of their knowledge of secret BIR practices); 67 Cong. Rec. 3016 (Jan. 30, 1926) (Copeland (D.-N.Y.)) (pointing out that full publicity of tax returns would not help publicize secret BIR rules). Couzens supported both the JCT proposal and the Norris amendment. See 67 Cong. Rec. 3503 (Feb. 8, 1926). [Check these cites]
[274] See id. at 3526. In 1928, Norris caught Senate leaders by surprise and prevailed with the same amendment (by a 27-19 vote), but the provision was dropped in Conference. See 69 Cong. Rec. 9082 (May 18, 1928); BLAKEY & BLAKEY (1940) at 295 (claiming that surprise amendment came after many Senators had gone home). The 1928 Act authorized the JCT to publish annually the taxpayer name and amount of any tax refund received greater than $75,000. See 1928 Act, § 710; 69 Cong. Rec. 9073-74 (May 18, 1928) (Sen. Smoot). Other than this new provision, there was no mention of the JCT during the brief 1928 debate on the Norris amendment, which was carried out almost exclusively by its supporters.
[275] See SFC Hearings (1926) at 177-80.
[276] See 67 Cong. Rec. 3761-63 (Feb. 11, 1926); SFC Rep. (1926) at 17-18; Conf. Rep. (1926) at 31.
[277] 67 Cong. Rec. 3762 (Feb. 11, 1926).
[278] The Finance Committee's original 25 percent allowance was eventually increased by the full Senate (by a 35-29 vote) to 30 percent, after narrow defeat (by one vote) of a 35 percent allowance. The Senate's provision was approved 48-13, with Couzens (who favored cost depletion) voting against it. 67 Cong. Rec. 3776-78 (Feb. 11, 1926). The final 1926 legislation reduced the allowance to 27½ percent of gross income (with the amount not to exceed 50 percent of net income), and it remained in the law until 1969 when the allowance was reduced to 22 percent. See 1926 Act, § 204(c)(2); 1969 Act, § 501(a). In 1975, the allowance was further phased down to 15 percent and generally limited to independent oil and gas producers. See 1975 Act, § 501; I.R.C., § 613A(c).
[279] See Pub. L. No. 63-127, 38 Stat. 454, 463 (1914) (appropriating funds to create legislative reference unit within Library of Congress); 1918 Act, § 303 (creating Legislative Drafting Service); Pub. L. No. 67-13, 42 Stat. 20, 23 (1921), § 301 (creating General Accounting Office). As originally created, the GAO was independent of the executive branch but not clearly part of the legislature. In 1945, Congress clarified the status of the office as part of the legislative branch. See TRASK (1996) at 57; Pub. L. No. 79-263, 59 Stat. 613, 616 (1945), § 7.
[280] See HAYNES (1938) at 982 (claiming that Coolidge message was interpreted as "rebuke" to the Senate for having instituted the investigation); GALLOWAY (1953) at 11-12, 66-90 (describing supervisory responsibilities of Congress).
[281] See supra note 167.
[282] See 3/15/24 letter from Mellon to Sen. Ladd in NARA-Treasury (box #213) ("returns inspection – publicity, 1920-24" file); S. Res. 185, 65 Cong. Rec. 3702 (Mar. 6, 1924) (requesting President to provide returns for such purpose).
[283] See MURRAY (1973) at 107-16.
[284] 3/3/24 memo from Undersecretary Winston to Mellon in NARA-Treasury (box #262) ("Mellon memos, 1923-31" file). The memo considers the request pursuant to S. Res. 180 (approved on Feb. 29, 1924), an earlier version of the one to which the President ultimately responded. See supra note 282; 65 Cong. Rec. 3299 (Feb. 29, 1924).
[285] 3/3/24 memo from Undersecretary Winston to Mellon in NARA-Treasury (box #262) ("Mellon memos, 1923-31" file).
[286] See 3/5/24 draft letters from Mellon to Coolidge and from Coolidge to the President pro tempore of the Senate in NARA-Treasury (box #213) ("returns inspection – publicity – 1920-24" file).
[287] See 3/15/24 letter from Mellon to Sen. Ladd in NARA-Treasury (box #213) ("returns inspection – publicity – 1920-24" file); T.D. 3566 (1924) at 58 (¶ 13).
[288] See supra note 232.
[289] See T.D. 3638 (1924) (former ¶ 13 removed); Reg. No. 65 (1924) at 936-38 (Art. 1090).
[290] 7/28/24 letter from Undersecretary Winston to Mellon in NARA-Treasury (box #198) ("BIR investigation, 1923-32" file).
[291] See I.R.C., §§ 6103(f), 8023.
[292] SFC Hearings (1926) at 214.
[293] citations.
[294] SFC Hearings (1926) at 219.

[295] In 1946, each standing committee was authorized to have four professional assistants, with the number increased to six in 1970 and 18 in 1974. See House History (1994) at 164; XX. In the 1960s, Congress considered creating a joint committee structure for the budget, expenditures, and national strategy. See Manley (1968) at 1050-51.

[296] 50 Cong. Rec. 2376 (July 11, 1913); see Lee (1929) at 383.

[297] See 64 Cong. Rec. 2111-12 (Jan. 20, 1923) (Cong. Sisson (D.-Miss.)).

[298] See GROSS (1953) at 282.

[299] See CLAPP (1963) at 35 (quoting unnamed Representative), 262. In his recent book, Bob Woodward describes a meeting between Senate Majority Leader Reid and President Obama in which Reid, "not [being] a details guy," is forced to rely on his chief of staff to describe the legislative issues to Obama. See WOODWARD (2012) at XX. It is not uncommon for Senators to have their staffers "negotiate" with House members on substantive legislative matters.

[300] See U.S. CONST., art. 1, sec. 7, cl. 1.

[301] See W&M Rep. (1918) at 39; supra notes 91 - 93 and accompanying text.

[302] See W&M Rep. (1918) at 38; supra note 86 and accompanying text.

[303] See W&M Rep. (1921) at 16; supra notes 95 - 97 and accompanying text.

[304] See W&M Rep. (1924) at 7-8; supra notes 88 - 90 and accompanying text. The initial idea for a special adjudicatory body in the tax area came from a bill introduced by Sen. Pomerene (D.-Oh.) right after the 1921 Act was passed, but his bill was referred to the Senate Judiciary Committee, not the Finance Committee. See 61 Cong. Rec. 7526-27 (Nov. 8, 1921); BLAKEY & BLAKEY (1940) at 217 n.92. The BTA proposal enacted in 1924 was developed by Ways & Means, which modified a recommendation from the Treasury.

[305] SFC Hearings (1926) at 221.

[306] For similar views, see SFC Rep. (1926) (part 2) at 13 (minority views); 67 Cong. Rec. 2871 (Jan. 28, 1926) (Smoot); 67 Cong. Rec. 2962 (Jan. 29, 1926) (King (D.-Ut.) and McKellar (D.-Tenn.)); 67 Cong. Rec. 3018-19 (Jan. 30, 1926) (Smith (D.-S.C.) and Reed (R.-Pa.)). When he resigned from the Couzens' investigation two years earlier, Professor Adams wrote that "[t]he federal income tax, as it actually works, is not merely defective; it has reached a condition of inequality the gravity of which could scarcely be exaggerated. But the evil goes back not to administrative inefficiency or personal dereliction, but to the complexity of the law . . . ." See supra note 158.

[307] 67 Cong. Rec. 3018-19 (Jan. 30, 1926) (emphasis added). A couple of days prior to Reed's floor statement, the *Washington Post* had editorialized in favor of the proposed new JCT and noted that "[o]ne of the evils connected with all internal revenue laws since 1918 is the failure of the average member of Congress to understand what the more or less technical provisions of the laws mean, and how they operate." "Joint Committee on Taxation," Wash. Post, Jan. 28, 1926, p.6.

[308] See BLAKEY & BLAKEY (1940) at 258.

[309] See id. at 543.

[310] See HAYNES (1938) at 315 (describing creation of JCT in 1926 as "innovation in congressional procedure"); MORROW (1969) at 37-38 (describing reluctance of House and Senate to cooperate on policy matters through formation of joint committees); JEWELL & PATTERSON (1977) at 182; Wigton (1991) at 329-31. According to one description of the rivalries between House members and senators, many of the former "regard senators as prima donnas who only seek publicity and do as little committee work as possible. Moreover, House members are irritated when senators send their staff to represent them in negotiations with representatives." Oleszek (1974) at 82; see CLAPP (1963) at 34-36, 271-72. By not delegating any legislative jurisdiction to the JCT, the proposal removed one area of conflict that deters creation of joint committees.

[311] If these had been the only functions needed, Congress might have delegated the tasks to an office like the GAO (established in 1921 to monitor the efficiency of the agencies) or, indeed, to the GAO itself.

[312] See FOX & HAMMOND (1977) at 171; GALLOWAY (1953) at 273; GROSS (1953) at 280-83 (claiming that committees received professional assistance from executive agencies and private groups not shown on the official records). Prior to enactment of the Legislative Reorganization Act of 1946, there were a total of 356 clerks employed by the House and Senate committees; few were professionals, and most were patronage appointments. See Galloway (1951) at 54; JEWELL & PATTERSON (1977) at 214; CLAPP (1963) at 255 (among committee staff at the outset of World War II, "only the . . . Appropriations committees and the [JCT] employed 'well trained technically qualified staffs with continuity of tenure'").

[313] Daniel Roper, who first served as clerk to the Senate Interstate Commerce Committee from 1893-?? and then as clerk to the House Ways & Means Committee from 1911-13, was an important exception. He later served as Commissioner of the BIR from 1917-20. See ROPER (1941) at 57-89, 123-29, 172-95.

[314] The 1926 House proposal also had involved creation of a "joint" commission, but the idea was considerably different from what Congress eventually approved. The Finance Committee simply stated that it is "more properly" the function

of the two tax-writing committees to carry out the JCT's activities jointly, without giving any further explanation. See SFC Rep. (1926) at 14.

[315] Cf. HAYNES (1938) at 315 (claiming that "service of joint committees, conducting hearings and making reports, might avoid enormous waste of time and duplication of effort"); MORROW (1969) at 37-38, 215-17.

[316] See Yin (2013) at XX.

[317] The same reservation had arisen in connection with a similar proposal in a prior Congress. See Lee (1929) at 383, 387.

[318] According to Haynes, the Origination Clause is the reason the members of the JCT agreed to deviate from the prior practice of having Senators chair all joint committees. The first chairman of the JCT was Cong. Green (who headed the House Ways & Means Committee); the first Senate chair of the JCT did not occur until 1933. See HAYNES (1938) at 314-15. Whatever the reason for the joint office, the structure clearly presented challenges for the staff. See BLOUGH (1952) at 64 ("[t]he problem of serving impartially the interests of both committees when they are on opposite sides of important issues has not been solved"); GALLOWAY (1953) at 311 (reporting that staff had generally been more useful to Finance Committee than Ways & Means); Manley (1968) at 1051 n.16, 1056-57 (suggesting opposite).

[319] By early 1926, when the tax bill was being considered, President Coolidge had escaped being tainted by the Harding Administration scandals and won a smashing victory, in both the popular and electoral vote, in 1924. The election had increased Republican majorities to 247-183 in the House and 56-39 in the Senate. The country had recovered from its recession in 1921-22, and was running budget surpluses (to pay down some of its war debts) despite the tax reductions approved in 1921 and 1924. The influence of the Progressives in Congress was on the wane, following Senator LaFollette's lackluster performance in the 1924 presidential campaign and his death in 1925. See XX.

[320] See BARNARD (1958) at 166; TUCKER & BARKLEY (1932) at 234.

[321] 67 Cong. Rec. 3524 (Feb. 8, 1926).

[322] SFC Hearings (1926) at 215.

[323] See Blakey (1926) at 424.

[324] See BARNARD (1958) at 144. In his memoirs, Sen. Watson described various personal attacks made by Couzens on the Senate floor, and characterized him as "a peculiar man . . . irritable and irascible." WATSON (1936) at 272-73.

[325] See TUCKER & BARKLEY (1932) at 235.

[326] See BARNARD (1958) at 118-19, 147-48, 156-57; more.

[327] See 67 Cong. Rec. 3102-03 (Feb. 1, 1926) (Couzens-Smoot (R.-Ut.)); 67 Cong. Rec. 3147 (Feb. 2, 1926) (Couzens-Harrison (D.-Miss.)); 67 Cong. Rec. 3297-98 (Feb. 4, 1926) (Couzens-Smoot); 67 Cong. Rec. 3526 (Feb. 8, 1926) (Couzens-Smoot); 67 Cong. Rec. 3769-71 (Feb. 11, 1926) (Couzens and several Senators).

[328] See 67 Cong. Rec. 3526 (Feb. 8, 1926).

[329] See BLAKEY & BLAKEY (1940) at 266; "Tax Publicity Dies by Senate's Action; Repeal Is Accepted," N.Y. Times, Feb. 9, 1926, p.1; "Norris Amendment for Tax Publicity Is Defeated, 49-32," Wash. Post, Feb. 9, 1926, p.1.

[330] The chair and vice-chair of the first JCT were Congressmen Green (R.-Ia.) (chair of the Ways & Means Committee) and Hawley (R.-Ore.) (next most senior Republican on Ways & Means).

[331] See supra note 309.

[332] See BLAKEY & BLAKEY (1940) at 266 n.44.

[333] See Blakey (1924) at 479; CANNADINE (2006) at 315; Murnane (2004) at 831-33; Rader (1971) at 429-30. Cong. Green defended his support for tax rates higher than those urged by Mellon in Green (1924) at 168.

[334] See Blakey (1928a) at 439-40 (check); RATNER (1980) at 428-33. Couzens reportedly was offered, and declined, the Ambassadorship to the Court of St. James in 1924 when his investigative committee was just getting started. BARNARD (1958) at 162; FERRELL (1998) at 172.

[335] See BROWNLEE (2004) at 75-76; WALTMAN (1985) at 63, 96 (higher tax rates brought out increased lobbying).

[336] 7/10/26 letter from Mellon to Green in NARA-Treasury (box #198) ("Joint Committee on Internal Revenue Taxation, 1926-32" file).

[337] 12/3/27 letter from Mellon to Coolidge in NARA-Treasury (box #244) ("Internal Revenue Bureau, 1926-27" file).