

The Joint Committee on Taxation and Codification of the Tax Laws

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Comments welcome.

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preliminary draft

[Note to conference attendees and other readers: This paper describes the work of the staff of the Joint Committee on Internal Revenue Taxation (JCT)¹ that led to codification of the tax laws in 1939. I hope eventually to incorporate this material into a larger project involving the “early years” of the JCT, roughly the period spanning the committee’s creation in 1926 and the retirement of Colin Stam in 1964. Stam served on the staff for virtually this entire period; he was first hired (on a temporary basis) in 1927 as assistant counsel, became staff counsel in 1929, and then served as Chief of Staff from 1938 until 1964. He is by far the longest-serving Chief of Staff the committee has ever had.

The conclusions in this draft are still preliminary as I have not yet completed my research. I welcome any comments or questions.]

Possibly the most significant accomplishment of the JCT and its staff during the committee’s “early years” was the enactment of the Internal Revenue Code of 1939. This “monumental task” was widely characterized as a “triumph of exacting scholarship” when it was finally completed. The staff produced at least three versions of a proposed tax code (in 1930, 1933, and 1938) before a final version was enacted into law in early 1939.

The undertaking is closely associated with Colin Stam, who many years later described it as his “first assignment” at the JCT. He prominently listed his codification work in biographical sketches prepared near the end of his career, and his Washington Post obituary identified him as the “co-author” of the 1939 (and 1954) Codes. Profiles of Stam claim that his name is “synonymous” with the Code, which is described as a “living monument” to his “prodigious ability and industry.”

* Edwin S. Cohen Distinguished Professor of Law and Taxation, University of Virginia; former Chief of Staff, Joint Committee on Taxation, 2003-05; gyin@virginia.edu. Copyright © 2016 George K. Yin. All rights reserved. Most footnotes have been omitted from this draft.

¹ The name of the committee was changed in 1976 to its present “Joint Committee on Taxation.”

Stam's codification efforts have even been mythologized. In one illustration, Stam is portrayed as Sisyphus attempting to push a huge boulder (labelled "codification") up a steep incline. Another depiction shows Stam as Orpheus rescuing a young child ("the Code") from Hades and the barking heads of Cerberus (represented by a menacing Bureau of Internal Revenue (BIR) Chief Counsel and the "Treasury hounds" of "ignorance," "possible error," "envy," and "delay"). As Stam transports the child safely across the River Styx to the other shore (labelled "absolute law"), he can be seen nimbly stepping on stones named for various persons involved in the legislative process.²

What led the JCT and Stam to undertake this project, and what ultimately was achieved? Why did it take Congress so long to act on the proposed codification? Finally, what might this accomplishment reveal about the broader significance of the JCT in the legislative process?

The Simplification Mission of the JCT

Codification was a natural outgrowth of the JCT staff's principal initial task, which was to develop proposals to simplify the tax laws. The JCT was created in 1926 to satisfy somewhat divergent objectives of the House and Senate. The House's main interest was simplification. Congress had been forced by the Great War to develop and pass many tax laws raising large amounts of revenue without adequate study or experience, and the House was anxious to use the post-war period to reexamine and simplify the law and remedy some of the defects that had crept into it. Beginning with the 1918 Act, the House approved modest steps with that objective and, in its tax bill that would eventually become part of the Revenue Act of 1926, it approved creation of a temporary (through 1927) "Joint *Commission* on Taxation"—consisting of members of the House, Senate, and public—to investigate the operation, effects, and administration of the tax laws and to propose methods of simplification and improvement.

The Senate's principal interest was somewhat different. Caught up in the "investigation hysteria" produced by numerous allegations of Harding Administration scandals, and offended by revelations arising from a public feud between Treasury Secretary Mellon and one of its members (Senator James Couzens (R.-Mi.)), the Senate had authorized an investigation, eventually led by Couzens, of the BIR. The investigation uncovered various unsound administrative practices at the agency but little indication of fraud or corruption. Nevertheless, Couzens was able to maintain continuing public interest in the investigation despite (or, perhaps, because of) Mellon's strenuous objections. The Senate eventually modified the

² See #487. A business contemporary of Stam has described the second illustration differently, claiming that Stam represents the lead character in Uncle Tom's Cabin who is rescuing "Little Eva" from drowning. Reportedly, the second illustration was drawn by a JCT staff member and Stam proudly posted it in his office for many years. See Connolly (1974) at 3-5.

House's proposal by approving creation of a permanent JCT, consisting of Senators and Representatives (but no members of the public), that could (through its staff) keep an eye on the BIR (as well as perform the other functions specified in the House bill). Some have suggested that the Senate's action was a maneuver to "sidetrack" the Couzens investigation (which was ended) because creation of the JCT enabled the Old Guard Republicans who led the Senate to claim that there would be continuing oversight of the BIR. The critical difference, of course, was that any future oversight would be performed by a committee and staff *under their control*. Couzens, who was not a member of the Finance Committee, was ineligible to become a member of the new JCT.

Following authorization of the committee in February, 1926, House Ways & Means Committee Chairman Green (R.-Ia.) and Senate Finance Committee Chairman Smoot (R.-Ut.) apparently quarreled for several months regarding who should chair the new committee, but eventually Green was elected. This choice may have been a fateful one from the standpoint of the evolution of the new JCT and its staff. It clearly meant that the staff would initially focus attention on the committee's simplification mission—the House's principal objective. It also resulted in the staff becoming closely integrated into the tax legislative process (as opposed to mainly serving an oversight-type role similar to the current staff of the Government Accountability Office or the oversight committees in Congress). Chairman Green early on described his expectation that the new JCT and its staff "would carry on its work entirely separately from that of the Ways & Means committee." But with the JCT staff focused on examining ways to simplify and improve the tax law (the central legislative mission of the Ways & Means and Finance Committees), with those committees lacking any professional staff assistance of their own, and with the leadership of those committees and the JCT being the same persons, it was natural to expect that the members of those committees would eventually turn to the new JCT staff for help. And that is precisely what happened. The staff was soon asked to assist both the Ways & Means and Finance Committees when they took up the tax bills that would become the Revenue Act of 1928, and important aspects of those bills were derived from JCT staff work. Eventually, in 1930, the JCT formally directed the staff to assist in the development of tax legislation.

This background helps to explain an intriguing mystery about the statutory provisions governing the JCT: despite a detailed listing of the committee's specific duties, the statute fails to mention the one task—assisting in the preparation of tax legislation—for which the staff is most known (and has performed throughout its 90-year existence). As Stam explained in 1954 in responding to an inquiry about the functions of the JCT and its staff, "by precedent and direction" (but not by statutory authorization), the staff "has functioned as advisors in the capacity of a professional staff to both [tax committees in the] . . . preparation of proposed tax legislation."

It is unclear whether this same development would have occurred had Smoot been elected the first JCT chairman rather than Green. The Senate does not appear to have had the same simplification interest as the House, and although the House

inserted into the final legislation creating the JCT the requirement that it produce a simplification report by the end of 1927, a Chairman Smoot might not have insisted on the same depth of analysis that the staff eventually gave to the report. Indeed, if the Senate's JCT interest was mostly to sidetrack the Couzens investigation, one might imagine a completely different scenario in which the committee and staff (directed by a Chairman Smoot) ended up being quite insignificant and short-lived. In its initial years, the staff appears to have had almost no contact with any of the Senate members of the JCT (or any Senator), whereas it did have considerable interaction with Chairman Green and at least one other House JCT member (Rep. Treadway (R.-Ma.)) who also had a keen interest in simplification. Although during his tenure as chairman, Green repeatedly referred to the JCT as a committee with a limited term, the manner in which he used the staff tended to ensure that it would become an important, long-term fixture of the legislature.

Green organized the staff into separate divisions for simplification and investigation to reflect the dual Congressional purposes for the committee. In July, 1926, Green hired Lovell Parker, an MIT-trained engineer, to head the Investigations Division. Parker had previously worked as an engineer and served as chief investigator of the defunct Couzens investigation before applying for a position on the new JCT staff. He would eventually earn a law degree in 1931.

Green had a more difficult time identifying appropriate staff for the Simplification Division, but he eventually hired in March, 1927, Charles Hamel to head the division and Edward McDermott as his assistant. Hamel was an experienced attorney who had served in various government agencies (including the BIR) and been the first chairman of the Board of Tax Appeals (BTA) (created in 1924) before joining the JCT staff. McDermott was a young attorney who had completed his legal studies at Harvard five years earlier. In August, 1927, at the urging of Hamel and McDermott, Green hired another young attorney, Colin Stam, as assistant counsel. After obtaining his law degree from Georgetown in 1922, Stam had worked at the BIR and been detailed to the Treasury to work on a report requested by the new JCT staff (and thereby came to the attention of the staff). He was initially hired on a temporary basis and expected to return to the Treasury once his duties at the JCT were completed.

Hamel and McDermott eventually left the staff in 1929 and each would found a law firm: Hamel's is now part of Foley & Lardner and McDermott's is the firm now known as McDermott, Will & Emery. When they left, the staff was reorganized to merge the two divisions (whose functions had overlapped), with Parker appointed the first Chief of the entire staff and Stam as counsel. When Parker resigned in 1938 to improve his "personal financial situation," Stam was named Chief of Staff.

Hamel and McDermott, as well as Stam once he joined the staff, appear to have done most of the initial simplification work. The immediate task was to prepare the simplification report due at the end of 1927. The JCT eventually circulated a three-volume report to the Ways & Means and Finance Committees in

late November, 1927, and submitted essentially the identical report to Congress in late December of that year. The staff was assisted by a five-person Advisory Group consisting of two economics professors (T. S. Adams (Yale) and Thomas W. Page (Virginia)), two New York City practitioners (Arthur Ballantine and George Holmes), and an accountant (George May of Price Waterhouse). They also solicited and received much input from the Treasury Department and outside professional groups, including a lengthy report and set of recommendations submitted by a committee (headed by Advisory Group member George Holmes) of the National Tax Association (NTA).

The State of the Income Tax Law in 1926

Looking back at the principal features of the 1926 tax law that the staff worked so fervently to simplify, a modern-day observer might initially seem puzzled by all of the effort. By 1926, the personal and dependent exemption amounts had been increased sufficiently to permit perhaps 90-95 percent of the population to escape having any income tax responsibility at all—the ultimate simplification for them. Most of the few remaining persons subject to the levy paid tax equal to only 1-1/2 to five percent of their net income. A very few very high income taxpayers paid tax at progressively higher rates, but only up to a top rate of 25 percent. Low and flat tax rates tend to simplify the law by reducing the need for relief provisions as well as rules preventing tax avoidance strategies such as income shifting.

The income tax base in 1926 was also fairly straightforward, with few exclusions, special deductions, or credits. Moreover, some of the most complex features of the tax law that were added during the war period had either been repealed or modified to reduce their complication.³ In short, based on just these key portions of the 1926 tax law, a modern-day observer might view the law as already quite simple; indeed, it arguably achieved a level of simplicity that has not been matched in the succeeding 90 years.

But that was not the view of observers in 1926. From their perspective, they had seen the almost overnight metamorphosis of an income tax law approved in 1913 that had been *even more* simple and pristine, with *much lower and flatter* rates, and exempting an *even greater* percentage of the population, into a behemoth containing many of the complications one would expect of a system with a top individual income tax rate of 77 percent and a top excess profits tax rate of 80 percent. Although the 1921, 1924, and 1926 Acts had all chipped away at the war period creation, many observers believed much more simplification was possible.

³ Both the excess profits tax and an amortization provision that allowed taxpayers to write off the estimated amount of losses from capital investments made to produce war materials were repealed in 1921. In the 1926 Act, Congress replaced the discovery depletion allowance for oil and gas investments with percentage depletion. However one may view the policy justification for percentage depletion, there seems to be little question that it greatly simplified the determination of the permissible allowance.

Moreover, the modern-day observer would be overlooking the still extremely fragile and undeveloped tax system infrastructure in 1926. This problem had been foreseen by Cordell Hull and others when they designed the 1913 income tax to be applicable to only a tiny slice of the population. They understood the need for gradual development of the required tax institutions before the income tax could be applied more broadly. But the vicissitudes of the war had made that hope an impossibility.

The most critical weakness was at the BIR. As explained by George Holmes of the NTA, “almost overnight, it became necessary to establish the largest tax-gathering organization the world has ever seen. And it had to be done in the midst of the bewilderment of war.” As might be expected, the agency had tremendous difficulty obtaining and retaining qualified personnel and keeping up with its responsibilities.

One manifestation of the BIR’s problems involved its auditing function. The agency’s policy was to examine all tax returns, but this quickly produced a huge backlog when the income tax was suddenly made applicable to increased affairs of many more taxpayers. To overcome this problem and accelerate its collection of needed revenue, the BIR began a policy of making “superficial audits” of most returns that generally resulted in complete disallowance of hard-to-determine deductions for purposes of both the income and excess profits tax. Not surprisingly, this policy produced a huge number of controversies. Initially, they all had to be resolved through refund actions because taxpayers at the time had no ability to contest deficiencies prior to assessment. When creation of the BTA in 1924 gave them that opportunity, the Board was flooded with cases, including a number of challenges to deficiencies purportedly arising from the high-tax war period years.

The agency was also extremely ineffective at explaining the law to taxpayers to help them understand their responsibilities and minimize later controversies. Regulations were scanty and published rulings and informal forms of guidance even scantier. BIR officials were reluctant to speak about the law or participate in educational conferences out of fear that their views might be misconstrued or found to be incorrect. According to one observer, the attitude of the BIR seemed to be that “the law speaks for itself.”

Of course, as a practical matter, the “law” (at least in terms of the statute) spoke to almost no one, certainly not ordinary taxpayers and probably not very many professional advisors. As George Holmes of the NTA stated, the “root of the trouble [with the income tax] is the complexity of the statute.”

What caused the statute to be so complex? Beginning in 1916, Congress had generally followed the policy of reenacting all of the substantive provisions of the tax law (and, in the process, repealing prior enactments covering the same material) whenever it made a major change to the law. This was done, in part, because the

substantive tax law rules (especially those enacted during the war period) were generally viewed as temporary, so that each new enactment replaced in its entirety the earlier temporary version of the law. Congress sometimes did not repeal (but would amend) prior enactments of administrative tax provisions out of the general view that such rules (no matter what substantive tax provisions accompanied them) were a necessary, “permanent” feature of the law.

This procedure provided the advantage of generally permitting taxpayers and their advisors to look only at the latest enactment to discover what the law was. But it required the tax committees each time they found the need to make a major change (which was often) to prepare a bill containing the entire substantive tax law and open up all of those provisions to possible amendment in committee and (more troublingly) on the House and Senate floor. It also meant that as certain changes were made, it sometimes became necessary to include in the current enactment a prior law rule if it was still applicable to earlier taxable years. For example, section 277 of the 1926 Act, concerning the period of limitations for assessing a deficiency, sets out different periods applicable to deficiencies arising under every major tax act between 1909 and 1926. Some of these provisions became so long and convoluted as to be completely impenetrable. Finally, the committees gradually added more and more provisions into the law to take into account issues that had been overlooked but became critically important during the high-tax war years. The result was an ever growing (and increasingly complicated) body of law that had to be periodically reenacted in its entirety. Table 1 roughly illustrates this consequence by showing the number of pages in the Statutes at Large that were devoted to just the income and excess-profits tax title (if any) of the major tax acts between 1913 and 1926.⁴

Table 1	
<u>Tax Act</u>	<u># pages</u>
1913	15
1916	21
1918	38
1921	50
1924	49 ⁵
1926	59

⁴ The two major tax acts enacted in 1917 are omitted from the table. The Revenue Act of Mar. 3, 1917, Pub. L. No. 64-377, 39 Stat. 1000, added a short excess profits tax (just two pages in the Statutes at Large) but it was repealed before ever going into effect. The War Revenue Act of 1917, Pub. L. No. 65-50, 40 Stat. 300, substituted a more elaborate excess profits tax (six pages) but otherwise amended selected provisions of the 1916 Act rather than reenacting the entire law. The process of amending portions of prior law rather than reenacting the entire law (and repealing the prior statute) was criticized because it required taxpayers to examine and understand more than one version of the statute. See Taussig; Blakey.

⁵ This slight decrease reflects in part the repeal of the excess profits tax in 1921. The 1921 Act included a version of that tax applicable to just 1921 (seven pages) after which the tax expired.

Aside from being long and obscure, the statute was also organized in a peculiar way. This may have occurred because of the lengthy and complicated nature of each underlying bill, the piecemeal incorporation of amendments to the bills, and the haste in which some of legislation had been prepared. Whatever the explanation, the 1926 Act provided 12 pages in the Statutes at Large, covering such arcane issues as the tax consequences of a reorganization, before specifying the tax rates applicable to individuals and the definitions of gross and net income and identification of permissible deductions. The statute then addressed special rules for nonresident aliens, partnerships, estates and trusts, the prevention of surtax evasion through incorporation, withholding, tax credits for individuals (including the foreign tax credit), and tax filing requirements, before turning to the corporate tax and specifying the corporate tax rates (29 pages into the Statutes at Large). In defining the corporate tax base, the statute reiterated word-for-word certain provisions already included in defining the tax base for individuals, such as the deductibility of ordinary and necessary business expenses and other items.⁶

The JCT Staff's Principal Recommendations

In the simplification report submitted at the end of 1927, as urged by both its Advisory Group and the NTA, the JCT staff focused primarily on methods to improve the structure of the statute. This choice may have been viewed as the most likely way to achieve simplification. The staff proposed ideas to simplify the operation of a few minor provisions (such as the *first* earned income tax credit), and several of the ideas were included in the 1928 Act. But modifying tax provisions, such as the capital gains preference, obviously introduced potentially tricky trade-offs. The staff (McDermott in particular) also spent time trying to simplify the language of the statute, a particular interest of Representative Treadway who urged improvement in the statute's "phraseology." Here, too, however, the staff recognized that even minor word changes might have important repercussions—and might end up complicating the law—if the meaning of previous language had already been construed by the courts. Probably more important than using "simple" words and phrases was the need for *precise and consistent* language that would ensure the legislature's intentions would be properly understood by tax professionals and the courts. Finally, the staff suggested ways to improve tax administration, including consolidating some BIR offices, improving coordination between the national office and the field, and extending civil service protection to all subordinate BIR employees. But the agency's fundamental problem was probably a lack of sufficient funds to pay for qualified personnel. The staff obviously was not in a position to have much influence over that decision.

⁶ Compare sections 214 and 234 of the 1926 Act. The 1916 Act set out these very similar provisions *four* times in defining the tax base separately for domestic individuals, nonresident aliens, and domestic and foreign corporations. See 1916 Act, §§ 5(a), 6(a), 12(a) and (b).

The principal recommendation was to rearrange the statute. The staff presented as a proposed title to the upcoming 1928 tax bill a complete rearrangement of the income tax provisions of the Revenue Act of 1926. Both the order and specific language of many of the draft provisions very closely preview the income tax chapter of the Code that would ultimately be enacted in 1939 (as well as the current version of the Code that is so familiar to many of us). The draft first presented the “General Provisions” of the law that were estimated to be the only rules needed by 80 percent of taxpayers. The remaining “Supplemental Provisions” then set out the rules for extraordinary classes of taxpayers and extraordinary transactions of ordinary taxpayers. The draft, submitted to the tax committees less than nine months after Hamel and McDermott joined the staff and less than four months after Stam arrived, was principally the work-product of House Legislative Counsel Middleton Beaman working with the JCT staff members.

Importantly, the draft rearrangement assumed that in addition to the new tax title to be enacted in 1928, the Revenue Act of 1926 would generally remain in effect. This change gave Congress a “fresh start”: it could enact a new, complete income tax title applicable only to *future* taxable years, and not have to include in the bill prior law enactments that remained applicable to prior years. As McDermott later explained, the process of repeatedly reenacting all cumulative parts of the law that continued to have some effect had reached a “breaking point” by 1926. The NTA recommended taking this step as its “most important conclusion.” According to Professor Blakey, the statute would have been “almost beyond understanding” had this change not been made.

The change effectively created a “base” law (in this case, the Revenue Act of 1926 served as the base law for all taxable years prior to 1928) with any subsequent enactment (such as the forthcoming 1928 bill) either amending that law or providing new law applicable only to future taxable years. When Congress approved the proposed rearrangement of the income tax as part of the 1928 Act, it followed this recommendation in the name of simplification (and therefore generally retained the Revenue Act of 1926 while adding the new 1928 tax title). One potential difficulty with this approach, however, was that if Congress were again to be given a “fresh start” in its subsequent enactments by also making them applicable only to future years, there would gradually accumulate a *series of* prior enactments (i.e., a series of “base laws”) that would continue to have effect only for selected prior years. Taxpayers involved in transactions spanning multiple years would potentially have to consult the entirety of many versions of the income tax statute.⁷

A final staff recommendation in 1927 was for Congress to enact a code of federal tax administration, a step that Hamel had urged from the very beginning of his time at the JCT. These laws had become scattered in many prior tax acts, statutes of general applicability, and other enactments (such as riders on appropriations bills). The staff argued that a code would allow all of these rules to be identified,

⁷ See note 4 regarding complaints when Congress did this in the War Revenue Act of 1917.

reconciled, simplified, and ultimately located in one law. The Senate Finance Committee approved of this idea and the Senate, as a first step, passed a resolution for its Legislative Counsel to begin compiling the various laws.

We can easily see from these 1927 developments the seeds of a future interest in codifying the entire tax law: the fundamental goal of simplification, desire to organize and present the law in a more logical fashion, need for a continuing law that could serve as a “base” for subsequent amendments, and interest in an administrative tax code. One other objective that a complete code could satisfy was simply to collect and present in one easily accessible document the entirety of the tax law. McDermott had previously expressed to Green his frustration at being unable to obtain some pertinent, prior tax law enactments.

The staff’s budding interest in codification would not, however, be fulfilled for over a decade. To help understand why, we must briefly consider some of the broader context of the staff’s activities.

Other U.S. Codification Efforts Prior to 1927

Most tax professionals probably think of the Internal Revenue Code of 1939 as the nation’s first tax code, but that turns out not to be true. By 1927, as the JCT staff worked on its simplification proposals, there had already been one, and possibly two, tax codes approved by Congress, depending upon the meaning of the term, “code.”

The first U.S. tax code was Title 35 of the Revised Statutes of 1873. In 1866, Congress authorized the President to appoint a three-person commission to consolidate all existing U.S. statutes of a general and permanent character. It was the first federal codification effort—the collection and restatement in an orderly fashion of the law contained in separately enacted statutes—and followed similar efforts that had occurred in the states during the first half of the 19th Century. These efforts might be thought of as “partial” codifications since they only tried to pull together stand-alone statutes covering the same subject-matter areas. A broader effort might also attempt to include in the code common-law rules, administrative regulations, and other sources of the law. In the tax area, we are all familiar with the recent debate regarding whether the common-law “economic substance doctrine” should be included in the Internal Revenue Code.

Proponents of codification (in the “partial” sense) argued that it would simplify the law. Without codification, laws affecting the same issues were often scattered among many separate enactments that might have amended or even repealed one another. Thus, it was sometimes necessary to undertake extensive

research merely to ascertain the state of the law at any given moment.⁸ This difficulty occasionally led some lawmakers, when they wanted to propose a new law, to craft and pass a stand-alone bill rather than determine whether there already existed a law that might need to be amended or repealed. In addition to collecting and reorganizing the law, codification provided an opportunity to identify (and possibly reconcile) inconsistencies that resulted from this practice.

An example occurred in 1953 when Congress passed a law authorizing the Secretary of Defense to regulate the sale of liquor on all Army and Navy military posts. In the Canteen Act of 1902, however, Congress had previously prohibited the sale of liquor on army posts. What, then, was the effect of the 1953 law? The first attempt to codify the law in this area took the position that the later enactment effectively repealed the earlier prohibition and permitted the sale of liquor subject to the Secretary's regulation. Unfortunately, this decision turned out to be highly controversial and almost undermined the entire codification effort. Eventually, Congress codified the law without specifying the rule on this issue, with the prior statutes left to speak for themselves.

Codification thus promised to provide important advantages, but it faced a number of challenges. The first was simply locating every prior enactment, including possible riders on appropriations bills, dealing with a particular subject. The codifier then had to eliminate obsolete and repealed provisions, reconcile direct conflicts, and place the remaining law in some logical order. The codifier also had to determine which laws were sufficiently "general and permanent" to be included in the code. Annual appropriation bills, for example, were not generally codified (even though riders of a "permanent" nature were). Some "temporary" laws were serially reenacted—a practice certainly familiar to current tax professionals—and the codifier had to decide at what point such law qualified as "general and permanent." A final question, as illustrated by the Canteen Act example, was the extent to which a codifier should change the law. If two prior enactments did not directly conflict with one another but nevertheless together produced a nonsensical outcome, should the codifier attempt to make sense out of the nonsense?

When a code is approved, an important distinction is whether Congress enacts it as "positive" (or "absolute") law as opposed to mere "prima facie evidence" of the law. "Positive" law is conclusive evidence of the law; a code enacted in that manner replaces its underlying statutes, which are repealed. In contrast, code provisions that are mere prima facie evidence of the law may be rebutted by the underlying statutes, which are not repealed. A researcher must still examine those statutes to determine the precise state of the law.

⁸ In explaining the need for what would eventually become the U.S. Code, Representative Little (R.-Ks.), chairman of the House Committee on Revisions of the Laws, asserted in 1919 that "you can read the laws of Hamurabi (sic) written 4,000 years ago [on a rock] and know the law of that city, and what you are disobeying, but that is more than you can do in the United States." H. Codification Hearing (1919) at 8.

Another reason the distinction is important is its effect on later amendments. A code enacted as positive law may serve as a base law that can be directly amended by subsequent enactments. A code that is merely prima facie evidence of the law cannot serve this function; subsequent amendments must be made to the underlying statutes. As we have seen, the absence of a continuing base law was one of the main problems encountered by Congress during the early years of the modern income tax. If there had existed a tax code constituting positive law, Congress could have passed amendments to it (rather than completely reenacting the entire law). The direct code amendments would also have preserved, without need for any further codification efforts, the orderly structure of the law already provided by the code.

Congress rejected the submission of the private sector experts who made up its 1866 commission because it found they had changed the underlying statutes too much. Congress, however, approved the work of another private attorney who corrected and completed the work of the commission, and enacted in 1874 as positive law the “Revised Statutes of 1873,” which codified all general and permanent U.S. statutes as of December 1, 1873. The enactment repealed all prior federal statutes covered by the revision, with the revision “be[ing] in force in lieu thereof.” Because the Civil War income tax had expired by that point, the Internal Revenue title (title 35) of the Revised Statutes did not include any income tax provisions but dealt exclusively with excise taxes and tax administration matters.

Almost immediately, there was criticism that the codification contained errors and was incomplete. In addition, there was some confusion about the exact state of the law following the codification. The revision contained a savings clause that preserved (rather than repealed) prior laws not included in the revision, but it did not specify what prior laws had, or had not, been included. As a result, some claimed that the revision failed to provide a single, complete set of laws. Finally, as subsequently confirmed by the Supreme Court, the 1874 revision did not merely restate the law without any change but made alterations “necessary to reconcile contradictions and amend imperfections in the original text of the preexisting statutes.”⁹

Any codification, of course, requires some change to the law if only to remove obsolete provisions, conform language used in separate enactments, organize provisions, and resolve direct conflicts. On the other hand, it should not be surprising that Congress jealously guards its legislative role and is therefore very sensitive to “too much” change. The experience in 1874 left Congress wary of enacting subsequent revisions as positive law. When a second edition of the revision (to correct the errors of the first edition) was completed in 1878 by George Boutwell (a former Senator and Treasury Secretary and the first Commissioner of Internal Revenue), Congress specified that the statutes enacted since December 1,

⁹ See *Dwight v. Merritt*, 140 U.S. 213, 217 (1891).

1873, and not the second edition, controlled in the event of any discrepancy. In addition, perhaps reflecting its lack of confidence in the Revised Statutes of 1873, Congress generally chose in subsequent legislation to pass separate enactments rather than direct amendments to the newly created “base” law. As a result, Congress gradually reintroduced the chaotic state of affairs that the Revised Statutes had been intended to eliminate. It again became necessary to examine individual statutes (and reconcile possible inconsistencies) to determine the state of the law on any given issue.

When the U.S. Code was created about 50 years later, Congress’s objective was merely to “compile” the prior laws into a code, rather than also to “revise” them as the 1874 revision had done. Nevertheless, a series of events similar to the earlier experience took place. Initially, the Senate did not take any action on 1920 and 1921 House bills that would have codified as positive law the post-1873 U.S. statutes of a general and permanent nature (and repealed those statutes). In 1924, the House tried again and passed another codification bill; this time, the Senate Committee on Revision of the Laws reported the bill unfavorably because of the bill’s errors and omissions. Finally, in 1925, the House passed a fourth codification bill but specified that the new code would be merely prima facie evidence of the law until July 1, 1927. The delayed effect was intended to give Congress time—termed a “twilight zone”—to identify possible errors and pass amendatory legislation. At the end of the twilight zone, the bill repealed the underlying statutes and approved the code as positive law. Reported favorably by the Senate committee, this bill was found on the Senate floor to contain glaring errors. As a result, the Senate amended it to make the twilight zone permanent, and the bill was eventually passed in that manner in 1926.

Thus, all of the titles of the U.S. Code (representing the law in effect on December 7, 1925) were initially approved as mere prima facie evidence of the law without the repeal of any prior statutes. The plan was to have Congress separately enact each title as positive law once it was clear that the title was accurate and complete. The tax title approved in 1926 (Title 26)—essentially setting forth in slightly reorganized form the provisions of the Revenue Act of 1924—became, in effect, the second U.S. tax code (albeit constituting mere prima facie law). The title (as well as the rest of the U.S. Code) was approved on June 30, 1926, almost precisely the day JCT Chairman Green began to organize the staff and make his first hires. In short, the JCT staff’s simplification work in 1927 took place within the shadow of significant Congressional interest in codification, but also wariness of its potential intrusion into the legislature’s prerogatives.

The Slow Trek to 1939

On November 15, 1930, Stam submitted to JCT Chairman Hawley (R.-Ore.) a proposed codification of all of the internal revenue laws of a permanent character in

force on December 1, 1930.¹⁰ Representative Hawley had replaced Green as Chairman of both the Ways & Means Committee and the JCT in March, 1928, when Green resigned from Congress to become a judge on the U.S. Court of Claims.¹¹ Green was 72 years old at the time, and the usual practice was not to name anyone over 60 to such a position. But Green had strongly opposed the Coolidge Administration's third attempt to repeal the estate tax (and the proposed repeal had not been included in the House tax bill then being considered by the Senate). Indeed, on the House floor, Green had characterized the debate on that issue as involving "the most extraordinary, highly financed propaganda for a selfish purpose . . . that has ever been known in the whole history of this country." There was speculation that the appointment was made to remove Green from Congress and improve the chance that estate tax repeal would be included in the final legislation (it wasn't).

In his letter to Hawley, Stam reported that he and one other JCT staffer had spent practically the entire preceding two years working on the draft code. There may well have been much truth to this statement. In the 30 months between May 29, 1928 (when the 1928 Act was approved and the 1st session of the 70th Congress ended) and Stam's submission in November, 1930, Congress had been out of session for about 13 months. Moreover, when it was in session (which included a special session), Congress—especially the tax committees—had devoted much time to developing the legislation that would eventually become the Tariff Act of 1930 (popularly known as "Smoot-Hawley"). Beginning in January, 1929, the Ways & Means Committee had conducted almost seven weeks of hearings and its bill had been on the House floor for 20 days. The Finance Committee subsequently conducted almost six weeks of hearings, and its bill was on the Senate floor for almost seven *months*. The Conference Report and debate had then taken another 2-1/2 months before final passage of the legislation occurred in June, 1930.

With the tax committees so preoccupied, they considered very little tax legislation during this period. They also apparently requested few JCT reports: during the 30 months, the JCT staff prepared only five reports—three on legislative tax issues and two relating to the JCT's review of BIR refunds. Meanwhile, the JCT staff (with responsibility only for *internal* revenue matters) appears not to have spent any time whatsoever on the tariff legislation. In short, the tariff bill (as well as, perhaps, the uncertain economic prognosis following the October, 1929 stock market crash) gave the staff a golden opportunity to work on codification.¹²

¹⁰ The proposal could make this claim because Congress was not scheduled to be back in session until December 1, 1930.

¹¹ In 1933, Senator Harrison (D.-Miss.), who was chairman of the Finance Committee, became the first member of the Senate to serve as JCT chairman. In 1935, the chairmen of the tax-writing committees began alternating serving as JCT chairman and vice-chairman each session.

¹² The lull may have continued even after Stam's submission of the draft code. A copy of an unsigned letter dated May 2, 1932, apparently from a JCT staff attorney, reports that "I am still attorneying for the Joint Committee, which means that I am not attorneying at all. But I can give you computations showing there never was any prosperity and that Huey Long should be President." (#259)

The staff benefitted from one other advantage. Congress had already passed the Revenue Act of 1928 by inserting its 1928 changes into the staff's proposed rearrangement of the income tax statute. The staff, therefore, had to make (and did make) only very minor changes to the income tax provisions of the 1928 Act to develop the income tax chapter of the proposed code.

Most of the staff's time was probably spent working on the rest of the internal revenue law, consisting of the estate tax, many miscellaneous excise taxes, tax procedure and administration provisions (including the rules for the BTA), rules applicable to BIR personnel, and the provisions authorizing the JCT. Although these laws had generally been included in the Revenue Acts of 1926 and 1928, unlike the income tax provisions, they had not been transformed into a code. As Stam explained to Hawley, the staff had to examine about 350 original statutes to make sure no law had been inadvertently omitted, identify and remove obsolete and temporary provisions, and then rearrange the law in an orderly fashion. Although not mentioned, the staff presumably had also reconciled inconsistencies in the law that it had discovered. Anticipating possible objections, both Stam and Hawley repeatedly emphasized that the proposed tax code made no change to substantive law and had been developed with the full involvement of the Treasury Department.

The JCT subsequently passed a resolution recommending the proposed code to the House Committee on Revision of the Laws, the committee that had prepared the U.S. Code in 1926 and had jurisdiction to report legislation enacting the proposed tax code as positive law. Representative Fitzgerald (R.-Oh.), chairman of that committee, responded to Hawley very positively: "I shall try to overlook no opportunity of pushing the matter forward." He requested a meeting with Stam and House Legislative Counsel Beaman to help him prepare the proper language. On the back of Fitzgerald's letter is a handwritten note, apparently written by Stam summarizing his main talking points in favor of codification:

"All the law is collected together in one place and conveniently and logically arranged.

The Code can be cited in court as absolute law and will not be rebuttable as in the case of the present law.

Practitioners do not use the code to any great extent now as they prefer to go back to the absolute law. This will be changed if this Code is enacted into law.

All internal revenue laws in the future can be enacted by amendment instead of by enacting the whole law over."

Stam may have timed his submission in the hope that the proposed tax code would be taken up during the third session of the 71st Congress that began in December, 1930. But notwithstanding Fitzgerald's enthusiastic response to Hawley and whatever arguments Stam may have made to Fitzgerald on behalf of codification, no bill was introduced in that session. Nor was any bill introduced in any of the next four Congresses (1931-38).

Meanwhile, during that period, the pace of other tax legislation quickly picked up, with seven major income tax acts passed (as well as the Social Security Act of 1935). Congress reenacted large portions of the income tax in four of the acts and gave itself a “fresh start” each time; thus, the new laws were generally made applicable only to future taxable years, with prior statutes preserved for prior years. In the other three income tax acts, Congress principally amended earlier statutes. The net result was a growing body of laws spread among a number of different enactments. The “base” law that Congress tried to create in 1928 had become fractured into many different pieces. Since the income tax statutes tended to be similar, but not identical, to one another, the potential for confusion in remembering what law applied to which years was quite high.

In addition to helping with all of this legislation, the JCT staff produced three more editions of the proposed tax code: in 1933 (for law in effect as of July 16, 1932), 1938 (for law as of January 1, 1938), and 1939 (for law as of January 2, 1939). Each edition, of course, had to incorporate the laws that had been enacted in the interim. The 243-page proposed code in 1930 grew to a 1939 proposal of 504 pages. Despite the staff’s efforts and the seemingly increasing need for a code, and aside from some occasional feedback received from the Treasury, BIR, and BTA regarding portions of the drafts, enactment of the tax code as positive law appears to have completely fallen off of the legislative radar screen. The JCT staff’s 1933 proposal was included as Title 26 of the 1934 edition of the U.S. Code, but it remained (like the rest of that Code) as mere prima facie evidence of the law.

Possible Reasons for the Legislative Delay

One possible reason for the lack of legislative activity may have been resistance from the House Committee on the Revision of the Laws. This committee had sponsored the House’s repeated efforts to enact the new U.S. Code as positive law but gotten badly burned in the process when the Senate kept identifying errors and omissions. As one member of the committee later explained, once the Senate pointed out all of the errors, the committee members “were all ashamed that we had ever voted for it.” It is, therefore, easy to imagine the committee being wary of supporting a bill codifying the tax laws as positive law, an area probably unfamiliar to most or all of the committee’s members. Although the committee almost surely knew and trusted House Legislative Counsel Beaman who probably did most of the drafting, they may well have been unfamiliar with Stam and anyone else on the JCT staff. Yet any changes to the law that had been made in the proposed code were likely the product of judgments by the JCT staff to iron out inconsistencies in the law. How confidently could these committee members respond to questions if a bill were brought to the House floor?

A factor contributing to the delay may have been the results of the 1930 and 1932 elections. Following the 1930 election, the Democrats took control of the

House. Thus, Representative Collier (D.-Miss.) replaced Hawley as chairman of both Ways & Means and the JCT.¹³ Then, in the 1932 landslide election for Franklin Roosevelt, Collier did not run for reelection, Hawley was defeated in his primary, and Smoot was defeated in the general election (the latter two results reportedly the consequence, in part, of fallout from the Smoot-Hawley bill). Thus, the election changed three of the top four positions at the JCT. Beginning in March, 1933, Representative Doughton (D.-N.C.) became chairman of Ways & Means and Senator Harrison (D.-Miss.) became chairman of the Finance Committee and the JCT.

Members have differing interests and priorities, and it is unclear if Collier, Doughton, or Harrison had any knowledge of, or interest in, codification at the time. It is also not clear how much contact they had had with the JCT staff before they became chairmen. A technical project like codification may demand a degree of trust in staff that can only be gained over time.

Presumably another factor delaying action on a codification bill was simply the surge of other tax legislation beginning with the Revenue Act of 1932. It is probably fair to assume that codification of the tax laws could not begin to compete with those legislative demands.

But, as suggested by one of the Stam cartoons, resistance from the Treasury Department and the BIR—the barking dogs of “ignorance,” “possible error,” “envy,” and “delay”—may be the main explanation for the lack of action on codification. As reported by E. W. Kenworthy, long-time DC correspondent for the *New York Times*, “Treasury was afraid to let anybody try to put that ocean into a pint pot.” Although every codification proposal of the staff emphasized Treasury’s full involvement in the project, it is noteworthy that there was never any mention of Treasury *endorsement* of the work-product or support for the legislation. No matter how many times the Treasury had been given drafts to review, the Department may well have remained wary if it had not had much input into the critical *first* draft when many important, initial decisions are sometimes made. Interestingly, the one government agency that strongly supported the project was the Justice Department, whose tax litigators especially stood to benefit from the clarity a code might provide.

A February, 1938 speech by Roswell Magill, who was then Under Secretary of the Treasury, may provide a little insight into the Treasury’s attitude at the time. According to one noted tax historian, Magill was “indisputably one of the most important tax officials of the 1930s.” During the same week he delivered his speech, Magill had appeared on the cover of Time Magazine.

Magill and Stam were contemporaries. Born less than a year apart, they each served in the armed forces before obtaining law degrees in the early 1920s. They

¹³ Stam may not have known this when he submitted the proposed tax code to Hawley on November 15, 1930, since the Republicans still had a very narrow majority immediately after the polls closed. Special elections occurring before the next Congress convened gave the Democrats their majority.

both then worked at the BIR in 1923 and 1924 (although there is no indication that they knew each other at the agency). Thereafter, Magill left to begin a teaching career at Columbia and would eventually join the Cravath firm in 1943 as one of the firm's few lateral partners. He continued, however, to be closely involved in the tax legislative process, serving in 1933-34 as Assistant Secretary of the Treasury and again in 1937-38 as Under Secretary for Treasury Secretary Henry Morgenthau. Of course, Stam at those times was already well into his lengthy involvement with that same process. Their paths crossed again at the end of their careers (and just a few years before they each passed away) when Magill, as chairman of the Tax Foundation's Board of Directors, delivered that organization's distinguished public service award to Stam in 1962.

But their lives intersected in more ways than this. In late 1926, when JCT Chairman Green was searching for staff for the JCT's Simplification Division, he invited Magill, who had been highly recommended to him, to head the division. Green apparently suggested various ways in which Magill might serve on the staff while continuing to teach at Columbia. For example, Magill might work part-time during the school year and full-time during the summer (when Congress was typically out of session). In a December, 1926, response to Green, Magill cordially declined the offer. He explained that although he was very interested in revision and simplification of the tax laws, given the size and importance of the task, he didn't feel it would be satisfactory to either of them if he spent only a limited time on the project in 1927. He offered his services as a volunteer "in any way you deem desirable," but did not want to undertake regular employment, even part-time.

Subsequently, in June, 1927, when Hamel and McDermott urged Green to hire another attorney to help with the simplification work, Green again thought of Magill and suggested that he be contacted. As it turns out, even before receiving the suggestion, McDermott had been in contact with Magill to solicit ideas and help on the simplification project. Magill offered some suggestions and expressed willingness to do research for the JCT while at Columbia, but apparently did not show any interest in coming to DC. It is not clear if Magill was approached again following Green's suggestion, but Magill did not join the staff and the position was shortly thereafter filled by Stam. Had Magill accepted either opportunity to work at the JCT, Stam might never have served on the staff.

In his 1938 speech to the New York City bar, Magill delivered a masterful summary of the key legislative, judicial, and administrative developments over the first 25 years of the modern income tax. Among other things, he described the morass of tax statutes that had accumulated and the increasing difficulty in knowing what law applied to a particular transaction occurring in the past. He stated (perhaps grudgingly) that "even a codification of existing provisions would be an enormous improvement over the present somewhat confused situation." But when he subsequently elaborated on codification, Magill mentioned only two developments. One was Treasury's ongoing attempt to restate and codify the administrative provisions of the internal revenue laws. The other was an effort to

codify the tax laws then taking place in England. Magill suggested that the U.S. might want to form an independent commission (as the British had done) to do the necessary work.

Just days before the speech, Magill had received from Stam the JCT staff's third draft tax code, and he was undoubtedly aware of the history of the codification effort that was then stretching into its eighth year. Further, the third edition of the code had been prepared partly at the request of Magill. It is, thus, extremely curious that in his lengthy speech, which included some discussion of codification, Magill did not mention a single word about the JCT staff's effort. It was as if, from his and Treasury's standpoint, the entire JCT project had disappeared by early 1938. Interestingly, the British codification effort referred to by Magill was in the process of going down to defeat, in large part because of the perceived failure of the British Commission to incorporate sufficiently the views of Inland Revenue. Magill, who had previously co-authored with JCT Chief of Staff Parker a summary of the British tax system, may well have been aware of those problems. Thus, a possible subtext of Magill's message to the practitioners was the need for greater Treasury involvement before codification would occur.

Magill's reticence may have mainly reflected the views of Herman Oliphant. Like Magill, Oliphant was a graduate of the University of Chicago Law School and was teaching at Columbia when Magill joined the faculty. From 1934 until he passed away in early 1939, Oliphant served as General Counsel of the Treasury Department where he was a close advisor to Treasury Secretary Morgenthau and best known for strongly supporting the undistributed profits tax. Oliphant opposed enactment of the proposed code as positive law. He believed that substantially all of the benefits of the code could be obtained if it remained as mere prima facie evidence of the law. Magill's successor as Under Secretary, John Hanes, later testified that it was his belief Magill "recognized the dangers inherent in . . . codification, but that the practical advantages to be gained thereby were such as to weigh heavily in favor of its enactment." Hanes conceded, however, that there was "some difference of opinion" among the legal staff at the Treasury towards the codification effort (referring to Oliphant's opposition), with the principal concern being the likelihood of errors in such a major undertaking.

Enactment of the 1939 Code

Straightforward power politics eventually pushed the proposed tax code across the finish line. In early 1939 (just one week after Oliphant's untimely death at the age of 54), Chairman Doughton introduced a codification bill (incorporating the staff's fourth proposed code) and it was referred to the Ways & Means Committee rather than the Committee on Revision of the Laws. From that point on, passage of the bill was a foregone conclusion. Once the powerful tax committees got behind the legislation on a matter within their substantive expertise and almost surely not raising any significant policy issues (no matter how many minor changes to the law

may have been made), few members of Congress were likely to be swayed by Treasury or BIR complaints that a particular sub-sub-sub clause in the proposed code had not been phrased exactly right.

The Ways & Means Committee unanimously approved the legislation. On the House floor, Doughton fielded questions about the extent of any change made by the proposed code and Treasury's position towards it. As the following colloquy illustrates, he was not especially responsive to some of the more pointed questions:

Mr. Robsion (R.-Ky.): [Can you assure] the House that no words have been added and no words have been taken from the statutes?

Mr. Doughton: Absolutely, unconditionally, without any qualification or equivocation, there has been no change in the law.

Treasury's position was also left somewhat ambiguous. Representative Treadway (R.-Ma.), Ranking Member of the Ways & Means Committee and a supporter of the legislation, explained that "[t]here was some little complication or unfortunate circumstance that prevented a definite approval by the Treasury Department," but he then promptly told the House that "we are assured that the Treasury Department . . . approves this effort at codification." Notwithstanding this lack of clarity, there was never any doubt that the bill would be approved, and the final vote in favor was 350-16.

The Senate's approval was even quicker than the House's. The Finance Committee unanimously reported the bill favorably without amendment. During the markup, there was a little concern expressed about the possibility of change and error in the proposed code. Stam and Assistant Attorney General Morris, however, persuaded the Committee that it was far preferable to gain the advantage of the permanent fresh start provided by a code enacted as positive law, and to correct any errors after the fact, than to continue the existing, confused state of the law. On the Senate floor, the bill was passed without a record vote. Less than one month after Doughton introduced his bill, the measure was signed into law as the first Act of the 76th Congress. As the Preface in the Statutes at Large volume indicates, the new code was derived from 164 separate enactments approved between July 1, 1862 and June 16, 1938. It was the first body of law covered by the U.S. Code to be enacted as positive law.¹⁴ The next title to be so enacted would not occur for another eight

¹⁴ As a technical matter, the law enacted the Internal Revenue Code, and not Title 26 of the U.S. Code, as positive law (but the latter incorporates the text of the former). See Pub. L. No. 76-1, § 2; cf. 1 U.S.C. § 204 note (2012) (clarifying same distinction for purposes of 1954 and 1986 Codes). It is for that reason that the U.S. Code does not indicate Title 26 as having been enacted as positive law. See United States Code (2012 ed.), p. III. As one law librarian has observed, the distinction "is a little hard to wrap your head around." Whisner (2009) at 554 n. 48. The courts have uniformly rejected the claims of some tax protestors that the Internal Revenue Code, or the text of Title 26 of the U.S. Code, is not positive law. See *Hackett v. Comm'r*, 791 F.2d 933 (6th Cir. 1986) (unpubl.), 1986 WL 16862 (describing argument as "frivolous"); *Young v. IRS*, 596 F. Supp. 141, 149 (N.D. Ind. 1984); *U.S. v.*

years, and at present, roughly half of the titles remain mere prima facie evidence of the law.

Significance of the Codification Effort for the Legislative Process

Some may view the swift denouement of the codification saga as simply illustrating the aphorism that “might makes right.” But that reaction would overlook one of the principal lessons of the episode. It may be true that the tax committees were powerful enough in 1939 to obtain passage of the proverbial ham (or sausage) sandwich. The question remained, however: who would prepare the sandwich to be passed? For legislation as long and technically challenging as the codification bill, this question presented a real dilemma for Congress.

At one point, it was common for legislators to draft their own bills. In 1913, in opposing a measure (which was not approved) that would have created a nonpartisan drafting service in Congress staffed by professionals, one Senator mocked colleagues who would need such help. He instructed them to “retire to their homes, resume their seats on their school benches, and let somebody else come [to the Senate] who is capable of doing [the necessary drafting].” The same Senator belittled the notion of nonpartisan staff, stating that if such an “all-wise man” with “great learning . . . absolute sincerity of purpose and patriotism” could be found, Congress should install that person as the lawmaker of the country. A decade later, at least some members of Congress continued to hold this view, with some interpreting the hiring of professional assistants as an “implied slur” upon their abilities as legislators. The initial 1913 income tax bill, as well as the initial bills of certain subsequent tax acts, had been principally drafted by Representative Cordell Hull (D.-Tn.) who was aided by a couple of assistants whom he had hired.

It was, however, extremely unlikely that any legislator would have the time or ability to draft a bill as long and complex as codification of the tax laws. Although by 1939, Congress had at its disposal the staff of the House and Senate Offices of Legislative Counsel to provide expert drafting assistance, a bill like codification required more than just drafting skill. It required extensive research to determine the exact state of the entire body of law. Knowledgeable tax professionals needed to collaborate with the draftsmen to craft the final product.

One option was to seek assistance from the private sector. Congress relied on such experts in producing the first codification of the U.S. statutes in 1874, and did likewise in the early 1920s when Representative Little (R.-Ks.), chairman of the House Committee on the Revision of the Laws, oversaw the work of a series of private sector advisors, including the staff of two legal publishing companies, to produce what would become the first U.S. Code. But in each case, the resort to

Zuger, 602 F. Supp. 889, 891-92 (D. Conn. 1984), aff'd 755 F.2d 915 (2d Cir. 1985), cert. denied, 474 U.S. 805 (1985); Lynch at 76-77 (describing arguments as emanating from the “lunatic fringe”).

private sector help for this most basic of legislative functions may have heightened the concerns and suspicions of Congress about the substance of the final product. As we have seen, neither effort resulted in the enactment of positive law that had the full confidence of Congress.

Another option was to seek help from the agencies of the Executive Branch. But inter-branch jealousies also made this possibility somewhat problematic. While some members of Congress during the brief 1939 debate sought assurance that Treasury had been fully involved in developing the tax codification proposal, others expressed concern that the Executive Branch agencies had been *too* involved. As one Representative stated: "I am inclined to think that there is a possibility that the Treasury [and Justice] Department[s] in their zeal to make a workable law have perhaps eliminated from this codification certain so-called unworkable provisions which have been a constant embarrassment to [them]."

Chairman Doughton and the other supporters of codification in 1939 repeatedly emphasized the third option that they had used: reliance on the staff of the JCT to perform the work. As he explained to the House, "the members of the [Ways & Means] committee, of course, could not [check the accuracy of the bill] with the [same] thoroughness [as] the staff . . . ; but the committee has agreed that it is willing to be governed by and responsible for the work of the staff of the joint committee." When one Representative, concerned that Treasury's view of the law (rather than the taxpayer's) had prevailed in the codification, asked who had protected the taxpayer, Doughton immediately responded, "[t]hat was the duty of the staff of the Joint Committee on Internal Revenue Taxation."

To be sure, Stam and the JCT staff obtained much assistance from the government tax agencies as well as private groups and individuals. But the staff's presence meant that someone in the legislative branch could be held responsible for the end product. The staff could provide a form of political cover for the members of Congress that the other options could not. As one member emphasized, the JCT staff are "all employees of the Congress."

Presently, of course, virtually every committee in Congress receives substantial help from professional staff. But that was not the case in 1926 (when the JCT was formed) or 1939 (when the 1939 Code was enacted). Between 1913 and 1946, Congress had only about 300 mostly nonprofessional aides spread among its 135 standing committees. Aside from the JCT staff, about the only professional committee staff during this time belonged to the House and Senate Appropriations Committees.

There was a limited amount of other professional assistance. By 1926, Congress was obtaining help from the staff of a legislative reference unit in the Library of Congress (created in 1914 and now the Congressional Research Service), the House and Senate Offices of Legislative Counsel (formed in 1924 from legislative drafting services approved in 1918), and the General Accounting Office (created in

1921 and now the Government Accountability Office). But none of these staffs worked directly for any committees or helped with day-to-day legislative work.

Given this context, we can see that the statement Doughton made on the House floor—that the Ways & Means Committee had not made a thorough check of the bill but was “willing to be governed by and responsible for the work of the staff of the joint committee”—may have been quite bold. Although most everyone in Congress presumably understood at some level the impossibility of the members giving detailed review to a bill as long and complicated as codification, there was, nevertheless, some risk in admitting this openly. Doughton was willing to take this risk because by that point, the JCT and its staff had “been operating on taxation for years” and their work was “familiar” to the House. Moreover, the staff’s work had been seen as *good*. As Representative Treadway (R.-Ma.), who had been a member of the JCT from the beginning, explained to the House:

We have employed ever since [the JCT] originated a most efficient staff. The head of that staff up to last year was Mr. Lovell H. Parker, than whom there is no greater tax expert in the country, in the opinion of the Committee on Ways and Means. He had under him, as counsel to the joint committee, Mr. Colin F. Stam; and when Mr. Parker resigned from his position, Mr. Stam was unanimously elected by our joint committee to take his place. Therein is the security of the public, that men of such high type as these employees and the persons under them have done the manual work, the actual physical work of codifying the laws on taxation.¹⁵

Finally, perhaps most important, the staff was perceived as having worked in a *nonpartisan* way. Treadway, who by early 1939 had been a member of the minority party in Congress for eight years, expressed confidence that “as much of a partisan as I am,” he could not conceive of the staff trying “to cover up or hide or prevent a proper classification and codification [of the tax law].”

Nothing in the JCT’s authorizing statute required the appointment of nonpartisan staff. Nevertheless, JCT Chairman Green seems to have followed that practice with his initial hires. Although some of the staff (such as Parker) came to Green’s attention through contacts in Congress, there is no indication of any selection based on political considerations. When party control of Congress changed in 1930 and 1932, there does not appear to have been any turnover on the staff. Years later, Stam reported that there was similarly no staff turnover following the 1952 elections that produced another change in control of Congress.

Thus, the innovation that Congress stumbled into when it created the JCT provided the legislature with the opportunity to learn that it could benefit from, but maintain proper control over and, therefore, trust, unelected professionals working

¹⁵ 84 Cong. Rec. 783 (Jan. 25, 1939); see also *id.* at 788 (statement of Rep. Reed (R.-N.Y.)) (“I believe the Joint Committee on Taxation has engaged as fine a lot of experts as can be found. They are experts in one definite line of legislation, namely, the revenue laws.”).

directly in the legislative process. In the Legislative Reorganization Act of 1946, which marked the formal beginning of professional staff for the committees, Congress specifically looked to the JCT model (and followed it in part) when it authorized the hiring of professional, nonpartisan staff by the House and Senate Committees. It may be a coincidence, but the first U.S. Code titles to be approved as positive law after enactment of the Internal Revenue Code of 1939 occurred just one year later, in 1947. In summary, perhaps more important than any specific achievement (including codification of the tax laws), the key contribution of Parker, Stam and the other early JCT staffers may have been to serve with enough skill and integrity to demonstrate to Congress that its innovation was a success.