

## TAX HISTORY

## Facts Are Stubborn Things — But So Are Opinions

by Joseph J. Thorndike

“Everyone is entitled to his own opinion, but not to his own facts.”

New York Sen. Daniel Patrick Moynihan usually gets credit for that observation, but it probably belongs to the American financier Bernard Baruch, who said something similar in the 1940s. Either way, the comment would make a good slogan for the unsung heroes of congressional oversight: They are all about the facts.

Lawmakers on Capitol Hill have many jobs, but one of the most important involves keeping tabs on things. Congressional oversight extends not simply to the operations of the federal government, but deep into the private sector as well. Lawmakers have the authority to investigate nearly anything they want, as long as the inquest advances the “legislative function.”

Elise Bean makes that point in her outstanding new book on congressional oversight, *Financial Exposure: Carl Levin’s Senate Investigations Into Finance and Tax Abuse*. Hers is a happy story, or at least a hopeful one, and although it’s tempting to be cynical about Bean’s optimistic view of American government, that would be a big mistake.

Critics of the Trump administration are quick to complain about the sorry state of congressional oversight. Defenders of the president, including most Republicans in Congress, counter that they are keeping a close eye on the White House. This debate tends to play out most obviously regarding the question of Russian interference in the 2016 presidential election, but it also shapes arguments about slightly less fraught issues, including disclosure of President Trump’s personal tax returns.

Whatever your opinion on how well Congress is performing its supervisory role, it’s safe to say that oversight will continue to be a vital function of the legislative branch. In many ways, it’s like the old saying about the weather in New England: If you don’t like it, just wait a bit and it will change.

Depending on the results of the midterm elections, change to the oversight function of Congress may come sooner rather than later. When it does, however, or even if it doesn’t, Bean’s story about her three decades of experience on Capitol Hill will be highly relevant. Her book — as readable as it is thorough — sheds much-needed light on the right way to exercise oversight: carefully, vigorously, and with a strong bipartisan impartiality.

### Levin as Hero

For three decades, Bean worked for Sen. Carl Levin, a Michigan Democrat who served on the staff of the Senate Homeland Security and Governmental Affairs Committee. For 12 of those years, Bean was Democratic staff director and chief counsel on the committee’s Permanent Subcommittee on Investigations (PSI).

In many ways, *Financial Exposure* is a paean to Levin, who Bean describes as a hardworking, well-intentioned, and generally evenhanded lawmaker. Working for Levin, Bean declares, taught her “how simply bearing witness to the facts can spark change, how conducting a good-faith investigation can turn a political competitor into an ally, and how congressional oversight can contribute to the common good.”

Bean outlines a dozen of Levin’s core principles, all of which shaped PSI’s investigations during her years there. Chief among them were:

- a commitment to original research (as opposed to relying on outside experts to analyze topics);
- an emphasis on illustrative case studies (to help crystallize important but sometimes abstract issues);
- a willingness to go slow (since good investigations take time); and
- a relentless commitment to bipartisanship.

This last element was especially crucial. Levin believed that bipartisan inquiry is not simply possible but vital. At the end of an investigation, bipartisanship can pave the way for a successful legislative solution, but it is helpful even during an investigation. “Our bottom line was that investigators with political differences had to investigate together, reviewing the same evidence

at the same time, if they were ever to agree on the facts," Bean writes. "More, we learned that investigators with different viewpoints produced more thorough, accurate, and credible fact-finding."

Bipartisan ideals notwithstanding, of course, Levin was still a Democrat, and his oversight investigations tended to reflect his political commitments. He believed strongly, for instance, in the value of progressive taxation, and specifically the idea that wealthy individuals and corporations should be made to pay their fair share of the overall tax burden. That conviction prompted Levin to champion a series of high-profile tax investigations, several of which Bean recounts in detail.

### Shelters and Shaming

For instance, Bean describes the PSI investigation of tax shelter promotion by some of the country's most important accounting firms. It was a lurid investigation, emphasizing the crass marketing that encouraged many of the most egregious tax avoidance schemes developed by firms like KPMG and EY. Levin was quick to exploit some of the unseemlier details, forcing reluctant witnesses to acknowledge the audacity of their promotional efforts, Bean recounts. It was an exercise in public shaming — and a successful one at that.

Similarly, Bean played a crucial role in several of PSI's other investigations of abusive tax shelters, tax haven banks, and corporate tax avoidance. In recounting each, she is forthright about her own views. One passage is especially illustrative: "All four radiated tax sleaze," Bean says of four witnesses called before PSI during one of its tax shelter investigations. "It was a sad commentary on the legal profession's role in too many tax matters today."

Bean devotes an entire chapter to PSI's wide-ranging investigation of tax avoidance by U.S. multinational corporations. Like all PSI investigations originating on the Democratic side of the aisle, this one was rooted in Levin's personal dispositions. "Senator Levin began ruminating about tackling what he saw as one of the great American injustices — profitable U.S. corporations paying little or no tax to Uncle Sam," Bean recalls. "To him, corporate tax dodgers were

tearing at the very fabric of American society, hiding profits, robbing the U.S. treasury of revenues needed for the country to thrive, and fueling middle class anger at the feds' failure to hold wealthy corporations accountable for their greed and deception."

### Are Facts Enough?

Levin's leadership of PSI over the course of his career was always rooted in such convictions, but just as importantly, it was grounded in a commitment to vigorous investigation and unbiased fact-gathering. "The world is a complicated place," Bean writes, "and problems worth investigating typically have layers of complexity. A good investigation has to dig through those layers to figure out what happened and why."

Facts were important for their own sake, but they were also crucial to building bipartisan goodwill. "Reaching bipartisan agreement on the key facts underlying important issues is usually a difficult process," Bean writes. "Once accomplished, however, bipartisan factual findings provide a solid foundation for informed public policy."

On that hopeful note, it's time to return to the Moynihan-Baruch quotation. Even if we assume that everyone will eventually be forced to accept the facts of a situation, they still are inclined to interpret those facts through the lens of their own political opinions, which can either clarify or distort, leading to vastly differing policy responses to a given set of facts.

Consider, for instance, the PSI investigation of corporate tax avoidance, and profit shifting particularly. Levin intended for that investigation to help bolster the flagging corporate income tax: Confronted with the reality of corporate tax avoidance, lawmakers would respond by beefing up enforcement, requiring greater transparency, and closing "abusive tax loopholes," to use Bean's words.

That's not what happened, however, as Bean readily acknowledges. "In 2017 the Trump Administration went the other way and won passage of a tax bill that will further reduce corporate tax revenues through lower tax rates, new loopholes, and new tax incentives to shift U.S. corporate profits offshore," she writes. Not

everyone would agree with that characterization of the Tax Cuts and Jobs Act (P.L. 115-97), but it's already clear that the law has accelerated the decline of the corporate tax as a pillar of federal finance.

The problem, of course, is that when Republicans looked at the kind of evidence that PSI was uncovering — including rampant profit shifting — their legislative response was to weaken the corporate tax further rather than trying to strengthen its role in the nation's revenue system.

Conservatives acknowledged that corporations were engaged in rampant tax avoidance, and many agreed that it was a problem. For most Republican lawmakers, however, the solution to the problem was not to close loopholes but to revamp the corporate tax itself. Avoidance was a sign that corporate taxes were misconceived, or at least poorly structured.

Like Levin and his progressive colleagues, Republicans believed that the facts made a case for corporate tax reform. They just happened to believe that the necessary reform involved lowering our expectations for the corporate tax and its contribution to the fisc.

In other words, facts are facts. But facts are not policy, nor do they lead inexorably toward any specific set of policy recommendations. Bean, of course, is aware of this political reality, but she is nonetheless convinced — and I think she's right — that the facts still matter. She writes:

When I look back at the Levin hearings, it seems to me that their most important accomplishment was simply describing what some American corporations were doing to dodge their tax obligations. That truth-telling — disclosing the facts accurately and in detail — helped inform and energize a worldwide conversation on corporate tax dodging. That's the power of oversight.

Indeed it is. More to the point, the worldwide conversation over corporate tax avoidance didn't end with President Trump's signature on the TCJA. It continues today and will continue well into the foreseeable future. And throughout this debate, the facts will continue to matter. ■

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