Should Tax Lawyers Mount an Inchon Invasion at CBO?

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The two top tax policy positions in the federal government, the Chief of Staff of the Joint Committee on Taxation and the Assistant Secretary for Tax Policy at the Treasury Department, are occupied by economists Tom Barthold and Mark Mazur. With the exception of Larry Woodworth (who held both positions consecutively in the 1960s and 1970s), up until now JCT and Treasury heads were esteemed tax lawyers. Although Barthold and Mazur have been known to frequent with lawyers and in the past both have undertaken typical legal tasks like statutory drafting and long footnoting, make no mistake about it: The current top JCT and Treasury tax staffers are economists through and through -- they likely believe in the concept of imputed rental value of home ownership, the marginal disutility of income, and yes, notwithstanding what happened to Larry Summers, maybe even the theoretical possibility of exporting pollution from the United States (provided there are proper side payments).

Barthold and Mazur are the face of the ascension of economists in the D.C. tax policy world. One could view this disciplinary development as evidence of the current broader general legal crisis documented, for example, by the painful-but-fascinating ongoing introspection at Paul Caron’s TaxProf blog. With this disciplinary revolution, one could ask where are the inspirational legal scholars in the D.C. tax world, the Stanley Surreys and Michael Graetzs of 2015? There certainly are many gifted legal academics and practitioners out there, but how many are in position to have the influence like, say, Ron Pearlman had on Treasury I in 1984? Is it possible, heaven forbid, that even accountants have climbed above lawyers in the D.C. tax pecking order (no insult intended -- some of my best friends are accountants)? Are tax lawyers doomed to the drudgery of drafting and regulatory work? If this trend isn’t stopped, will Peter Orszag be appointed to the Supreme Court?

But there is a current opportunity to reverse this anti-lawyer trend. Just like the Inchon Invasion was a counterattack that turned around a bad strategic situation for the United States in the Korean War (don’t expect the movie The Interview to cover any of this), it’s time for a tax lawyer counterattack. Remembering that surprise and nimbleness are tactical virtues, tax lawyers should think of the CBO director reappointment as their Inchon, a cross-disciplinary outflanking that could stem the retreat.

Set aside politics and issues like dynamic scoring in the current debate about CBO leadership. Tax lawyers should beeline to file an amicus brief (lawyer friends, do I have this right?) to the CBO appointment process, asking that it be stipulated that Doug Elmendorf (or his replacement), if not already possessed of a law degree, as a condition of employment has to attend law school at night. It would be an especially sweet disciplinary triumph because CBO is that rare thing for a Washington
institution, essentially lawyerless (CBO has a counsel for administrative reasons, but doesn’t use in-house lawyers for policy analysis, which has to have been a decades-long affront to tax and other lawyers; and unlike CBO, OMB has all the lawyers in the executive branch at its disposal). While some may see CBO’s lawyerlessness as a virtue, as a time-limited bonus tax lawyers are missing the opportunity to blame whatever is alleged (and I emphasize “alleged”) to have happened in recent health care policy considerations with regard to Jonathan Gruber on the fact that ... Doug Elmendorf and other CBO staff weren’t versed enough in torts.

Just sayin’.