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Was Stanley Surrey racist? Was he a coward for not speaking as plainly about the Swiss tax haven problem in public as the Surrey Papers reveal his team did in private? In the broad sweep of history Surrey's silence may have mattered a great deal or it may have mattered very little. The quiet aspect of the Liberia problem that it highlights undoubtedly does. Exploiting the public's misunderstanding of the term tax haven as Surrey quickly learned to do has become second nature to scholars and policymakers alike. No less powerful than the loud aspect of the Liberia problem, the dog whistle politics it embodies demean all those who harness it by railing against tax havens just as it does those who decry "welfare cheats or illegal aliens." Banning the term would not solve the Liberia problem, but everyone who uses it must be aware of the risks they court and the lasting damage they cause by doing so.

I.
Introduction

Today, tax law has a Liberia problem.[1] In 2000, the Organization for Economic Cooperation and Development (OCED) published a list of jurisdictions it had identified as key threats to the welfare of its wealthy member states. [2] The list overwhelmingly featured Black and brown jurisdictions. Liberia, a state then lost in civil war, should not have been—but was—among those states targeted by the OECD.[3] Only an eleventh hour intervention by a majority of the U.S. Congressional Black Caucus spared Liberia and the others from the OECD's threat of sanctions.[4]

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* Professor of Law, Brooklyn Law School. This article benefitted from helpful comments from Ajay Mehrotra, Larry Zelenak and the editors of this journal. It also benefitted from excellent research assistance from Shivani Patel.

[1] Steven A. Dean & Attiya Waris, *Ten Truths About Tax Havens: Inclusion and the "Liberia" Problem*, 70 Emory L.J. 1659, 1663 (2021) ("Stubborn facts of inequality, racism, and privilege have kept outdated perceptions alive, stifling efforts to address persistent problems of inequality, racism, and privilege.").

[2] OECD, Towards Global Tax Co-Operation: Report to the 2000 Ministerial Council Meeting and Recommendations by the Committee on Fiscal Affairs 17 (2000), https://www.oecd.org/tax/harmful/2090192.pdf.

[3] *Id.*

[4] Most of the members of the Congressional Black Caucus signed a letter to the U.S. Treasury Secretary excoriating the OECD effort, and the United States withdrew its support just two months later. Steven A. Dean, *Inclusive*

In 2021, the OECD featured a racist meme in support of policies that prominent Black states refuse to embrace.[5] Race continues to play a pernicious role in shaping international tax policy each time policymakers, scholars, or others strategically accuse Black states of misdeeds.[6]

Sixty years ago, as this article details, the United States had a Swiss tax haven problem. The policy response highlights an aspect of the Liberia problem. A reluctance to name and shame Switzerland—despite feverish behind-the-scenes efforts to contain the profound threat U.S. experts perceived in the rise of Swiss subsidiaries of leading U.S. multinationals—exemplifies the quiet aspect of the Liberia problem. Stanley Surrey, the man many consider to be the greatest U.S. tax scholar,[7] had an opportunity to tell an indelible story of Switzerland's role in facilitating corporate tax avoidance. Instead, Surrey chose to remain largely silent.

The Stanley S. Surrey Papers housed in Harvard Law School's Historical & Special Collections reveal that Surrey's Subpart F addressed a very specific challenge.[8] But for the public,

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International Tax Policymaking: FATCA, the U.S. Congressional Black Caucus, and the OECD Blacklist, 99 TAX NOTES INT'L 83 (2020).

[5] *See* OECD, OECD/G20 BASE EROSION AND PROFIT SHIFTING PROJECT: TWO-PILLAR SOLUTION TO ADDRESS THE TAX CHALLENGES ARISING FROM THE DIGITALISATION OF THE ECONOMY 15 (2021), https://www.oecd.org/tax/beps/brochure-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf. After I published an article criticizing the brochure's racism, the OECD edited the image. The current version of the brochure replaced the original sun-drenched, palm-tree bedecked island with a city skyline. Original version: https://perma.cc/68NS-R3N7. Edited version: https://www.oecd.org/tax/beps/brochure-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf/.

[6] This is the loud aspect of the Liberia problem. The OECD's use of racist imagery and the President Biden incident described below offer two examples of policymakers' exploitation of bias. Scholarship in prestigious journals exploit racial bias in much the same way. *See, e.g.*, Vanessa Ogle, *Archipelago Capitalism: Tax Havens, Offshore Money, and the State, 1950s–1970s*, 122 AM. HIST. REV. 1431 (2017) (using a suggestive archipelago metaphor to describe a system of tax abuses that encompasses jurisdictions like Delaware as well as tropical islands). Even pollsters exploit racial bias when they survey individuals about their views on corporate tax avoidance. *See* Vanessa Williamson, How Americans Think About Taxes, Address (Jan. 20, 2017) (citing Greenberg Quinlan Rosner Research (June 17–22, 2003) which asked the following suggestive question about corporate tax abuse: "We should close the tax loophole that allows corporations to create tax havens in countries such as Bermuda.").

[7] Robert Goulder, *Stanley S. Surrey—The Greatest U.S. Tax Scholar?*, FORBES (June 8, 2022), https://www.forbes.com/sites/taxnotes/2022/06/08/stanley-s-surrey---the-greatest-us-tax-scholar/?sh=21b58b28c598 (quoting Professor Lawrence A. Zelenak as saying "I think that's absolutely right that he is the greatest scholar in the history of the United States. Certainly in the history of the U.S. income tax.").

[8] Harvard Law School Library, Historical & Special Collections, https://hollisarchives.lib.harvard.edu/repositories/5/resources/7491/collection_organization.

thanks to Surrey's uncharacteristic reticence, that would be impossible to know. As detailed below, in their internal correspondence, Surrey and his team focused explicitly and exclusively on an urgent threat posed by Switzerland. The notorious complexity of international tax law ordinarily ensures the absence of both heroes and villains in the narratives that animate it.[9] However, in this instance, Surrey's team left no doubt about "the importance we attach to solving the Swiss tax haven problem."[10] The Surrey Papers reveal a series of events not out of place in a spy thriller.

Part II describes the quiet aspect of the Liberia problem, explaining how strategic silence on the part of tax experts and officials leaves space for the public to conjure a vision of the international tax landscape consistent with anti-Black racism and other biases. Part III describes the impact of the loud aspect of the Liberia problem on international tax policy, highlighting the anti-Black racism at the heart of the OECD's 2000 attack on tax havens. Part IV offers startling insights into the origins of Subpart F from the Surrey Papers, unearthing a furious effort by Surrey and his colleagues to document and contain an urgent threat posed by the formation of Swiss Subsidiaries by leading US multinationals. Part V explores the continuing role of the quiet aspect of the Liberia problem in the work of leading policymakers and scholars, revealing the ongoing impact of Surrey's remarkable silence.

II
The Surrey Papers

The quiet aspect of the Liberia problem—as revealed by the Surrey Papers—tells a story of a profound disconnect between the private motivation and the public perception of the Kennedy

[9] The challenges faced by the international tax system at the time the OECD published its blacklist were longstanding, complex, and systemic. *See* Michael J. Graetz, *Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies*, 54 TAX L. REV. 261, 264 (2001) ("[N]ot only the fundamental structure of the system for taxing international income today, but also many of the core concepts used to implement that structure—concepts such as permanent establishment, corporate residence, and arm's length pricing—date from a time when airplanes were first becoming a regular means of travel . . . .").

[10] Memorandum from Treasury Department economist Nathan N. Gordon to Stanley S. Surrey (Dec. 7, 1961) (on file with author).

administration's efforts. Surrey allowed that divide to grow by confining blunt talk about Switzerland to internal correspondence. He allowed the public's ire to focus on native women under gaily painted parasols.[11]

For more than half a century, Subpart F has been one of the most important features of the international tax policy landscape. For Surrey's team, Subpart F served as a tax on Swiss subsidiaries of U.S. corporations, a bold strike against a hardened target. The Surrey Papers make that apparent, detailing how they risked the threat of criminal prosecution by Swiss authorities to carefully count those Swiss subsidiaries before and—with satisfaction—after Subpart F's introduction. Had Surrey and his team revealed the high drama of espionage and diplomacy that marked the birth of Subpart F—or had they simply ensured that Subpart F's inscrutable name was less so—the international tax policy landscape might look very different today. Instead, Surrey exploited the quiet aspect of the Liberia problem. That choice helped pave the way for its loud aspect, evident in the racially inflected narrative of tax havens the OECD and others exploit.

In the early days of the Kennedy administration, high ranking U.S. Treasury officials shared intelligence marked "CONFIDENTIAL" showing that leading U.S. corporations had begun to form subsidiaries in Switzerland to shield their global profits from taxation.[12] That triggered a flurry of activity that culminated in a threat of Swiss prosecution for espionage.[13] The Surrey Papers "tax haven" files document one of the most remarkable episodes in the long arc of taxation, until now lost to history.

[11] *See infra* note 15 and accompanying text.
[12] Memorandum from Treasury Department economist Nathan N. Gordon to Stanley S. Surrey (Mar. 1, 1961) (on file with author).
[13] Memorandum from Treasury Department economist Nathan N. Gordon to Stanley S. Surrey (undated) (on file with author).

To be sure, Surrey made no secret of Switzerland's role in corporate tax avoidance. With Surrey serving as his chief tax policy advisor, Switzerland found itself in the crosshairs of Kennedy's opening salvo against tax abuses by multinational corporations.[14] Somehow, Surrey's silence about Switzerland grew as the pursuit of a legislative solution to the Swiss tax haven problem intensified. In victory, Surrey's silence became an enduring fixture of the international tax policy landscape. Surrey's lasting tax haven compromise would come to be known not as the Swiss subsidiary tax it was crafted to be, but by the nondescript label Subpart F.

Surrey's embrace of silence suggests his growing understanding of the power of a quiet aspect of the Liberia problem. By declining to name-and-shame Switzerland, Surrey allowed others to substitute explanations for his actions that suited their worldviews.[15] Alongside confidential diplomatic briefings on Switzerland, the Surrey Papers contain a telling Wall Street Journal article from early 1962.[16] It suggests that Surrey knew the public preferred to imagine another—more colorful—target for Subpart F. With a dateline of Nassau, Bahamas, the article carefully sets the scene: "On picturesque Rawson Square here native women sit under gaily colored parasols plaiting and selling handbags, hats and other accessories."[17]

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[14] *See Text of Special Message on Taxes Submitted by President Kennedy to Congress*, N.Y. TIMES, Apr. 21, 1961, at 18–19 (recognizing an unfairness in the tax advantages that U.S. firms "operating through foreign subsidiaries" get as opposed to those firms that operate in the U.S., and proposing changes to U.S. tax law to remedy this).
[15] A newspaper article nestled in the Surrey Papers among the memorandums described here suggests the associations the public would draw from the application of the term tax haven to jurisdictions in which multinational corporations formed subsidiaries to engage in tax avoidance. Rather than Switzerland, it focused on the Bahamas, then a British colony known as a place individuals could avoid taxation. *See* Lee Silberman, *Fading Tax Haven? Proposal in Congress Could Hobble American Ventures in Bahamas*, WALL ST. J., Mar. 29, 1962 (describing what would become Subpart F as a threat to the Bahamas).
[16] *Id.*
[17] *Id.*

The OECD has never offered an explanation for its blacklist. It has never withdrawn it nor acknowledged the bias that shaped it.[18] Others have embraced its blacklist approach,[19] fueling the racist falsehood that equates corporate tax avoidance with white sand beaches. Even President Biden sought political advantage in naming and shaming Black states as tax havens while ignoring the white states his experts carefully build the case against.[20]

Examining the Surrey Papers suggests that the source of so much of the good in U.S. twentieth century tax policy deserves a share of the blame for allowing today's Liberia problem to flourish. The enduring impact of his silence can be seen as Black states face harsh punishments—punctuated by threats of violence—for crimes committed with impunity by white states. White states remain in the crosshairs of experts but receive very different treatment from policymakers. In the same year the OECD's brochure used the palm tree meme, U.S. Treasury Secretary Janet Yellen plied Ireland with pastries.[21] The Surrey Papers reveal that—despite being aware of the

[18] In the absence of any such acknowledgement, the OECD's 2000 blacklist remains influential, a fact highlighted by the proliferation of—and the inclusion of Liberia on—subsequent lists of tax havens. *See, e.g.*, JANE GRAVELLE, CONG. RSCH. SERV., R40623, TAX HAVENS: INTERNATIONAL TAX AVOIDANCE AND EVASION 4 (Jan. 6, 2022) (noting that "[t]he OECD created an initial list of tax havens in 2000" and including Liberia in a table titled "Countries Listed on Various Tax Haven Lists"); James R. Hines Jr., *Treasure Islands*, 24 J. ECON. PERSPECTIVES 103, 104 (2010) (a peer-reviewed scholarly article including Liberia on a list of tax havens). When the EU released its initial blacklist in 2015, Liberia was included. *EU Releases World Tax Havens Blacklist*, EU BUS. (Jun. 18, 2015), https://www.eubusiness.com/news-eu/economy-politics.120n. The EU explained that its list was created by identifying jurisdictions "that feature on at least 10 member states' blacklists." *Id.* Sharman described the proliferation of obviously flawed tax haven blacklists. J.C. Sharman, *Dysfunctional Policy Transfer in National Tax Blacklists*, 23 GOVERNANCE: AN INTERNATIONAL JOURNAL OF POLICY, ADMINISTRATION, AND INSTITUTIONS 623 (2010) (describing the "often arbitrary and inaccurate nature of such lists"). Of course, not all references to the OECD's blacklist were uncritical. *See, e.g.*, Jahanzeb Akhtar & Verónica Grondona, *Tax Haven Listing in Multiple Hues: Blind, Winking or Conniving?* 6 (S. Cntr., Research Paper No. 94, 2019) (acknowledging "serious questions on the OECD's objectivity of application of its criteria and the motivation behind the deliberately weak criteria used by it").

[19] *See EU List of Non-cooperative Jurisdictions for Tax Purposes*, EUR. COUNCIL, https://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/ (listing non-cooperative tax jurisdictions).

[20] Steven A. Dean, *A Plea to President Biden to Stop Perpetuating Racist Tax Policy*, NATION (Apr. 13, 2021), https://www.thenation.com/article/economy/biden-tax-policy/.

[21] Alan Rappeport, *Pastries and Persuasion: How a Global Tax Deal Got Done*, N.Y. TIMES, Oct. 28, 2021, at B1 ("Over a two-hour breakfast of tea and pastries at the Hotel Amigo in Brussels in July, Treasury Secretary Janet L. Yellen tried to persuade Paschal Donohoe, the Irish finance minister, to abandon Ireland's rock bottom corporate tax rate and join the global deal the Biden administration was racing to clinch.").

threat—Surrey and his team of experts left the door open to the misinformation that fuels the Liberia problem today. All they did was speak more plainly in private than they did in public. But that would prove to be enough.

From the start, Surrey and his team of experts focused on Switzerland. Had they been as outspoken about Switzerland publicly as the Surrey Papers reveal they remained behind closed doors, the OECD might not have had the opportunity to leapfrog from misinformation to a meme. By challenging the public perception that native women under parasols could symbolize the failures of an international tax system that he would help to shape, Surrey might have ensured that there would be no Liberia problem. Instead, he remained silent.

III
GANGSTERS

Beginning in 2000, tax scholars began to confront a daunting reality. Despite a flourishing network of bilateral treaties long overseen by the OECD and hailed as a "flawed miracle"[22] and "a triumph of international law,"[23] the world's tax system was failing.[24] Although the consequences of that failure would inevitably be felt more keenly by poor states, it became clear that no amount of wealth or privilege would shield states from its flaws. Experts warned that "[t]ax competition . . . threatens to undermine the individual and corporate income taxes, which traditionally have generated the largest share of revenue for modern welfare states."[25]

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[22] *See* Reuven S. Avi-Yonah, *The Structure of International Taxation: A Proposal for Simplification*, 74 TEX. L. REV. 1301, 1303 (1996).

[23] H. David Rosenbloom, *International Tax Arbitrage and the "International Tax System*,*"* 53 TAX L. REV. 137, 164 (2000) (identifying the "network of international tax conventions . . . that represents, cumulatively, a triumph of international law in the field of taxation").

[24] *See* Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1576 (2000) (observing that an inability to tax placed the welfare states of wealthy countries in jeopardy).

[25] *Id*.

Faced with that stark truth, the OECD responded with a lie. At the time, the OECD was already well on its way to becoming a de facto World Tax Organization, with an influence far outstripping its official status.[26] In 2000, the OECD might have admitted that the system it had been tasked with bringing to life and sustained for four decades had entrenched "inadequate principles, outdated concepts, and unsatisfactory policies"[27] that threatened even the wealthiest countries in the world with austerity. Instead, it chose to round up and punish a group of predominantly Black and brown states.[28]

Both in deference to its role as an informal World Tax Organization and an apparent predisposition to believe lawlessness ascribed to Black and brown states the world embraced the misinformation that would eventually be reduced to a meme of a palm tree. The OECD's triumph, it complained, had been sullied by the misdeeds of Black states like Liberia. The claim was grotesque given that civil war had engulfed Liberia for years, but it was widely repeated and has been largely unchallenged since.[29]

Since 2000, the world has embraced a racialized notion of tax havens. The role of predominantly white states like Switzerland—and even the United States[30]—in threatening the fiscal health of both rich and poor states remains as clear to Surrey's heirs as it was to his original

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[26] Arthur J. Cockfield, *The Rise of the OECD as Informal World Tax Organization through National Responses to E-Commerce Tax Challenges*, 8 YALE J.L. & TECH. 136 (2006).
[27] Michael J. Graetz, *Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies*, 26 BROOKLYN J. INT'L L. 1357, 1362 (2001) ("[W]e, I mean the professional international tax community—lawyers, accountants, and economists, in the universities, private practice, and the government . . . . [H]ave been blinded by adherence to inadequate principles and remain wedded to outdated concepts. As a result, we have no sound basis for pronouncing our international tax policy satisfactory or unsatisfactory. Fashioning proper policy requires clear and appropriate normative bearings.").
[28] OECD, *supra* note **Error! Bookmark not defined.**.
[29] *See supra* note 18.
[30] *See* Will Fitzgibbon, Debbie Cenziper & Alice Crites, *The Gatekeepers Who Help Open America to Oligarchs and Scammers*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Apr. 5, 2022), https://www.icij.org/investigations/pandora-papers/the-gatekeepers-who-help-open-america-to-oligarchs-and-scammers/ ("Companies established in Wyoming have been listed in overseas lawsuits alleging medical fraud in Russia, tax dodging in Hungary and bank theft in Zimbabwe, foreign court records show.").

team, and just as hidden from everyone else. While more subtle than in 1962, in 2000 the racism that sustains the Liberia problem remained easy to spot. An OECD representative speaking with a New York Times reporter described the mostly Black and brown states it had singled out as "behaving like gangsters."[31]

It was easier for a casual observer of international tax policy to picture Liberia as a menacing gangster than Switzerland and indeed the former found itself undeservedly included on the OECD's list and the latter omitted. That fanciful claim was also infinitely easier to grasp than the complex dynamics scholars understood to be at the heart of the threat to the welfare states of wealthy countries.[32] The OECD's 2000 effort would falter after a challenge from the U.S. Congressional Black Caucus.[33] The Bush administration publicly reversed course after initially continuing the Clinton administration's support. The Black Caucus easily recognized the loud aspect of the Liberia problem. As a result, the OECD's sanctions would be deferred—all because one member's Congressional district appeared on the OECD blacklist.[34] And perhaps because another member of the Black Caucus had considerable tax expertise.[35]

Together with a majority of the Caucus—and the most unlikely of allies[36]—two Black members of Congress stopped the would-be World Tax Organization in its tracks. Their intervention ensured that Liberia would not face economic sanctions from the world's wealthiest nations while in the

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[31] *See* Barry James, *Tax Havens Face OECD Threat of Sanctions*, N.Y. TIMES (June 14, 2000), https://www.nytimes.com/2000/06/14/news/tax-havens-face-oecd-threat-of-sanctions.html (quoting an OECD spokesman who asked: "Why give aid to people who are behaving like gangsters?").
[32] *See supra* note **Error! Bookmark not defined.**.
[33] Cordia Scott, *Black Caucus Says OECD Tax Move Unfairly Blasts Developing Nations*, 22 TAX NOTES INT'L 1600 (2001).
[34] Letter from Donna M. Christensen, Delegate, U.S. House of Representatives, to Hon. Paul H. O'Neill, Sec'y, U.S. Dep't of Treasury (Mar. 12, 2001).
[35] Dean, *supra* note 4 (describing the role of U.S. Virgin Islands Delegate Donna Christensen in enlisting Congressional Black Caucus members like New York's Representative Charles Rangel—at the time the Ranking Member and eventually Chair of the House Ways and Means Committee, responsible for tax legislation—into the fight against the biased OECD effort).
[36] J.C. SHARMAN, HAVENS IN A STORM: THE STRUGGLE FOR GLOBAL TAX REGULATION 67-68 (2006) (noting the role conservative groups played in alerting the Congressional Black Caucus to the OECD effort).

depths of a bloody civil war. But saving Liberia did little to reduce the role of misinformation in international tax policy. As the definitive history of the effort put it: "[t]hanks to the OECD's campaign, aided by… related initiatives, 'tax haven' has become a pejorative term with which to threaten reputation and thus the viability of small states' financial sectors."[37] The Black Caucus saved Liberia, but it could not save the world from the Liberia problem.

IV
STANLEY SURREY'S SILENCE

Misinformation in international tax policy neither began nor ended with that threat of OECD sanctions.[38] More than a decade later, the OECD acknowledged the complexity of the threat to its international tax regime with its Base Erosion and Profit Shifting initiative. Years later still, the OECD responded to criticism of its exclusive membership—in its more than half-century of existence it has never had a majority Black member—by forming an Inclusive Framework to seek input from outsiders. But the OECD has never acknowledged—much less made amends for—its role in spawning the Liberia problem.

For good or ill, the OECD need not shoulder all of the blame. In 1961, President Kennedy submitted a "Special Message to the Congress on Taxation."[39] In it, he decried the use of "the tax haven 'device'" and called for its "elimination." He urged the end of "tax deferral privileges for those forms of activities, such as trading, licensing, insurance and others, that typically seek out tax haven methods of operation." Kennedy's only example of a tax haven was Switzerland. The

[37] *Id.* at 106 (2006). Sharman focuses on the "small" size and geographic location—in the Caribbean—of the states the OECD targeted rather than their racial makeup. It should be noted that Liberia has roughly the same population as Ireland and is nearly ten times the size of Luxembourg and not much closer to the Caribbean than either.

[38] The European Union has increasingly taken on the role of criticizing countries in the Global South as the OECD has grown quieter. Stefanie Geringer, *Dissemination of Tax Good Governance Standard by the EU and the OECD: A Comparative Analysis of Changes in Treatment and Tone*, 77 BULL. INT. TAX. 4 (2023) (the European Union has chosen to reproduce outdated and biased patterns of assessment without restriction, especially in the context of the EU blacklist").

[39] *Text of Special Message on Taxes Submitted by President Kennedy to Congress*, *supra* note 14, at 18–19.

Surrey Papers reveal that Kennedy's reference to Switzerland represented only the tip of an iceberg. Kennedy's tax experts furiously investigated Switzerland's role in furthering the tax avoidance efforts of some of the country's largest corporations.[40]

Surrey served as Kennedy's Assistant Secretary for Tax Policy at the Treasury Department, his chief tax policy advisor. Surrey's correspondence with his team details a multi-year attempt to plumb the depths of what they described in internal memoranda as "the Swiss tax haven problem." Less than a month after Kennedy's inauguration, the U.S. embassy in Switzerland delivered a bombshell: a report highlighting American firms in Switzerland.[41] One of Surrey's top deputies shared that report with Surrey with a note describing it as "an excellent analysis of the use of Switzerland as a tax haven."[42]

By the fall of 1961, Surrey's "Collection of Tax Haven Data in Switzerland" ran into a significant obstacle.[43] In their zeal, Surrey's team encountered a "problem collecting information on American and other tax haven corporations in Switzerland."[44] Surrey was informed that "[i]t is almost impossible . . . to augment" basic published information on corporate registrations "because of stiff prohibitions in Swiss law against 'economic espionage.'"[45]

An undated draft memo to Surrey details the full history of a deputy's effort to collect information on Swiss subsidiaries of U.S. corporations.[46] They secured funding from the State Department to finance the effort, coordinated with Consular and IRS officials, and attempted to

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[40] In testimony to that focus, the Surrey Papers include an organizational chart of Chrysler's Swiss subsidiaries. *See* Organizational Chart, Geneva Offices, Chrysler International S.A. (on file with author).
[41] *See supra* note 12. The report Gordon shared with Surrey was dated February 14, 1961.
[42] *Id.*
[43] Memorandum from Treasury Department economist Nathan N. Gordon to Stanley S. Surrey (Oct. 4, 1961) (on file with author).
[44] *Id*.
[45] *Id*.
[46] Memorandum from Treasury Department economist Nathan N. Gordon to Stanley S. Surrey (undated) (on file with author).

hire a private firm in Zurich recommended by the embassy.[47] Although using a private firm had been intended to avoid antagonizing Swiss authorities, when the IRS informed Swiss tax officials of their plan—who then informed the Swiss Foreign Office—Swiss objections brought the contractor's work to an abrupt halt.[48]

After failing to receive the anticipated approval from the Swiss Foreign Office, the Treasury team received a warning from the Swiss tax delegation to the OECD that the Swiss Attorney General retained "jurisdiction over matters involving economic espionage" and "had the case under advisement."[49] The final paragraph of the draft referred to a telegram that ominously warned "the contractor could not proceed with the compilation without running heavy risks."[50] Ultimately, to avoid the threat of criminal prosecution, the embassy itself was tasked with the responsibility of compiling the information on Swiss subsidiaries. Surrey received it in January of 1962 just months before the creation of Subpart F.[51]

The "'tax haven' compromise" Congress delivered in 1962 ensured that "'tax haven' income of U.S.-controlled foreign corporations" would be "taxed currently to substantial U.S. shareholders, whether distributed or not" and has now done so for six decades.[52] The remedy, known as Subpart F, did precisely what Surrey hoped. His team carefully documented that the creation of new Swiss tax haven subsidiaries plummeted when Subpart F arrived. A 1963 memo

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[47] *Id*.
[48] *Id*.
[49] *Id*.
[50] *Id*.
[51] *See* Memorandum from the Treasury Department's Assistant Tax Legislative Counsel Larry Stone to Stanley S. Surrey (Jan. 16, 1962) (on file with author) (containing the compiled data).
[52] David R. Tillinghast, *The Contributions of Stanley S. Surrey to the International Aspects of Taxation*, 38 NAT'L TAX J. 267, 269 (1985).

to Surrey noted that "the number of Swiss corporations established by United States interests dropped sharply from 1961 to 1962."[53]

For even the most sophisticated outside observers, that focus on Switzerland would not have been apparent. For example, when Surrey sent copies of the draft bill to executives of companies like Proctor & Gamble, H.J. Heinz, and Chrysler—which had testified in Congress on the issue—his cover letter referred only to "the tax treatment of 'tax haven' profits" and to the "tax advantage which accrues to firms operating through foreign subsidiaries under some circumstances which are not available to firms producing in the United States and selling their products to foreign markets." [54] No reference at all to Switzerland or the Swiss Chrysler subsidiary whose organizational chart lies in the Surrey Papers.

That public silence on the dramatic Switzerland investigation stands in stark contrast to Surrey's reputation for brashness. Surrey was "an activist"[55] known for his "crusading" [56] approach to international tax policy. That came through in a willingness to use "combative, and perhaps to some offensive, language"[57] in the pursuit of his policy objectives. The Swiss episode shows that Surrey also possessed a different—and more calculated—sort of ruthlessness. Decades later, the OECD would not merely sit on their hands while others made damning accusations against the wrong states. They themselves generated misinformation that came close to delivering

[53] Memorandum titled "The Estimated Number of Corporations Established in Switzerland by United States Interests, 1958 to 1963" (Aug. 8, 1963) (on file with author).
[54] *See, e.g.*, letter from Stanley S. Surrey to H.J. Heinz II, Chairman, H.J. Heinz Co. (Nov. 13, 1961) (on file with author) (discussing only the mentioned topics, and not, for example, Switzerland).
[55] Tillinghast, *supra* note 52, at 267
[56] *Id*. at 268. As Tillinghast details in his essay, Pakistan did not prove so fortunate. As he "abhorred preferences anywhere in the tax law," Surrey's "crusading," "determined, virtually unassisted and eventually successful opposition to the 'tax-sparing' article in the 1959 tax treaty with Pakistan" all but assured that the United States would be the only developed country to oppose these subsidies to developing countries. *Id.*
[57] *Id.*

punishment to an innocent African state for wholly imagined misdeeds. Surrey merely stood by silently while journalists and others drew their own conclusions about what inspired Subpart F.

The reference to Switzerland in Kennedy's message demonstrates a willingness to provoke the Swiss. The Wall Street Journal article in the Surrey Papers shows why Surrey may have chosen not to, how silence could prove even more powerful. If Surrey believed that keeping the public's attention focused on Switzerland would have helped his cause, a man as averse to "pussy-footing"[58] as he was would have been relentless in doing so. By simply remaining silent, he allowed the public imagination to supply whatever rationale suited it best. The article's racist and misogynistic language seems unlikely to have persuaded Surrey that the Bahamas posed a greater threat than Switzerland. But if it would win over the Wall Street Journal's readers and help make Subpart F a reality, Surrey might reasonably have chosen not to interfere. He may personally have found it foolish or distasteful. But by the standards of the time, such sentiments may have been no different than referring to Black and brown states as "gangsters" in 2000.

It remains possible that Surrey's worldview was tainted by racial bias. He owed much of his success, after all, to his work on the U.S.–Pakistan Double Tax Treaty. His ferocity won him the admiration of then-Senator John F. Kennedy. Had he not been implacable in his opposition to generosity towards Pakistan he might never have become one of the tax law's leading policy voices.[59] His efforts proved noteworthy for one achievement in particular. Thanks to his "determined, virtually unassisted and eventually successful opposition," tax sparing—a provision

[58] *Id.*
[59] *See id.* at 269 ("[O]n the Pakistan treaty, Stanley won the respect of then Senator John F. Kennedy and, through a series of events more appropriately recounted elsewhere, became the Assistant Secretary of the Treasury for Tax Policy in 1961.").

designed to be as generous to developing countries as the U.S. tax system had long been to Europe—was omitted from the treaty.[60]

Surrey might have fought just as hard against tax sparing had it been deployed to benefit a white state. But the 1950s were a long time ago. The ways that racial bias shaped the thinking of men and women of the era can be difficult for us to understand.[61] The tax law had long been remarkably generous in the way foreign tax credits treated capital-importing countries.[62] That generosity may have looked different to Surrey when directed towards Pakistan than a postwar Germany. If so, he may have found criticizing Switzerland personally distasteful and been relieved to find a Black country shouldering the blame. Whatever his reasons, Surrey's strategic silence on the urgency of the Swiss tax haven problem let the public decide for itself what inspired Subpart F. If the influential executives he wrote to chose to support the bill after reading the Wall Street Journal article—and without the benefit of powerful evidence of Swiss recalcitrance he had access to—so be it. But the consequences of Subpart F not being branded the Swiss subsidiary tax could not be more obvious. It would have been more difficult—perhaps impossible—for the OECD to avoid naming Switzerland in 2000.

The Liberia problem suggests that a Swiss subsidiary tax might have proven less popular and enduring than Subpart F. And its author may not have enjoyed quite the same storied career. Even today, European tax havens tend to get the carrot—or pastry—with the stick reserved for others.

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[60] *See id*. at 268 (describing Stanley's deeply held conviction that "it was simply unfair for American companies investing abroad to bear a lesser tax than those which invested at home" and his efforts to prevent that from becoming reality).

[61] *See* IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA (2005) (telling the story of generosity turning into skepticism when the color of the skin of the recipients changes). A similar story might help explain why generosity towards Europe after the two world wars in the form of the foreign tax credit seemed natural, but generosity towards capital-importing countries in the Global South proved difficult to sustain after decolonization changed their hue.

[62] See EDWIN R.A. SELIGMAN, DOUBLE TAXATION AND INTERNATIONAL FISCAL COOPERATION 135 (1928) (complaining its approach "means that the United States is making a present of the revenue to other countries").

According to a contemporary, Surrey would not have even been in a position to create Subpart F had he been generous in his negotiations with Pakistan.[63] Legislators—and the public they serve—might easily have balked at the prospect of a Swiss subsidiary tax.

V
THE LIBERIA PROBLEM

The ferocious advocate who secured a leading role in the Kennedy administration by stripping tax sparing from the U.S.–Pakistan treaty chose silence when confronting Switzerland. When trying to win over influential executives, he focused not on Swiss misdeeds but on more generic notions of foreign subsidiaries and tax havens.[64] The quiet aspect of the Liberia problem allowed him to leave space for others to provide more compelling justifications for Subpart F.

Today's experts, focused on the continuing threat posed by Switzerland, find the quiet aspect of the Liberia problem just as useful. They explain that "[c]orporate tax revenues are low despite the fact that U.S. companies produce very high corporate profits" and pin the blame on "foreign tax havens."[65] They still can—and sometimes do—identify Switzerland at the heart of the global tax system's problems but still favor the more ambiguous terminology that exploits the quiet aspect of the Liberia problem. The ambiguity allows the public imagination to conjure the white sand beaches and palm trees that serve as today's equivalent of native women sitting under gaily colored parasols plaiting and selling handbags.

Gabriel Zucman's book "The Hidden Wealth of Nations: The Scourge of Tax Havens" offers an instructive example. To Zucman's credit, the book's cover features neither a beach nor a palm

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[63] *See supra* note 59.
[64] *See supra* note 54 and accompanying text.
[65] Press Release, U.S. Dep't of the Treasury, Testimony of Kimberly A. Clausing, Deputy Assistant Secretary, Tax Analysis, Before the Senate Committee on Finance (Mar. 25, 2021), https://home.treasury.gov/news/press-releases/jy0079. Clausing's press release uses the word "foreign" or a variation thereof seventeen times. It mentions Switzerland exactly once, in the notes to a chart listing the "big seven havens"—a majority of which turn out to be European.

tree.[66] Yet it could easily have featured a Swiss mountain peak and been titled "The Hidden Wealth of Nations: The Scourge of Switzerland." Just a few pages into his book, Zucman goes so far as to suggest sanctions against Switzerland.[67] Zucman's book could have, but does not, begin "Switzerland is the heart of financial, budgetary, and democratic crises."[68] Predictably, the introduction begins by calling out "[t]ax havens."[69]

And that matters. Surrey's choice of downplaying Switzerland's role, like Zucman's choice not to feature Switzerland on his cover, exploits the quiet aspect of the Liberia problem. Experts like Surrey and Zucman know that when they speak of the tax haven problem, they speak of Switzerland. The public often does not. Hearing government officials and highly esteemed experts levying such damning indictments against foreign tax havens, the public might be forgiven for wondering why measures beyond economic should be off the table. If experts tell us that democracy itself may be at stake, even military force could be justified.

In 2021, President Biden embraced the loud aspect of the Liberia problem. He targeted two majority Black states, the Cayman Islands and Bermuda, to rally support for legislative action against tax havens.[70] His experts had, of course, identified Switzerland and other European states as key problems but his statement mentioned the only two majority Black states they listed.[71] Inspired by President Biden—and perhaps Zucman—the Week suggested that "the U.S. could

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[66] GABRIEL ZUCMAN, THE HIDDEN WEALTH OF NATIONS: THE SCOURGE OF TAX HAVENS (2015). In fact, the book features no images at all. The book's text-only cover appears to have been inspired by the cover of Tomas Piketty's CAPITAL IN THE TWENTY-FIRST CENTURY.
[67] *Id*. at 5 ("The calculations presented in this book show that France, Germany, and Italy would be able to force Switzerland to disclose all the assets held there by their residents by jointly imposing customs duties of 30% on the goods that they import from Switzerland, because the costs for Switzerland would then be more than the income derived from its banks involved in tax evasion.").
[68] The book actually starts: "Tax havens are the heart of financial, budgetary, and democratic crises." *Id*. at 1.
[69] *Id*.
[70] Dean, *supra* note 20.
[71] *See* Press Release, U.S. Dep't of the Treasury, *supra* note 65 (highlighting "Bermuda, the Caymans, Ireland, Luxembourg, the Netherlands, Singapore, and Switzerland"); Kimberly A. Clausing, *Profit Shifting Before and After the Tax Cuts and Jobs Act*, 73 NAT'L TAX J. 1233, 1237 (2020) (noting that "$2.8 trillion is located in just 9 havens (Bermuda, the Caymans, Ireland, Jersey, Luxembourg, Netherlands, Puerto Rico, Singapore, and Switzerland).").

apply economic sanctions to tax havens."[72] Zucman had suggested sanctions on Switzerland.[73] But the Week went further, imagining that the United States might "even threaten them with military force."[74]

Experts do not, of course, mean to suggest violence against Switzerland. They rarely even hint at the possibility of military action as a possible response to tax havens. But when they do, their imagined targets remain predictably brown and Black. In the wake of the collapse of the OECD's initial effort to impose sanctions on Liberia and others, one economist mused that "larger nations" could have used their "militaries" as an "effective and efficient" solution.[75] Inevitably, the illustration in the Week featured blue oceans rather than white mountain peaks. And the efficient and effective military operations offered as templates for violence against tax havens targeted Grenada and Panama rather than Switzerland or Ireland.[76] The Liberia problem makes it easy for casual observers to forget that Switzerland—not Panama—sits at the heart of the financial, budgetary, and democratic crises Zucman describes.

The Liberia problem allows experts and officials to benefit from that confusion. Surrey need not invoke native women under gaily colored parasols. President Biden need not hint at violence. But for both, obscuring the true nature of the threat posed by tax havens offered an opportunity to advance a legislative agenda.

VI

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[72] Ryan Cooper, *Janet Yellen's Proposal to Revolutionize Corporate Taxation*, WEEK (Apr. 6, 2021), https://theweek.com/articles/975735/janet-yellens-proposal-revolutionize-corporate-taxation (rather than an image of one of the European tax havens Zucman focuses on, the article featured a map of Bermuda and a photo of Treasury Secretary Yellen).
[73] *See supra* note 67.
[74] *Id*.
[75] Martin A. Sullivan, *Lessons from the Last War on Tax Havens*, 116 TAX NOTES FED. 327, 334 (2007) ("It is entertaining to consider, for example, why the larger nations did not use their militaries to enforce their will on smaller nations. After all, the U.S. did invade two of the [OECD 2000] blacklisted nations in recent times — Grenada in 1983 and Panama in 1989. And there is no doubt military action would have been effective and efficient.").
[76] *Id.*

Conclusion

So much might be different had Surrey not embraced the quiet aspect of the Liberia problem in his pursuit of Subpart F. Switzerland might have been on Zucman's cover and in his title. President Biden might not have singled out the only two Black jurisdictions his experts identified after signing an executive order condemning racism.[77] The Week might not have inadvertently suggested violence against Switzerland.

But a different Surrey may have accomplished none of those things. President Biden and Zucman may have discovered the Liberia problem on their own. News outlets like the Guardian might still illustrate stories about the Channel Islands being targeted as tax havens with images of beaches far from the English Channel.[78] Stanley Surrey may have been the first to exploit the quiet aspect of the Liberia problem, but he was far from the last.

Was Stanley Surrey racist? Was he a coward for not speaking as plainly about the Swiss tax haven problem in public as the Surrey Papers reveal his team did in private? In the broad sweep of history Surrey's silence may have mattered a great deal or it may have mattered very little. The quiet aspect of the Liberia problem that it highlights undoubtedly does.

Exploiting the public's misunderstanding of the term tax haven as Surrey quickly learned to do has become second nature to scholars and policymakers alike. No less powerful than the loud

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[77] Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Jan. 20, 2021, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/ (deploring the "unbearable human costs of systemic racism").

[78] Richard Partington, *MEPs Vote to Add Channel and British Virgin Islands to Tax Haven Blacklist*, GUARDIAN (Jan. 22, 2021), https://www.theguardian.com/world/2021/jan/22/meps-vote-to-add-channel-and-british-virgin-islands-to-tax-haven-blacklist (using an image of palm trees, white sand and aquamarine waters—identified as a beach in the British Virgin Islands—as an illustration). The Guardian would presumably never have illustrated a story about two accused criminals—one Black and one white—with only a photo of the Black suspect.

aspect of the Liberia problem, the dog whistle politics[79] it embodies demean all those who harness it by railing against tax havens just as it does those who decry "welfare cheats or illegal aliens."[80] Banning the term would not solve the Liberia problem, but everyone who uses it must be aware of the risks they court and the lasting damage they cause by doing so.

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[79] IAN HANEY-LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS xii (2014) (explaining "how politicians backed by concentrated wealth manipulate racial appeals to win elections and also to win support for regressive policies that help corporations and the super-rich, and in the process wreck the middle class").

[80] *Id.* at 4.