

Tax Court Appointments and Reappointments: Do They Strengthen the Tax Court?

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Abstract

During the Presidential administrations of William J. Clinton and George W. Bush changes in the political climate made politics increasingly visible in judicial appointments. Not surprisingly, politics were also very visible with respect to President Barack Obama's first judicial appointments. Most of the public attention with regard to judicial appointments is focused on nominees to serve as judges on the Article III courts: the United States District Courts, United States Courts of Appeals, and the United States Supreme Court. However, other courts are affected by this trend, specifically, the courts created by legislative enactment pursuant to Article I of the Constitution, like the United States Tax Court.

As an Article I court, the Tax Court has a number of differences from Article III courts, including different the protections afforded to Tax Court judges following their appointment to the bench. Under current law, Tax Court judges are appointed by the President, with the advice and consent of the Senate to serve 15 year terms, and judges may be reappointed.

The majority of civil tax litigation goes through the Tax Court, and the Tax Court's decisions play an important role in the economic life and health of all taxpayers. As a consequence, the effect of the Tax Court's decisions is very far reaching. Thus, the appointments and reappointments to the Tax Court should be of great concern to all.

This Article explores the appointment of Tax Court judges and the reappointment of Tax Court judges. In exploring these issues, this Article focuses particularly on the processes historically used, and the impact that changes delays experienced during the two most recently past presidential administrations have had on the efficient and effective disposition of justice to taxpayers.

This Article concludes that a politicizing the selection of Tax Court judges, or the conditions under which a Tax Court judge will be reappointed, would weaken the legitimacy of the Tax Court, however, in this context, politics are only a symptom. Nonetheless, recent experience demonstrates that the appointment process is working well to ensure that Tax Court judges are well qualified, as demonstrated by the nomination and subsequent withdrawal of unqualified candidates during the Bush Administration. This Article also demonstrates that the reappointment process, as recent Administrations have used it, weakens the Tax Court by reducing the availability of experienced, established, well qualified Presidentially appointed Tax Court judges. A rebuttable presumption of timely reappointment should exist among sitting Tax Court judges who receive favorable ratings from the American Bar Association Section on Taxation Judicial Appointments Committee, can complete at least two-thirds of a full term without reaching the mandatory age for judicial retirement, and make a timely expression of willingness to be reappointed to the President, to remove political considerations that may override considerations of merit during the reappointment process. In instances where these presumptions are not satisfied, reappointment should remain entirely at the discretion of the President.