

## TAX COURT APPOINTMENTS AND REAPPOINTMENTS: IMPROVING THE PROCESS

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*This article explores the problems with the appointment and reappointment process of judges to the United States Tax Court, particularly focusing on the recent politicization of the process. Until 1992, the process ensured the appointment of only well-qualified judges to the Tax Court bench. However, beginning with the administrations of Presidents William J. Clinton and George W. Bush, the President infused politics into the nomination process, causing the process to slow and creating vacancies on the court. Such delays threaten the court's effectiveness and disrupt its operations. To solve this problem, the author endorses changing the statute to allow Tax Court judges whose terms have expired but who have expressed a desire to be reappointed to be recalled with the same rights and duties as a Tax Court judge, unless the President indicates that the position will be left vacant or filled with another nominee.*

### I. INTRODUCTION

The partisanship of the current political dialog coupled with the constant news cycle results in an increasingly rancorous dis-

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course about government, law, and the judicial process. Judicial appointments have become increasingly politicized. This politicization places the judicial appointment process at the mercy of politics more than any other time in recent history. The appearance of an increasingly politicized judicial appointment process is troubling as the judicial branch of government is intended to remain above the political fray.

Court watchers note that increasingly bitter partisan battles make navigating the judicial appointment process ever more difficult. The Republicans and Democrats wage increasingly hostile battles along ideological lines to keep the judiciary free of judges whom the parties find objectionable for political and moral reasons.<sup>1</sup> One can see the concern over ideology throughout the judicial appointment process—presidential nomination, Senate advice and consent, and confirmation. Fierce battles arise particularly when different parties control the Presidency and the Senate.<sup>2</sup> The partisanship is not isolated to either branch. While Presidents seek to appoint judges who will support their philosophical approaches to governance, the party controlling the Senate seeks to limit the influence of the other party's ideology in the judiciary. The tension between the parties manifests itself in slower appointments to the bench, regardless of which Senate committee investigates and oversees the advice and consent process.<sup>3</sup>

These controversies played out repeatedly in the confirmation hearings during the administrations of Presidents William J. Clinton and George W. Bush, with respect to nominees to fill va-

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1. See Press Release, Am. Bar Ass'n, Contentious Federal Judicial Nominations, State Court Elections the Focus of Next ABA President (Aug. 11, 2008), *available at* <http://www.abanet.org/2008/08/contentious-federal-judicial-nominations-state-court-elections-focus-of-next-aba-president/>. In 2008, the incoming president for the American Bar Association noted this as an ongoing and systematic problem facing the judiciary. *Id.* He cited the existence of "a nomination and confirmation process for federal judges that 'too often involves lengthy, partisan conflict and delay,' [and] . . . strongly backed prospective association policy that offers new ways to address the problem." *Id.*

2. See S. Comm. on Rules & Administration, 112th Cong., Rules of the Senate R. XXII (2011) [hereinafter Senate Rules] (explaining that even when one party nominally controls the Senate and White House without a sufficiently large margin in the Senate, the other party may effectively block nominees it perceives as undesirable with actual or threatened filibusters).

3. The United States Senate Committee on the Judiciary vets the nominees to most federal courts. *Id.* at R. XXV(1)(L)(5). Then, if approved, the nominations are sent to the Senate floor for a vote. *Id.* However, the United States Committee on Finance provides the first screening of nominees to the Tax Court. *Id.* at R. XXV(1)(i).

cancies in the United States district courts, United States courts of appeals, and, most visibly, loudly, and publicly, the Supreme Court of the United States.<sup>4</sup> Even more recently, the length and depth of the ideological and partisan divide were manifest during the confirmation process of Judge Sonia Sotomayor of the United States Court of Appeals for the Second Circuit, following her September 2009 nomination by President Barack Obama to replace retiring Associate Justice David Souter on the Supreme Court of the United States.<sup>5</sup> However, this battle affects not only the Article III courts but also the nomination and confirmation of judicial officers to Article I courts, such as the United States Tax Court (the “Tax Court”).

Indeed, both sides of the aisle acknowledge a problem exists with the judicial appointment process. Moreover, many non-political organizations, including the Judicial Conference of the United States, consider the current number of judicial vacancies a crisis.<sup>6</sup> Many assert that partisanship has no place in judicial

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4. See generally Tuan Samahon, *The Judicial Vesting Option: Opting out of Nomination and Advice and Consent*, 67 OHIO ST. L.J. 783, 785 (2006) (discussing the nominations of Justices Miles, Alito, and Roberts and arguing for a “merit-based approach to federal judicial selection that avoids undue emphasis on securing particular outcomes on specific issues”); Carl Tobias, *Filling Federal Appellate Vacancies*, 41 ARIZ. L. REV. 829, 839–47 (2009) (discussing the nomination and approval processes of federal judges during the Clinton and Bush administrations).

5. See *Partisan Confirmation Hearings Expected for Sotomayor*, CNN POLITICS (May 27, 2009, 8:45 AM), [www.cnn.com/2009/POLITICS/05/26/sotomayor.reax/index.html?iref=allsearch#cnnSTCTEXT](http://www.cnn.com/2009/POLITICS/05/26/sotomayor.reax/index.html?iref=allsearch#cnnSTCTEXT); Kathy Kiely, *Republican Support for Sotomayor Looks Paltry*, USA TODAY (Aug. 4, 2009, 3:00 PM), [www.usatoday.com/news/washington/judicial/2009-08-03-sotomayor-N.htm](http://www.usatoday.com/news/washington/judicial/2009-08-03-sotomayor-N.htm). See generally *Confirmation Hearings on Federal Appointments: Hearing Before the S. Comm. on the Judiciary, Confirmation Hearings*, 102d Cong. (1992) (including Senators’ statements and testimony of nominees).

6. See Gordon Bermant et al., *Judicial Vacancies: An Examination of the Problem and Possible Solutions*, 14 MISS. C. L. REV. 319, 319 (1994) (discussing judicial emergencies created by vacancies in judgeships). Currently the Article III courts, which include the Supreme Court of the United States, the Court of Appeals, the United States district courts, and the Court of International Trade, have 874 total combined judgeships. *Federal Judgeships*, U.S. COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/FederalJudgeships.aspx> (last visited Dec. 12, 2011). Included in this total number are ten temporary judgeships authorized for the district courts. *U.S. District Courts Authorized Temporary Judgeships*, U.S. COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/viewer.aspx?Doc=/uscourts/JudgesandJudgeships/doc/districttemp.pdf> (last visited Dec. 12, 2011). The Article I courts have far fewer authorized judgeships with four in the territorial courts, sixteen in the Federal Court of Claims, and seven in the Court of Appeals for Veterans Claims. 28 U.S.C. § 171(a) (2006) (stating that the United States Court of Federal Claim consists of sixteen judges); 38 U.S.C. § 7253(a) (2006 & Supp. III 2010) (2006) (discussing the makeup of the Court of Appeals for Veterans Claims); 48 U.S.C. §§ 1424(a), 1614(a), 1821(a) (2006) (discussing the composition of the district courts of Guam, the Virgin Islands, and the Northern Mariana Islands). There are currently nineteen members on the

appointments and whether the Senate should confirm a nominee differs greatly from the question of whether individual Senators would select the nominee.<sup>7</sup> Instead, the determination should simply be whether the nominee possesses the qualifications to properly fulfill the duties of the office.

However, resolving all tensions in the advice and consent process would probably introduce other problems to the judicial system. Moreover, these tensions provide a check and balance by preventing any one group from gaining too much power and ensuring that the minority always has an opportunity to prevent the majority from imposing their views on the populace as a whole. It is unlikely that all who express concern about the current state of affairs would agree on a single global solution, and a single solution does not need to be achieved.

This article considers a smaller part of the overall confirmation battle, that is, the issues surrounding the appointment and reappointment of judges to the Tax Court. Until recently, Tax Court appointments, which are made by Presidential nomination and confirmed by the Senate “solely on the grounds of fitness to perform the duties of the office,”<sup>8</sup> were seldom controversial as long as the nominee possessed the qualifications to perform the job. In recent years, presidential nominations to the Tax Court and Senate consideration have occurred at a slower rate. These delays cannot be blamed on a backlog in the Senate Judiciary Committee because initial Senate consideration goes through the Senate Finance Committee. These appointments are very important economically, societally, and judicially, and like other federal judicial appointments, appointments and reappointments to the Tax Court bench have suffered substantial delays. Unlike Article III courts, which require a single appointment because the judges have life tenure, Tax Court judges serve fifteen-year terms. This

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Tax Court. I.R.C. § 7443(a) (2006).

7. See Sheryl Gay Stolberg, *Committee Approves Kagan's Nomination to Supreme Court*, THE CAUCUS (July 20, 2010, 12:09 PM), <http://thecaucus.blogs.nytimes.com/2010/07/20/judicial-committee-approves-kagans-nomination-to-supreme-court> (discussing the Senate Judiciary Committee's 13-6 approval of Elena Kagan's nomination and quoting Senator Lindsey Graham, Republican senator from South Carolina, saying “[t]he Constitution in my view puts a requirement on me not to replace my judgment for [President Obama's]”) (internal quotation marks omitted). Senator Graham noted a change over time in the standard from “whether [the judicial nominees were] qualified and of good character” to a standard that also permitted consideration of judicial philosophy. *Id.*

8. I.R.C. § 7443(b) (2006).

finite term potentially allows not only an initial appointment but also a subsequent reappointment at the expiration of the judge's term, unless the sitting President wishes to replace the judge with another appointee or the judge no longer wishes to remain on the bench.<sup>9</sup>

Because of the fixed fifteen-year terms, vacancies in Tax Court judgeships occur at relatively predictable times, allowing planning in most cases. Thus, the problems associated with expired terms and vacancies in Tax Court judgeships could be avoided more easily than in the context of Article III courts, even without considering the differences in the appointment procedure between the two.

Moreover, fewer divisive issues should exist with respect to appointments to specialized courts with limited jurisdiction and shorter judicial terms than appointments to Article III courts with more general jurisdiction and life tenure. In the context of the district courts, courts of appeals, and the Supreme Court of the United States, individual senators or political caucuses sometimes decide to block a nominee's appointment based on political litmus tests. In these cases, the source of concern is generally that the nominee does or does not subscribe to a particular ideology and, therefore, may or may not uphold certain precedent, decide cases as an activist jurist, or apply a very strict construction of the law, depending on the views of the party seeking to block the appointment.<sup>10</sup>

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9. Compare U.S. CONST. art. III, § 1 (allowing judges to indefinitely hold "their [o]ffices during good [b]ehavior"), with I.R.C. § 7443(e) (limiting the term of a presidentially appointed tax court judge to fifteen years). However, Internal Revenue Code § 7447(b)(3) notes that a presidentially appointed Tax Court judge may request reappointment not more than nine months before the expiration of the judge's term nor less than six months before the expiration of the term. I.R.C. § 7447(b)(3). Thus, requests for reappointment are expected and, among judges who are not seeking to retire or enter senior status, such requests are frequently made. As will be more fully developed, many judges request and receive second terms as presidentially appointed judges of the Tax Court, but the frequency with which such requests are granted is declining in recent years. Certainly other operational differences exist, including the nature of the power each court may exercise, because Article I courts as legislative constructs have only those powers specifically created by Congress, while Article III courts possess all of the traditional powers inherent in the judiciary. See *infra* note 11 and accompanying text.

10. See generally Erwin Chemerinsky, *Ideology and the Selection of Federal Judges*, 36 U.C. DAVIS L. REV. 619, 620 (2003) (discussing the importance of considering a judicial nominee's ideology and how it will influence his decision making). One of the most frequently identified concerns is *Roe v. Wade* and its progeny, relating to abortion rights. 410 U.S. 113 (1973).

Nominees to the Tax Court usually possess impeccable credentials. Specifically, nominees most frequently come from a background of either public or private tax practice. Many nominees' backgrounds include both practice areas with their prior employment including a combination of private law or accounting firms, the Internal Revenue Service (the "IRS"), the U.S. Department of Justice Tax Division, or one of the tax-writing legislative staffs. Of course, exceptions to these generalizations exist, which allow the advice and consent process to add value by discovering and eliminating unqualified nominees.

This article concludes that the current process for identifying, nominating, and confirming new judges to the Tax Court largely works to ensure the appointment of well-qualified judges. Additionally, in most instances, the reappointment process ultimately arrives at the right result. However, since 1992, the reappointment process has increasingly interfered with the efficient operation of the court, possibly eroding confidence in the court's effectiveness.

During this period, timely appointments and reappointments to the Tax Court became increasingly less likely, causing disruptions in the court's operations. In some instances, nominations were more political than practical and, thus, disregarded the need for nominees to possess the requisite qualifications and experience. The political nature of presidential appointments and the process for their confirmation constitutes a symptom rather than the ultimate problem. Therefore, removing politics from the process may not constitute the solution. Rather, the solution requires more careful consideration of the effect the timing of the appointments and reappointments of Tax Court judges has on the judicial process, the effective administration of the court, and the outcomes for the litigants who filed their claims with the Tax Court.

Recent experience shows that the processes for reappointing Tax Court judges at the conclusion of a fifteen-year term potentially discounts the value of merit and experience in favor of less relevant political considerations. Moreover, the disruptions in Tax Court operations may harm the court's effectiveness, result in less well-developed law, and cause financial harm to taxpayers when reduced judicial resources delay their cases.

As a result, this article advocates a change to the statute governing the Tax Court. This article proposes that at the expiration of a judge's term, if the judge has not been reappointed and no successor has been appointed, then the eligible judge should be permitted to retain the privileges of a Tax Court judge until the President nominates and the Senate confirms a successor. At that time, the former judge could, subject to the discretion of the chief judge of the Tax Court, assume the status of senior judge.

Additionally, this proposal allows the Tax Court to avoid problems arising out of delays in the political process that have become the norm over the last five presidential terms. This proposal provides the sitting President with the same freedom to replace Tax Court judges allowed by current law, comports with the Appointments Clause of the U.S. Constitution, and allows for maximum flexibility in staffing the court. As discussed, this solution also resolves the problems caused by the long delays in appointing and reappointing Tax Court judges created during the last three presidential administrations, allowing the Tax Court to more effectively meet taxpayers' needs and carry out its responsibilities.

Part II of this article discusses the Tax Court's structure, along with its constitutional and statutory makeup. Part III explains the history of appointments and reappointments to the Tax Court and its predecessors. Next, Part IV discusses recent nominations of new judges and nominations to reappoint sitting judges. This discussion demonstrates that the appointment process currently serves its purpose as a gatekeeper, ensuring that only well-qualified judges receive appointments to the Tax Court. This discussion also demonstrates the manner in which recent presidential administrations approached reappointments and how these methods have disrupted the Tax Court's operations to the detriment of taxpayers. Part V recommends changes to the reappointment process to ensure qualified, experienced Tax Court judges are retained and prevent unnecessary vacancies that result only from the passing of a fixed period of time. This solution allows qualified judges to continue to perform all, rather than only some, of the duties required of a Tax Court judge until the nomination and advice and consent process produces an appropriate replacement. This provision provides the President with maximum flexibility in choosing appointees, while ensuring partisan bickering causes no harm to the Tax Court.

This article explores two additional alternative solutions, although both face substantial obstacles, including potential constitutional challenges. The first alternative solution would allow judges serving in good standing—those who are able to serve at least half of a second term before reaching retirement age and also satisfy other criteria—to receive a rebuttable presumption of reappointment. The second alternative would extend the initial term for Tax Court judges to twenty years. While not entirely eliminating the problem, increasing the initial term would result in less disruption to the Tax Court’s operation than the approach used by either of the past two presidential administrations and would reduce the number of instances in which reappointment is an issue. Lastly, Part VI discusses the reasons for disfavoring these alternatives.

## II. THE STRUCTURE OF THE ARTICLE I COURTS AND THE STATUTORY HISTORY OF THE TAX COURT

### A. *Article I Courts Generally*

Article I courts derive their power from a legislative delegation of judicial power pursuant to Article I and not from Article III of the U.S. Constitution.<sup>11</sup> Article I, Section 8, of the U.S. Constitution permits Congress to “[t]o constitute Tribunals inferior to the supreme Court.”<sup>12</sup> This authority contrasts with the creation of the judiciary in Article III of the Constitution stating:

The judicial Power of the United States, shall be vested in one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour,

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11. U.S. CONST. art. 1, § 8, cl. 9. While discussing territorial and legislative courts, the Supreme Court of the United States in *Williams v. United States* noted that “[t]he jurisdiction, . . . with which [the courts] are invested, is not a part of that judicial power which is defined in the [Article III] of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States.” 289 U.S. 553, 565 (1933) (quoting *Am. Ins. Co. v. Carter*, 26 U.S. (1 Pet.) 511, 546 (1828)) (internal quotation marks omitted). The Court interpreted that statement to mean “that the courts of the territories (and, of course, other legislative courts) are invested with judicial power, but . . . this power is not conferred by [Article III] of the Constitution, but by Congress in the execution of other provisions of that instrument.” *Id.* at 565–66.

12. U.S. CONST. art. I, § 8, cl. 9.



and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.<sup>13</sup>

Current examples of Article I courts include the Tax Court,<sup>14</sup> the United States Court of Appeals for the Armed Forces,<sup>15</sup> and the United States Court of Federal Claims.<sup>16</sup> The judges sitting on each of these courts enjoy a fifteen-year tenure.<sup>17</sup>

Specialized Article I courts create unique opportunities for judges to provide added value by working in an area of expertise. This specialization creates the potential for greater efficiency but also gives rise to legitimate concerns that the agency with which the judges interact most frequently may interfere with the independence of judges' decision making.<sup>18</sup> Notwithstanding the potential for better decision making, critics raise a number of concerns about specialized courts that include the possibility that repetitive subject matter or specific issue decision making results

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13. *Id.* art. III. § 1.

14. I.R.C. § 7441 (2006).

15. 10 U.S.C. § 941 (2006).

16. 28 U.S.C. § 171(a). In *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, the Supreme Court of the United States declared the bankruptcy courts, which were established under the Bankruptcy Act of 1978, unconstitutional. 458 U.S. 50, 53, 76 (1982) (plurality opinion) (citing the Bankruptcy Act of 1978, 28 U.S.C. § 151(a) (1976)). To satisfy the constitutional concerns raised in that case, Congress reconfigured the bankruptcy courts when it enacted the Bankruptcy Code, making the bankruptcy courts part of the local United States district courts. 28 U.S.C. § 151 (2006). Bankruptcy Courts, unlike the Tax Court, the Court of Federal Claims, and the Court of Appeals for the Armed Services, have judges appointed for only fourteen years. *Id.* § 152(a)(1).

17. 10 U.S.C. § 942(b)(2) (United States Court of Appeals for the Armed Forces); I.R.C. § 7443(e) (Tax Court); 28 U.S.C. § 172(a) (United States Court of Federal Claims). A Tax Court judge may only be removed from office by the President, after notice and opportunity for public hearing, for inefficiency, neglecting the judge's duties, or committing malfeasance in office. I.R.C. § 7443(f). In addition, a judge removed from office pursuant to § 7443(f) is barred from practicing before the Tax Court. *Id.* § 7443(g). However, no judge has ever been removed from the Tax Court bench. James Edward Maule, *Instant Replay, Weak Terms, and Disputed Calls: An Empirical Study of Alleged Tax Court Judge Bias*, 66 TENN. L. REV. 351, 406 (1999).

18. Maule, *supra* note 17, at 354–62; *see also* John F. Duffy, *Why Business Method Patents?*, 63 STAN. L. REV. 1247, 1253–54 (2010) (acknowledging concern that the federal circuit would become captured by the patent bar); Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1695 (2010) (discussing the concerns for capture in specialized courts); Diane P. Wood, *Generalist Judges in a Specialized World*, 50 S.M.U. L. REV. 1755, 1767 (1997) (“[T]he generalist judge is less likely to become the victim of regulatory capture than her specialized counterpart, despite the best of intentions on the latter's side.”).

in monotony for the judges, thus reducing the quality of the potential judicial candidate pool.<sup>19</sup>

In the context of all federal judicial appointments, the most important and harmful effect of the confirmation process is not the loss of civility or the potential for moving toward ideological litmus tests in appointing life tenure judges. Although both are certainly harmful, the most tragic consequence is the effect of these debates on the judiciary, the courts, and ultimately justice itself. Justice may be increasingly impinged upon as the politics of the process hold up more appointments and fill fewer vacancies, increasingly delaying access to the courts.<sup>20</sup>

Although they usually do not garner the same attention in the specialized courts, such controversies in judicial appointments are not unique to the Article III courts.<sup>21</sup> Ideological divides have increasingly affected nominees to the Article I courts, including the Tax Court.<sup>22</sup> President George W. Bush used nominations to Article I courts as rewards to party faithfuls, without adequate consideration of institutional needs.<sup>23</sup> As in Article III courts, holdups in the confirmation process for Article I courts mean unfilled vacancies and result in delayed justice for parties coming before the courts.

One significant difference between the two types of courts is that Article I judges do not have the protection of lifetime tenure enjoyed by the judges of Article III courts. Under current law, Tax Court judges serve terms of fifteen years with the possibility of

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19. See RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 254 (1996); Anne-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction Cases*, 86 MINN. L. REV. 625, 692–93 (2002) (discussing concerns that commentators have expressed regarding prestige among jurists sitting on specialized courts); Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 3 (1989) (citing RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 150–57 (1985)); Jeffrey W. Stempel, *Two Cheers for Specialization*, 61 BROOK. L. REV. 67, 71–72 (1995).

20. See, e.g., Chief Justice John G. Roberts, Jr., *2010 Year-End Report on the Federal Judiciary*, THIRD BRANCH (Admin. Office of the U.S. Courts), Jan. 2011, at 1–2.

21. Although not all Article I courts are fully specialized courts, because the focus of this article is on the Tax Court, the terms specialized court and Article I court are used interchangeably.

22. It is worth noting that when looking at statistics relating to the federal judiciary, those compiled by the Judicial Conference of the United States (the “Judicial Conference”) do not include the Tax Court because it is not a member of the Judicial Conference.

23. See *infra* Part IV.

reappointment.<sup>24</sup> This specified tenure makes it easier to determine the date on which potential vacancies will occur. On the other hand, the extent to which politics rather than merit control the appointment process may also affect the reappointment process. Specifically, politics may affect the likelihood of reappointing a well-respected, qualified judge. Historically, most eligible Tax Court judges willing to serve a second term were reappointed.<sup>25</sup> In recent years, such reappointments have often been delayed or refused, increasing concerns about the likelihood that well-qualified individuals would continue to seek appointment to the bench. The nature of the appointment process and the disparity in pay between the bench and the bar exacerbates the problem that it may be difficult to attract the best qualified candidates to the bench, especially if an appointment to an Article I court results in little more than a fifteen-year hiatus from practice during peak earning years.

Politicizing the selection of judges who sit for a term of years or the conditions of reappointment at the end of a judge's term also weakens the legitimacy of the Tax Court. Even the appearance of increased politicization may be harmful to the institution. Thus, the process of appointment and reappointment of Tax Court judges must be examined to determine whether changes would strengthen the vitality and perceived validity of the institution.

Institutionally, the more limited duration of the judicial appointments may be both a strength and weakness of the Article I courts. The existence of a judiciary with limited judicial terms may be a systemic strength for courts where the caseload fluctuates and a full complement of judges is not necessary at all times.<sup>26</sup> Lifetime appointments make it difficult to decrease the

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24. I.R.C. §§ 7443(b), 7447(b)(3) (2006).

25. *Judges*, U.S. TAX COURT, <http://www.ustaxcourt.gov/judges.htm> (last visited Dec. 12, 2011) (listing Judges John O. Colvin, Mary Ann Cohen, Maurice B. Foley, Joseph H. Gale, James S. Halpen, and Juan F. Vasquez as judges seeking and receiving reappointment); Matt E. Stevens, *President Obama Announces Nominations, Including Maurice B. Foley to U.S. Tax Court*, POLITIC365 (Dec. 6, 2010), <http://politic365.com/2010/12/06/president-obama-announces-nominations-including-maurice-b-foley-to-u-s-tax-court>.

26. As will be discussed in Part V of the article, with respect to the Tax Court, once a judge has served a full term, the chief judge may recall the judge to serve as a senior judge at full pay. Many judges are recalled to senior status following the expiration of their terms, but it is impossible to know precisely how many judges seek reappointment, as the process lacks any transparency. However, there is likely some indication of the number of judges who request reappointment available from the number of judges that are reappointed and the number of judges whose terms expire and then are recalled to senior sta-

number of judicial officers in line with what caseloads require. With an appointment for a term of years, at the expiration of any term, an assessment of the court's caseload can be made to determine whether all of the positions remain necessary. To assess whether limited terms make it possible for Article I courts to respond more readily to caseload fluctuations, it would be advisable to consider all available data, including the number of cases and their size and complexity. Systemic reviews have not been regularly conducted for the purpose of determining whether "right-sizing" of Article I courts would be appropriate.

Members of the judiciary view appointment to an Article I court as less prestigious and, therefore, less desirable than appointment to an Article III court.<sup>27</sup> One of the most significant reasons contributing to this view of these courts is the unavailability of life tenure for judges serving on Article I courts. A court with lower prestige may have a harder time attracting qualified judicial candidates, especially given the disparity in pay between private practice and judicial service. Even when presented with equal salaries, potential judges may be more willing to serve on a more prestigious Article III court.<sup>28</sup>

Although Article I courts address many important societal issues including taxes, claims against the government, and bankruptcy, an increased politicization of the appointment and reappointment process may reduce the attractiveness of service on these courts. As demonstrated in Part V, the available evidence suggests that the initial appointment process in the Tax Court largely works because the Senate Finance Committee focuses on the merit of nominees, blocking the appointment of unqualified candidates. Unfortunately, although the appointment process works at the outset with respect to those already nominated, nothing can force the President to make a nomination. As a re-

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tus without reappointment, but at an age that would indicate that reappointment would not have been a futile gesture. This, however, would not have a perfect correlation as other factors may be reflected in a decision to seek reappointment than merely age and availability of reappointment.

27. See POSNER, *supra* note 19, at 254; Carstens, *supra* note 19, at 692–93 (discussing concerns that commentators have expressed regarding prestige among jurists sitting on specialized courts); Dreyfuss, *supra* note 19, at 3; Stempel, *supra* note 19, at 71–72.

28. See I.R.C. § 7443(c)(1) (2006) ("Each judge shall receive salary at the same rate and in the same installments as judges of the district courts of the United States."). The United States Court of Federal Claims judges also receive the same salary at the same intervals as the United States district court judges. 28 U.S.C. § 172(b) (2006).

sult, the current process may result in unfilled vacancies for prolonged periods following the expiration of a judge's term. Meanwhile, the qualified judge whose term expired serves in senior status for an extended time, often only to later receive reappointment to the same position, making the vacancy wholly unnecessary. As this phenomenon continues to increase in frequency and duration, such gaps between terms have the potential to disrupt the business of the Tax Court, impact the collegial quality of the court, and negatively affect the quality of the opinions rendered.

The political issues involved in appointments to the Tax Court and other Article I courts are unlikely to be identical to the issues that court watchers and constitutional scholars refer to when they discuss the politics of judicial appointments in the context of appointments to Article III courts. In addition to qualification to sit on the bench, court watchers and constitutional scholars often express concern about the imposition of ideological limitations and litmus tests on nominees.<sup>29</sup> In the context of Article I courts, in addition to the same concerns about general qualification for appointment, the more relevant concern should be whether the nominee is qualified as a specialist judge. Some previous nominations appeared to have been made on the basis of the nominee's actions as a party member, including contributions and recruitment of donors and supporters. Appointments to specialized courts based on party activities, rather than on their subject area qualifications and knowledge, would be as harmful to specialized courts as ideological limitations or litmus tests are to Article III courts. In fact, with respect to specialized courts, the potential for repetitive work may lower the quality of the candidates.<sup>30</sup> However, the complexity of tax law and the intricacy of many of the issues considered by the Tax Court make it an ideal area for a specialized court.<sup>31</sup>

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29. *E.g.*, Stolberg, *supra* note 7.

30. *See supra* notes 17–18 and accompanying text.

31. *Cf. POSNER, supra* note 19, at 242. Some have raised concerns about “tax exceptionalism.” Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1619 (2006); Steve R. Johnson, *An IRS Duty of Consistency: The Failure of Common Law and a Proposed Legislative Solution*, 77 TENN. L. REV. 563, 605 (2010). It seems logical that tax exceptionalism might be increased by using specialized rather than general jurisdiction courts.

Moreover, treating the appointment of Article I judges as purely political appointments could harm the judiciary as a whole, Article I courts exercise a significant measure of the country's judicial power.<sup>32</sup> As discussed below, in the context of the Tax Court, such an approach will result in not only weakening an important judicial institution but also in reducing the quality of the judges who preside over the court's cases, irreparably harming the tax system as a whole.

However, because the appointment process for the Tax Court, with nominations coming from the President, proceeding through the Senate Finance Committee, and being confirmed by the Senate, has historically fulfilled the function of rejecting the unqualified candidates, no changes are recommended with respect to the appointment process. The remainder of this part considers the structure of the Tax Court and the history of appointments to the Tax Court.

#### B. *Statutory Structure of the Tax Court*

In 1969, the Tax Court was established as an Article I court.<sup>33</sup> The court is comprised of judges and a chief judge, who the appointed judges elect every two years.<sup>34</sup> When fully staffed, the Tax Court is comprised of nineteen members.<sup>35</sup> Like Article III judges, subject to the advice and consent of the Senate, the President appoints Tax Court judges.<sup>36</sup> Specifically, the statute provides that

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32. See James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 648, 650–51 (2001). However, such power is limited to the authority that is granted by Congress and lacks general equitable powers. *Comm'r v. McCoy*, 484 U.S. 3, 7 (1987) (citing *Comm'r v. Gooch Milling & Elevator Co.*, 320 U.S. 418, 420–22 (1943)).

33. Tax Reform Act of 1969, Pub. L. No. 91-172, § 951, 83 Stat. 487 (codified as amended at I.R.C. § 7441 (2006)). Establishing the United States Tax Court as an Article I court fundamentally changed the nature of the court, which had been in existence since 1924 as an agency of the Executive Branch. See generally Harold D. Dubroff, *THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS PART IV*, reprinted in 41 ALB. L. REV. 1, 11–20 (1976) [hereinafter DUBROFF, PART IV] (discussing the evolution of the United States Tax Court from an agency of the executive branch to an Article I court).

34. I.R.C. §§ 7441, 7444(b) (2006).

35. *Id.* § 7443(a). The number of judges has been increased over time from sixteen to nineteen. Act of Oct. 13, 1980, Pub. L. 96-439, § 1(a), 99 Stat. 1878 (codified at I.R.C. § 7443(a) (2006)).

36. U.S. CONST. art. 11, § 2, cl. 2; I.R.C. § 7443(b) (2006).

“[j]udges of the Tax Court shall be appointed by the President, by and with the advice and consent of the Senate.”<sup>37</sup>

There are three major differences between the rights and duties of judges appointed to the Tax Court as Article I judges and those appointed as Article III judges: (1) the advice and consent path; (2) the time and consequences of retirement; and (3) the term of service.

First, Tax Court nominees proceed through the Senate Finance Committee, while Article III judicial nominations proceed through the Senate Judiciary Committee.<sup>38</sup> This difference reflects the specialized nature of the Tax Court and the compromises made to elevate the court from an executive agency to full judicial status.<sup>39</sup> With very few exceptions, the nominees and appointees to the Tax Court have generally been well-qualified and respected members of the tax bar.<sup>40</sup> During the conversion of the Tax Court from an executive branch agency to an Article I court and when later proposals to elevate the court or create a Court of Appeals for Tax Appeals under Article III were made, the value of having the greater expertise of the Senate Finance Committee vet the nominees was viewed as a significant benefit of Article I status.<sup>41</sup>

Second, the term of service is very different for Tax Court judges than for Article III judges. Tax Court judges serve fifteen-year terms and must retire from active service upon reaching the age

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37. I.R.C. § 7443(b).

38. Compare Senate Rules, *supra* note 2, at R. XXV(1)(L)(S) (listing the Committee on the Judiciary as the referral committee for all matters relating to “[f]ederal courts and judges”), with *id.* at R. (7)(i) (making the Committee on Finance as the referral committee for all matters involving revenue).

39. Cf. DUBROFF, PART IV, *supra* note 33 (mentioning the Tax Court’s specialized nature and discussing the political battles over its 1942 transition from “Board of Appeals” to “Tax Court of the United States”).

40. See, e.g., Michael Hoskins, *New Tax Court Judge “Honored and Humbled” By Appointment*, THE INDIANA LAWYER (Dec. 23, 2010), <http://www.theindianalawyer.com/new-tax-court-judge-honored-and-humbled-by-appointment/PARAMS/article/25435>. A different concern may exist where judicial nominees, regardless of the court to which they are nominated, are less than qualified. Although President Obama has reversed the position taken by his immediate predecessor with respect to consulting with the American Bar Association regarding judicial nominees, reports suggest that more of his potential nominees have been ranked “not qualified” than were those of President George W. Bush, influencing the slowdown in appointments. Charlie Savage, *Ratings Shrink President’s List for Judge-ships*, N.Y. TIMES, Nov. 23, 2011, at A1.

41. See DUBROFF, PART IV, *supra* note 33, at 48–50 (discussing other benefits of Article I status).

of seventy.<sup>42</sup> Although not required to retire before the age of seventy, Tax Court judges may elect to retire at a younger age, receiving full pay and benefits if they served for fifteen years and reached the age of sixty-five or some other combination of age and service that satisfies the statutory conditions referred to as the “Rule of 80.”<sup>43</sup> In contrast, Article III judges serve “during good behavior,” with no mandatory retirement age.<sup>44</sup> Despite the mandatory retirement, at the discretion of the chief judge, Tax Court judges may maintain much of their authority and continue to perform many of their duties by serving as senior judges.<sup>45</sup>

Third, and most importantly, Tax Court judges receive appointments for fifteen-year terms, not for life tenure.<sup>46</sup> However, reappointment is possible for a judge who gives notice to the President of the judge’s willingness to be reappointed not more than nine and not less than six months before the expiration of their terms.<sup>47</sup> Such reappointments have historically been made as a matter of course.

When a judge retires at the end of their term, because the judge has reached the retirement age of seventy, or the judge retires, the chief judge of the Tax Court may recall that judge to service as a senior judge.<sup>48</sup> Judges recalled in senior status receive the same compensation and travel allowance as Tax Court judges during their term of service.<sup>49</sup> Although the compensation and travel allowance paid during the regular term to Tax Court judges and senior judges are identical, there are critical differences between service as a Tax Court judge and service as a Tax Court

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42. I.R.C. § 7447(b)(1) (2006).

43. *Id.* § 7447(b)(2); see also *Frequently Asked Questions: Federal Judges*, U.S. COURTS, <http://www.uscourts.gov/common/FAQS.aspx#FederalJudges> (last visited Dec. 12, 2011).

44. U.S. CONST. art. III, § 1.

45. I.R.C. § 7447(c).

46. Compare U.S. CONST. art. III, § 1 (declaring that Article III judges hold their offices during good behavior), with I.R.C. § 7443(e) (stating the Tax Court judges hold terms of fifteen years).

47. I.R.C. § 7447(b)(3).

48. *Id.* § 7447(c). A judge may voluntarily retire at the age of sixty-five and collect a retired judge’s salary after ten years of service on the Tax Court. *Id.* § 7447(b)(2). The number of years of service required before a judge is eligible for voluntary retirement with full pay decreases between the ages of sixty-five and sixty-nine from ten years of service to five years of service as a presidentially appointed Tax Court judge. *Id.*

49. *Id.* § 7447(c).



senior judge.<sup>50</sup> Perhaps the most important difference is the authority to participate in court-reviewed decisions and have an opinion take effect pursuant to Internal Revenue Code § 7460(b). That statute states:

The report of the division shall become the report of the Tax Court within 30 days after such report by the division, unless within such period the chief judge has directed that such report shall be reviewed by the Tax Court. . . . The report of a division shall not be a part of the record in any case in which the chief judge directs that such report shall be reviewed by the Tax Court.<sup>51</sup>

Thus, the Tax Court permits review only by the presidentially appointed judges, except in instances where a senior judge was the trier of fact. As a result, upon the expiration of a judge's term, the Tax Court judge does not have the same rights and privileges as prior to expiration of his or her judicial term.

### III. THE HISTORY OF APPOINTMENTS AND REAPPOINTMENTS TO THE TAX COURT

The appointment and reappointment of Tax Court judges has largely ensured that only well-qualified candidates have served as adjudicators since the Tax Court and its predecessor, the Board of Tax Appeals, became independent of the Bureau of Internal Revenue.<sup>52</sup> In 1924, the Board of Tax Appeals was created as an independent executive branch agency to provide an independent body to which taxpayers could appeal asserted tax liabilities prior to paying the tax liability.<sup>53</sup> The other available fora in which a taxpayer can challenge a tax liability—the United States district courts and the United States Court of Federal Claims—require that the taxpayer first pay the tax and then file a claim for refund.<sup>54</sup>

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50. *See id.* §§ 7443(a), 7444(c).

51. *Id.* § 7460(b).

52. *See generally* DUBROFF, PART IV, *supra* note 33, at 11–20 (discussing the transition from the “Board of Appeals” to “Tax Court of the United States”).

53. *See generally* BORIS L. BITTKER & LAWRENCE NOKEN, 4 FEDERAL TAXATION OF INCOME, ESTATES & GIFTS ¶ 115-8 (2d ed., 1992) (providing background information on the organization and jurisdiction of the Tax Court); HAROLD DUBROFF, THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS, PART II: CREATION OF THE BOARD OF TAX APPEALS—THE REVENUE ACT OF 1924, *reprinted in* 40 ALB. L. REV. 53 (1975) [hereinafter DUBROFF, PART II] (discussing the creation of the Board of Tax Appeals).

54. I.R.C. § 7422(a) (2006) (authorizing suits for refunds); 28 U.S.C. § 1491(a)(1)

Driving the creation of this forum, where tax payers could challenge their tax liability prior to paying it, were concerns that requiring prepayment of tax liabilities prior to allowing a taxpayer to challenge an asserted tax deficiency might cause undue hardship for those taxpayers who were unable to pay the tax.<sup>55</sup> The new income tax might overwhelm the system and require significant judicial involvement because of the complexity of the income tax code.<sup>56</sup> These concerns led to the creation of the Board of Tax Appeals,<sup>57</sup> an administrative agency that was part of the Treasury Department but was independent of the Bureau of Internal Revenue.<sup>58</sup>

A matter of serious discussion and concern surrounded who would be permitted to serve as an adjudicator on the new body. Then, as today, the concerns were both practical and political. As part of the discussion of who should be members of the Board of Tax Appeals, consideration was given to whether the members needed to be lawyers, accountants, or even lay people.<sup>59</sup> It was ultimately decided that members of the Board should be lawyers.<sup>60</sup>

Professor Harold Dubroff, in his history of the Tax Court, notes “it should not be surprising that Presidents have tended to select appointees for the Board and the Tax Court from the ranks of

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(2006) (providing the United States Court of Federal Claims with refund jurisdiction in tax cases). The United States Court of Federal Claims was originally named the Court of Claims. Act of Feb. 24, 1855, ch. 122, 10 Stat. 612.

55. See DUBROFF, PART II, *supra* note 53, at 27–28.

56. *Id.*

57. Revenue Act of 1924, Pub. L. No. 68-176, ch. 234, § 900(a), 43 Stat. 253, 336. The Board of Tax Appeals was the early predecessor to today’s United States Tax Court. Its evolution has been significant, from 1924, as an agency that was part of the Treasury Department but independent of the Bureau of Internal Revenue, to 1942 when its name was changed to the Tax Court of the United States, although it remained an executive branch agency. Revenue Act of 1942, Pub. L. No. 77-753, ch. 619, § 504(a), 56 Stat. 798, 957. Again, in 1969, the agency was changed, making it an Article I, legislative court, which will be discussed in some greater depth later in this article, and again renamed, this time as the United States Tax Court. Tax Reform Act of 1969, Pub. L. No. 91-172, § 951, 83 Stat. 487, 730 (codified as amended at I.R.C. § 7441 (2006)). For a more complete discussion of the history of the Tax Court’s evolution see DUBROFF, PART II, *supra* note 53; DUBROFF, PART IV, *supra* note 33.

58. The Bureau of Internal Revenue was the predecessor to our modern day Internal Revenue Service. See T.D. 6038, 1953-2C.B. 443 (“[A] reference to the Bureau of Internal Revenue shall be deemed to refer to the Internal Revenue Service.”).

59. See DUBROFF, PART II, *supra* note 53, at 88, 92–93. Among the considerations was the fact that everyone should understand the relatively new tax obligations and that many tax professionals would not be lawyers. See *id.* at 92–93.

60. See *id.* at 108.

their own parties.”<sup>61</sup> After deciding the nature of the members’ professional background, politics played a role in the selection process.<sup>62</sup> Because of the judicial nature of the appointments and the fact that the President makes the appointments, the possibility that politics always played a role in the appointment process is neither new nor surprising. Even though the political affiliation of the first appointees to the newly created Board of Tax Appeals was noted, the appointees’ professional qualifications were the paramount factor in obtaining their appointments.<sup>63</sup> The party affiliation appeared parenthetically alongside the names in the list of recommended membership that Treasury Secretary Mellon prepared and presented to President Calvin Coolidge in 1924 for the first Board of Tax Appeals.<sup>64</sup> However, others argue that politics have played a very limited role in Tax Court appointments, at least to the extent that the politics at play are party politics.<sup>65</sup>

One thing that proponents of the creation of a specialized tax tribunal knew early on was that the Tax Court had little hope of becoming an Article III court with attendant powers, privileges, and life-tenured judges.<sup>66</sup> This expectation was affirmed when the Board of Tax Appeals was first created, as well as when the Tax Court was established in 1969, accompanied by a near uniform rejection of the idea that the court should be accorded Article III status.<sup>67</sup>

Professor Dubroff notes that Congress adopted a novel approach to the tenure of Tax Court judges in 1969 when it converted the Board from an executive agency at a time when proposals to grant the new court Article III status faced very strong opposition from groups, including the Judicial Conference.<sup>68</sup> Professor Dubroff also notes that Representative Wilbur Mills and Senator Russell Long, chairmen of the House Ways and Means Committee and the Senate Finance Committee respectively, were very concerned about terms that allowed judges to serve “in good behav-

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61. *Id.*

62. *See id.* at 88.

63. *Id.*

64. *Id.*

65. Sheryl Stratton, *Tax Court Judges May Not Be Back, Even by Popular Demand*, 102 TAX NOTES 176, 180 (2004).

66. *See, e.g.*, DUBROFF, PART IV, *supra* note 33, at 7–10, 38–48, 50–51.

67. *Id.* at 7–10, 50–51.

68. *Id.* at 50.

ior.”<sup>69</sup> Discussing the legislative history of the Tax Reform Act of 1969, Professor Dubroff concludes that “[t]his was a novel approach to the problem of judicial tenure, and permitted the forced retirement of judges without formal removal proceedings, while guaranteeing financial independence to those so retired.”<sup>70</sup>

Although politics are always a consideration in any appointment process, their effect on judicial appointments has not frequently been to the exclusion of the consideration of a potential judge’s qualification and merit, especially in the Tax Court. Not surprisingly, most Presidents favored nominees from their own party, but both Presidents Dwight D. Eisenhower and Jimmy Carter appointed Tax Court judges across party lines.<sup>71</sup> In 1960, President Eisenhower, a Republican, appointed Irene C. Scott, a Democrat from Alabama, to replace Marion J. Harron (a Republican appointed by President Truman in 1948) who failed to make a timely request for reappointment.<sup>72</sup> In 1979, President Carter, a Democrat, appointed Arthur L. Nims III, a New Jersey Republican, to serve on the Tax Court.<sup>73</sup> Notwithstanding these two exceptions, the initial appointments of Tax Court judges have generally come from within the President’s party.<sup>74</sup>

In most instances, however, the President reappointed those judges who indicated a willingness to continue serving on the Tax Court regardless of the judge’s party affiliation.<sup>75</sup> In fact, until recently there were not any reported instances of willing judges being refused reappointment since the Eisenhower administration.<sup>76</sup>

A secondary effect of the Tax Court originating as an executive agency is its continued struggle for legitimacy in the eyes of some taxpayers and litigants. Politicizing the selection of judges or the

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69. *Id.* at 47–48; Long, *Russell Billiu*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=L00428> (last visited Dec. 12, 2011); Mills, *Wilbur Daigh*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=M000778> (last visited Dec. 12, 2011).

70. DUBROFF, PART IV, *supra* note 33, at 49.

71. Stratton, *supra* note 65, at 180.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*; see *infra* Part IV.

76. Stratton, *supra* note 65, at 180.

conditions under which a judge may be reappointed at the end of their term weakens the legitimacy of the Tax Court.

#### IV. RECENT TAX COURT APPOINTMENTS AND REAPPOINTMENTS

The structure of the Tax Court vis-a-vis appointments and reappointments worked relatively well until the administrations of Presidents William J. Clinton and George W. Bush.<sup>77</sup> Like other judicial appointments, in both Article III and Article I courts, Tax Court appointments during these presidential administrations became increasingly politicized, causing confirmation to take increasingly longer.<sup>78</sup> Prior to these administrations, Presidents routinely reappointed Tax Court judges whose terms were expiring, regardless of who had originally appointed the judge.<sup>79</sup> Both the Clinton and Bush administrations, likely for different reasons, changed this traditional approach and in so doing weakened the process by allowing terms to expire, waiting to announce reappointments or nominations, and introducing more politics into the process.

Beginning in the Clinton administration, occurring throughout George W. Bush's administration, and extending into the first two years of the Obama administration, a significant number of Tax Court judges' terms have expired.<sup>80</sup> These Presidents have repeatedly delayed announcing the reappointment or replacement of judges whose terms have expired.<sup>81</sup> The lapse of time between terms has caused a variety of problems for the administration of the Tax Court, including reducing the Tax Court's ability to serve taxpayers and potentially harming its legitimacy.<sup>82</sup>

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77. *Id.* at 176. Prior to the slowdowns that occurred during the Clinton and Bush administrations, reappointment occurred as a matter of course dating back to the Eisenhower administration. *See id.*

78. *See id.* at 176, 179–80 (exploring lapses in Tax Court reappointments and confirmations during the Clinton and George W. Bush administrations).

79. *Id.* at 179.

80. *See id.* at 179–80; Press Release, Office of the Press Secretary, Presidential Nominations Sent to Senate (Jan. 5, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/01/05> (noting Judge Foley was nominated for reappointment by President Obama on December 6, 2010); *Judge Maurice B. Foley*, U.S. TAX COURT, <http://www.ustaxcourt.gov/judges/foley/htm> (last updated May 6, 2010) (noting Judge Foley's term ended April 8, 2010).

81. *See Stratton, supra* note 65, at 176, 179–80.

82. *Id.* at 179.

During the first Clinton administration, Tax Court reappointments began to slow. For instance, the terms of Judges Herbert Chabot,<sup>83</sup> Mary Ann Cohen,<sup>84</sup> Stephen Swift,<sup>85</sup> and Joel Gerber expired.<sup>86</sup> When Judge Mary Ann Cohen's term expired in 1997, she was serving a term as chief judge.<sup>87</sup> This lapse led to a structural crisis in the court because the statute did not address an expiration of the sitting chief judge's term. Ultimately, the appointment of an interim chief judge solved this problem.<sup>88</sup> However, if the President had taken timely reappointment action, a stopgap measure would not have been necessary.

Although President Clinton ultimately reappointed all four judges, the nomination delays were significant, ranging from six weeks to two years.<sup>89</sup> The lapse in these judges' terms of service had meaningful consequences because they interfered with the operation of the Tax Court. Significantly, the failure to timely reappoint judges or to nominate replacements was unprecedented.<sup>90</sup>

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83. See *Judge Herbert L. Chabot*, U.S. TAX COURT available at <http://www.ustaxcourt.gov/judges/chabot.htm> (last updated Jan. 7, 2009). Judge Chabot's term expired on April 3, 1993. *Id.* On October 20, 1993, he received appointment to a term ending October 29, 2008. *Id.* Judge Chabot ultimately retired and accepted senior status on July 1, 2001. *Id.*

84. See *Judge Mary Ann Cohen*, U.S. TAX COURT, <http://www.ustaxcourt.gov/judges/cohen.htm> (last updated Apr. 7, 2009). President Reagan appointed Judge Cohen on September 24, 1982 to a term ending on September 23, 1997. *Id.* She was reappointed and sworn in on November 7, 1997. *Id.* Judge Cohen served as chief judge from June 1, 1996 through September 23, 1997, and, again, from November 7, 1997 to May 31, 2000. *Id.* The interruption in her term as chief judge is attributable to the time during which her term expired making her ineligible to serve as the chief judge because she was not a presidentially appointed judge but served as a recalled judge on senior status. See Stratton, *supra* note 65, at 179.

85. See *Judge Stephen J. Swift*, U.S. TAX COURT, <http://www.ustaxcourt.gov/judges/swift.htm> (last updated Sept. 7, 2010). President Reagan initially appointed Judge Stephen J. Swift in 1983 to a term that expired on August 15, 1998. *Id.* Chief Judge Mary Ann Cohen recalled Judge Swift to serve as a senior judge until his reappointment on December 1, 2000 for a term ending on November 30, 2015. *Id.* He retired on September 7, 2008. *Id.*

86. See *Judge Joel Gerber*, U.S. TAX COURT, <http://www.uscourt.gov/judges/gerber.htm> (last updated Jan. 7, 2009). Judge Joel Gerber received his appointment to the Tax Court on June 18, 1984, for a fifteen-year term that expired on June 17, 1999. *Id.* His reappointment occurred on December 15, 2000 to a fifteen-year term that will expire on December 14, 2015. *Id.* Judge Gerber served as a senior judge between June 17, 1999 and December 15, 2000. *Id.* He assumed senior status on June 1, 2006 following service from June 1, 2004 through May 31, 2006 as the chief judge of the Tax Court. *Id.*

87. See Stratton, *supra* note 65, at 179.

88. *Id.*

89. *Id.* at 179–80.

90. See *id.*

Since the Eisenhower administration Tax Court judges who requested timely reappointment received timely nominations.<sup>91</sup>

To provide context for the discussion of the delays in reappointments, open positions, and their effects on the Tax Court, the following table sets forth information on all of the Tax Court judges whose terms expired between the beginning of the Clinton administration in January 1993 and the end of the second year of the Obama administration in 2010. This table reflects only those judges who still serve on the Tax Court in active or senior status and does not reflect retired judges, who no longer provide service to the court. As the discussion will demonstrate, this relatively simple data shows a great deal about the appointment and reappointment process.

Chart 1

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91. *Id.* The last untimely nomination for reappointment was Judge Clarence V. Opper whose term lapsed for six months during President Truman's administration in 1950. *Id.* at 179.





A few easily observed phenomena are apparent from the information in this chart. First, not all of the Tax Court judges who reach the expiration of their fifteen-year term either seek or are chosen for nomination to a second fifteen-year term. This sample involves judges whose terms expired over a period of seventeen years. In that time, nineteen judges' terms expired and eight of those judges did not seek or were not chosen for nomination for a second term. Notably, these eight constitute almost half of those who might otherwise have been eligible.

All of the remaining eleven judges expressed willingness to serve a second term, and the sitting President, who was frequently not from the same party as the President who originally appointed the judge, nominated all of these judges. Of these eleven, nine of those judges experienced delays ranging from as short as one and a half months to as long as eighteen months. Thus, only two judges, Judges Thomas B. Wells and Howard A. Dawson, Jr., were immediately nominated, vetted, and confirmed to the position they already held without some delay.

The remainder of the reappointed judges lost the status of Tax Court judge in the interim between the expiration of their term and the confirmation of their reappointment, requiring them to serve as senior judges on recall at the request of the chief judge until the completion of the nomination and confirmation process. This delay reduces the rights of the judges, changes the court's procedures and the dynamics in the court's statutory conference process, and may introduce other questions regarding how the court should operate since its authority to exist is entirely statutory.

These delays led to a slowing of the Tax Court's ability to function, which the practicing tax bar met with surprise. In May 2000, at a meeting of the American Bar Association (the "ABA") Taxation Section, Chairman Paul Sax,<sup>92</sup> said "[i]t's disruptive of the process of the court to have these three judges in semipermanent limbo."<sup>93</sup> The process itself lacks transparency, frequently making it unclear whether the judges themselves have requested

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92. *Paul J. Sax*, SACRAMENTO STATE, <http://www.csus.edu/ssis/inductees/academy/sax.html> (last visited Dec. 12, 2011).

93. Tom Herman, *Tax Report: The IRS and Justice Department Turn Up the Heat on Illegal Trusts*, WALL. ST. J. (May 17, 2000), <http://online.wsj.com/article/SB958523814311486304.html> (internal quotation marks omitted).

reappointment. However, during recent delays, even some of the judges discussed the lack of movement. Notably, at an ABA Taxation Section meeting occurring before the expiration of her own term, Chief Judge Mary Ann Cohen stated that “[w]e’ve heard some encouraging words but no action.”<sup>94</sup> Judge Cohen not only experienced the problem administratively as chief judge, requiring her to recall Judges Swift, Jacob, and Gerber to serve as senior judges,<sup>95</sup> but she later faced a similar wait for her own reappointment.<sup>96</sup>

The two prior presidential administrations and their staffs agreed that politics slowed the appointments process. The Clinton administration cited politics as a reason for the delay in action on the reappointments.<sup>97</sup> White House Deputy Press Secretary Jim Kennedy responded to concerns at the May 2000 session meeting by stating that he expected action soon on the Tax Court positions.<sup>98</sup> However, he went on to add that “the real delay in judicial nominations comes from Republicans in the Senate who continue to hold up dozens of highly qualified nominations.”<sup>99</sup>

An important distinction between nominees to serve on Article III courts and nominees to serve on the Tax Court is that the former are vetted through the Senate Judiciary Committee,<sup>100</sup> whereas the latter are vetted through the Senate Finance Committee.<sup>101</sup> The most publicly discussed judicial nominees are those going through the Senate Judiciary Committee. Fortunately, filibusters are not threatened over judicial nominees coming from the Senate Finance Committee in the manner that they are over nominees coming out of the Senate Judiciary Committee.<sup>102</sup>

Additional changes to the appointment process occurred during the Clinton administration. Midway through his second term, President Clinton decided not to accept recommendations from

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94. *Id.* (internal quotation marks omitted).

95. *Id.*

96. *See* Stratton, *supra* note 65, at 179.

97. Herman, *supra* note 93.

98. *Id.*

99. *Id.* (internal quotation marks omitted).

100. Senate Rules, *supra* note 2, at R. XXXV(1)(L)(5).

101. *Id.* at R. XXV(1)(i).

102. Carl Hulse, *G.O.P. Blocks Judicial Nominee in a Sign of Battles to Come*, N.Y. TIMES, May 20, 2011, at A16.

the ABA on potential judicial nominees.<sup>103</sup> This decision eliminated a potentially powerful ally to the President because these recommendations had ensured that candidates possessed the required qualifications while also reducing the likelihood of publicizing multiple names to obtain sufficient information for adequate vetting.<sup>104</sup>

Similar delays occurred during President George W. Bush's administration. He was also slow to name new nominees to the Tax Court bench or to seek reappointment of judges whose terms were expiring. In addition, during both of his presidential terms, the process used to nominate Tax Court judges became increasingly politicized. President Bush initially refused to nominate sitting judges for reappointment, preferring to use the vacancies as political appointments.<sup>105</sup> Despite a number of successful nominations to the Tax Court, President Bush made two famously unsuccessful appointments. He withdrew the nominations of Francis Cramer and Glen Bower because the Senate Finance Committee would not approve them due to their lack of experience and failure to meet other minimum qualifications.<sup>106</sup> However, because of the political pressure to find a role for these nominees, Cramer and Bower were ultimately nominated for and approved as immigration judges, despite their lack of experience or expertise in immigration law.<sup>107</sup>

Observers noted that President Bush disregarded the weight of history by refusing to reappoint sitting Tax Court judges who possessed valuable experience in favor of those who had served

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103. Stratton, *supra* note 65, at 178. The refusal to accept input from the ABA was even more pronounced during President Bush's administration. In contrast, President Obama has actively sought the ABA's rating of judicial nominees, although the ratings have reportedly not been entirely favorable. Savage, *supra* note 40.

104. Stratton, *supra* note 65, at 178.

105. *See id.* at 176, 178. It may be worth noting that many of the terms that expired early in his presidency were those of judges who were appointed by his father, President George H.W. Bush, or the preceding Republican president who also remains widely respected in Republican circles, President Ronald Reagan. *Id.* at 176.

106. Dan Eggen & Amy Goldstein, *Immigration Judges Often Picked Based on GOP Ties, Law Forbids Practice; Courts Being Reshaped*, WASH. POST, June 11, 2007, at A1.

107. *Id.* Not only were these two failed Tax Court appointees named to the Immigration Court, but "[a]t least one-third of the immigration judges appointed by the Justice Department since 2004 have had Republican connections or have been administration insiders, and have lacked experience in immigration law, Justice Department, immigration court and other records show." *Id.* Appointments to the Immigration Court were easier to accomplish because the Department Head, the Attorney General, rather than the President with the advice and consent of the Senate, made the appointment. *See id.*

his party during his campaign.<sup>108</sup> Nominees who did not possess adequate character and fitness failed to survive the vetting process in the Republican-controlled Senate Finance Committee. Historically these potential nominees might have been stopped by the vetting process before they became public. However, the desire to avoid outside influence resulted in the withdrawal of both nominations.

The first of these unsuccessful nominees, Francis L. Cramer, lacked experience as a tax practitioner. *The Wall Street Journal* reported:

An American Bar Association panel questions Francis L. Cramer's qualifications for the U.S. Tax Court, which decides IRS disputes with taxpayers. Cramer is close to New Hampshire GOP Sen. Gregg and works in the law firm founded by Gregg's father, a former governor. Its Web site says his focus is commercial and personal-injury litigation.

Senate Finance Committee Democrats sought ABA review; the group's pan of a tax judge is the first tax lawyers recall. Bush officials want to reduce the ABA's longtime role vetting judicial nominees, claiming bias against conservatives.<sup>109</sup>

The second nominee, Glen L. Bower, who had previously served on the Railroad Retirement Board and for the Illinois Department of Revenue, received a nomination in October 2003.<sup>110</sup> In March 2004, the White House withdrew his nomination after it became clear that his nomination would not clear the Senate Finance Committee after Senator Baucus raised significant concerns about Bower's personal income tax returns.<sup>111</sup>

It became clear that the administration was determined to find judicial positions for these nominees. Both Cramer and Bower subsequently received successful nominations to the immigration court.<sup>112</sup> The functioning of the Senate, particularly the Senate

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108. Heather Bennett, *White House Withdraws Bower Nomination for Tax Court Judge*, 102 TAX NOTES 1602, 1602 (2004); Stratton, *supra* note 65, at 177; Jackie Calmes, *A Special Weekly Report from the Wall Street Journal's Capital Bureau*, WALL ST. J., May 24, 2002, at A4.

109. Calmes, *supra* note 108.

110. Bennett, *supra* note 108.

111. Stratton, *supra* note 65, at 178. It was also noted that over half of the appointments to the immigration court during the administration of President George W. Bush were unqualified in immigration matters and that over one-third of the appointees had a Republican connection or were administration insiders. Eggen & Goldstein, *supra* note 106.

112. Eggen & Goldstein, *supra* note 106. Neither nominee had a significant immigra-

Finance Committee, as a gatekeeper to prevent the successful appointment of less than fully qualified professionals to Tax Court judgeships indicates that the appointment process worked in these two instances.

By 2003, the Bush administration changed the process even further. That year the Bush administration allowed Judge John O. Colvin's term to expire.<sup>113</sup> This term expiration was the final straw that called both the tax bar and Congress to action regarding presidential inaction relating to the expiration of Tax Court terms. Reportedly, the Treasury General Counsel's committee, which then consisted of Treasury General Counsel David D. Aufhauser, Treasury Assistant Secretary for Tax Policy Pamela Olson, Eileen J. O'Connor, the assistant attorney general for the Justice Department's tax division, IRS Chief Counsel B. John Williams Jr., and Associate White House Counsel D. Kyle Sampson, reviewed Judge Colvin's record following his timely request for reappointment and unanimously recommended his reappointment.<sup>114</sup> The memo recommending Judge Colvin's reappointment allegedly stated that if he was not a sitting judge, he would be the group's first choice for appointment to the Tax Court.<sup>115</sup> However, during the summer, the White House apparently notified certain members of the Treasury General Counsel's Committee that the White House would not reappoint the judges currently sitting on the Tax Court.<sup>116</sup>

Apparently unaware of the Bush administration's change of policies, the ABA and Senate reacted to the failure to put forward Judge Colvin's nomination for reappointment.<sup>117</sup> Within two days in October 2003, President Bush received two separate letters, one from the ABA Section on Taxation, signed by Richard A. Shaw, the section's president, and a second from the majority and minority leaders of the Senate Finance Committee, Senators Charles E. Grassley and Max Baucus, and the Chairman of the

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tion law background. *See id.*

113. Stratton, *supra* note 65, at 179.

114. *Id.* IRS Chief Counsel B. John Williams, Jr., served as a Tax Court Judge from December 2, 1985, until February 28, 1990. Press Release, U.S. Dep't of the Treasury, B. John Williams, Jr., Sworn in as Chief Counsel of the Internal Revenue Service (Feb. 7, 2002), available at [http://www.treasury.gov/press-center/press-release/Pages/po\\_978.aspx](http://www.treasury.gov/press-center/press-release/Pages/po_978.aspx).

115. Stratton, *supra* note 65, at 179.

116. *Id.*

117. *Id.*

Senate Judiciary Committee, Senator Orrin Hatch. Both letters urged President Bush to reappoint Judge Colvin to the Tax Court.<sup>118</sup> Following the calls for Judge Colvin's reappointment, President Bush's staff indicated the President would consider nominating sitting Tax Court judges for reappointment, along with other potential nominees, but would not automatically reappoint Tax Court judges as a matter of course.<sup>119</sup> Simply put, President Bush intended to only consider reappointments on a case-by-case basis.<sup>120</sup>

The Bush administration's approach to filling positions on the Tax Court differed from that used by prior presidential administrations. In prior administrations, the names of future nominees to the Tax Court often originated in the White House rather than in recommendations from the Treasury.<sup>121</sup> Despite the Bush administration's attempts to further reduce the influence the ABA and its sections exerted in vetting judicial candidates, the Senate Finance Committee still received the vetting information provided by the ABA Taxation Section.<sup>122</sup>

However, since the nomination had already been made, such vetting could not be used to avoid potentially embarrassing nominations. In previous administrations, the White House received vetting and qualification ratings prior to the announcing nomination, thus keeping such information confidential.<sup>123</sup> After announcing the nominee's name, qualification ratings could not remain confidential.<sup>124</sup> Allowing the ABA qualification rating to become public can potentially result in embarrassment to the President and the nominees. For instance, if the White House had asked the ABA for a rating on Francis L. Cramer, a public statement from Senator Baucus about his lack of qualifications might not have been needed. Knowing his rating prior to the nomination might have reduced the time and resources spent on his ultimately withdrawn nomination and eliminated the embarrassment to him and the White House.

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118. *Id.*

119. *Id.*

120. *Id.* at 180.

121. *Id.* at 177-78.

122. *Id.* at 178.

123. *Id.*

124. *Id.*

President Obama has returned to the practice of seeking qualification ratings from the ABA.<sup>125</sup> Although the President's staff has noted that the administration does not agree with all of the ratings, this process has resulted in potential judicial nominees not coming forward.<sup>126</sup>

Generally, the appointment and reappointment of Tax Court judges has resulted in a very qualified and specialized Tax Court bench. However, the recent politicization of the process and the nomination of truly political appointees, rather than qualified and respected members of the tax bar, raise questions about the legitimacy of the court's decisions. Furthermore, the assistance of the ABA and its sections prior to naming nominees could mean avoiding needless embarrassment to presidential administrations and nominees. It could also reduce the time required to complete the appointment process.

The reappointment process and politicization of appointments raises new questions and that part of the process now merits reconsideration. The apparent fairness of the process by which judges are appointed or reappointed will influence the perceived legitimacy of the Tax Court.<sup>127</sup> When considering the possibility of changing the appointment and reappointment process for Tax Court judges, reviewing past practices is important.

At its inception, significant distrust surrounded a reviewing body consisting entirely of lawyers.<sup>128</sup> Resolving the problem with Tax Court appointments and reappointments is easier than resolving the inherent problems of politics and the conflict between government tax collections and taxpayers' desires to minimize their tax bills. In this context, developing an actual procedural mechanism to ensure sound reappointments will eliminate many of the concerns associated with the symptom of politics in the operation of the Tax Court. Because taxes are a part of our everyday lives and essential to the government's operation, the concern is that citizens should have adequate recourse to redress govern-

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125. Savage, *supra* note 40.

126. *Id.*

127. See generally Freytag v. Comm'r, 501 U.S. 868 (1991) (affirming the constitutionality of a decision rendered by a Tax Court judge following a fact-finding process conducted by a special trial judge).

128. DUBROFF, PART II, *supra* note 53, at 92–93 (noting that until its dissolution in 1924, the several members on the Committee on Appeals and Review, an internal review mechanism within the Bureau of Internal Revenue, were not lawyers).

mental assertions of taxes owed with which the citizen disagrees. This belief is so deeply ingrained in our social fabric that the legitimacy of that process must be fiercely protected.

Problems with timely reappointment may create disabilities that impact the operation of the court and the effectiveness of the judges. Because each judge whose term lapsed is no longer a “judge,” he or she is no longer eligible to participate in the conference for review of Tax Court opinions.<sup>129</sup> Therefore, the several occasions when there have been multiple vacancies simultaneously on the Tax Court created a deeply problematic situation of fewer judges eligible to participate in court review of important issues. This situation results in fewer voices and potentially less robust discussion of the legal issues at stake in any given case to determine the proper application of the law. With fewer views on an issue of law, the results may not be as well considered because fewer perspectives will be represented. Also, fewer opinions present in a court reviewed Tax Court Opinion may result in less transparency regarding how the court will handle future cases. This lack of transparency creates a potential detriment to all taxpayers.

Another concern involves the issue of staffing the Tax Court. A President may choose not to reappoint a judge if the caseload of the Tax Court has decreased, making fewer judges necessary. Therefore, a benefit of an Article I court in which judges serve for a term of years, rather than during “good behavior,” is more flexibility to change judicial staffing to reflect the caseload. However, such changes in judicial staffing should be made thoughtfully and after careful study, not impulsively and without consideration of caseload and complexity. Additional considerations affecting the caseload involve the differences between Tax Court judges and senior judges. Tax Court judges are permitted to have more law clerks and administrative staff than senior judges.<sup>130</sup> Additionally, statutorily, senior judges are not required to work the same number of days as judges.<sup>131</sup> Thus, changing the number of judges significantly impacts the work of the Tax Court.

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129. See I.R.C. §§ 7443(a), 7447(a)(2), (c) (2006). Further complicating the issues is the judge’s ineligibility to serve as chief judge. *Id.* §§ 7444(b), 7447(a)(2), (c).

130. Stratton, *supra* note 65, at 176.

131. 28 U.S.C. § 371(A)–(C) (2006).



According to the figures available for the IRS Office of Chief Counsel, approximately ninety percent of all civil tax litigation occurs in the Tax Court.<sup>132</sup> As a result, fewer active judges with a full staff will likely result in slower, less well-developed decisions. Because the Tax Court is, first and foremost, a prepayment forum, slower opinions mean taxpayers continue to accrue interest and penalties on the asserted tax liabilities until the liabilities are paid. In cases where the court rules in favor of the IRS, the longer it takes to render a final decision, the greater the debt the taxpayer owes.

#### V. OPTIONS TO IMPROVE THE REAPPOINTMENT PROCESS

The major potential problem of changes to the appointment and reappointment process that politicize the selection of Tax Court judges is that the politicization risks diminishing confidence in an integral part of the tax system. The Tax Court has long been charged with being biased for or against taxpayers.<sup>133</sup> Although these charges are generally anecdotal rather than empirically based, such fears increase if politics, rather than qualifications and merit, provide the basis for appointments to this court. Moreover, perception is often reality in that if taxpayers lose confidence in the system, they will be less likely to comply.

Due to a number of factors, including that the taxpayer need not prepay the tax prior to filing a petition in the Tax Court, the majority of tax cases are filed in the Tax Court. Just because it is a prepayment forum, however, does not decrease the importance of obtaining a legitimate and trustworthy judgment.

In addition, new judges will not be as efficient as more experienced judges. Those who have served for a period of time will be more effective in handling complex cases.

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132. *Table 27: Chief Counsel Workload: Tax Litigation Cases, by Case Type, Fiscal Year 2008*, INTERNAL REVENUE SERVICE, <http://www.irs.gov/taxstats/bustaxstats/article/0,,id=207733,00.html> (last updated Mar. 14, 2011) (showing just over 35,000 active tax litigation in the fiscal year 2008, with all but 235 pending in the Tax Court). Similar reports are available for fiscal years 2001 through 2007. See *S01 Tax Status—Chief Counsel Workload: Tax Litigation Cases, by Type of Case*, INTERNAL REVENUE SERVICE, <http://www.irs.gov/taxstats/bustaxstats/article/0,,id=207733,00html> (last updated Mar. 14, 2011) (listing the caseloads from 1998 to 2010). The caseload increased in 2008. See *id.*

133. Maule, *supra* note 17, at 353 (exploring allegations of Tax Court bias and concluding that such allegations are unfounded).

Structural problems may also result from regularly allowing judges' terms to lapse. An example is the controversy that resulted when the then-current chief judge's term expired during the Clinton administration. President Clinton's failure to timely reappoint Chief Judge Mary Ann Cohen represented a major shift in policy relating to the Tax Court. Not reappointing productive Tax Court judges who have indicated a desire to continue serving, as happened during the Bush administration, was a further shift from the traditional appointment and reappointment process for Tax Court judges. Because more than seventeen months elapsed between the expiration of the terms of Judges Foley and Vasquez and their nominations for reappointment, and four months between the expiration of Judge Gale's term and his nomination for reappointment,<sup>134</sup> lags between term expiration and nomination have become the norm in the Obama administration. Arriving on July 11, 2011, and receiving confirmation on September 26, 2011, Judge Gale's nomination was the quickest to make it through the Senate.<sup>135</sup> After their nominations in January 2011, Judges Foley and Vasquez also were confirmed on September 26, 2011.<sup>136</sup> Four judicial slots remain unfilled. As a result, the problems associated with vacancies on the Tax Court and Tax Court judges' terms expiring without reappointment remain unaddressed.

The Tax Court's approach to applying its own precedent,<sup>137</sup> the statutes relating to court conferences, and the manner in which the Tax Court decides its cases make reappointment a real and important issue. While there have been several unsuccessful attempts to make the Tax Court an Article III court,<sup>138</sup> it is unlikely that future efforts will be any more successful, making significant disruptions of its operations a potentially continuous problem. As a consequence, a compromise somewhere between the life tenure of Article III judges and the current state of affairs is needed.

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134. *Presidential Nominations 112th Congress (2011–2012)*, THOMAS, <http://thomas.loc.gov/home/nomis.html> (last visited Dec. 12, 2011) (listing Judge Maurice B. Foley as presidential nominee PN 58-112; Judge Juan F. Vasquez as presidential nominee PN 108-112; and Judge Joseph H. Gale as presidential nominee PN 754-112).

135. *Id.*

136. *Id.*

137. *Golsen v. Comm'r*, 54 T.C. 742, 756–57 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971).

138. DUBROFF, PART II, *supra* note 53, at 172–73; Deborah A. Geier, *The Tax Court, Article III, and the Proposal Advanced by the Federal Courts Study Committee: A Study in Applied Constitutional Theory*, 76 CORNELL L. REV. 985, 991 (1991).

This article presents three possibilities, but rules out the first two as unworkable and possibly unconstitutional, before adopting the third. The first possible approach to improving the reappointment process creates a presumption of reappointment for judges who have satisfied certain criteria. The second possible approach lengthens the term of a Tax Court judge to twenty years. The third approach lies somewhere in between the two previous options and allows a judge whose term has expired and is serving as a senior judge to retain the rights and privileges of an active judge until reappointment, nomination of a replacement, or a declaration that the position will remain unfilled.

The first possible solution would be to require that judges up for reappointment receive favorable ratings from the ABA Section on Taxation Judicial Appointments Committee before permitting reappointment. In addition, because of the desire to ensure continuity on the bench and to retain appointments within the Presidents' party, as well as to conserve resources during the vetting process, it may also be desirable to limit reappointments to judges young enough to complete a specific portion of the second term, such as two-thirds, before reaching the mandatory retirement age of seventy. Finally, before applying any presumptions of reappointment, it is likely desirable to continue to have the judge express a timely interest in reappointment.

Any presumption of reappointment would significantly limit the role of politics in the reappointment process. In addition, because of the time and resources required to vet candidates, even for reappointments, it might be reasonable to ask a candidate about his or her intentions to complete the entire term.<sup>139</sup> By balancing concerns that judges not be automatically reappointed, this option leaves the sitting President with the intended discretion to appoint a nominee of his or her own choosing and provides some assurances that there would not be unnecessary vacancies.

Unfortunately, for all of the benefits of this approach, it has some drawbacks that are not easily overcome—the most problematic of which is the Appointments Clause.<sup>140</sup> Creating a presumption of reappointment could raise the question of whether the President was actually making an appointment.

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139. The table above, demonstrates that most reappointed judges serve a substantial portion of their second term. *See supra* Table 1.

140. U.S. CONST. art. II, § 2, cl. 2.

The Appointments Clause of the U.S. Constitution contains the President's power to appoint judges to these courts and to other offices. This clause vests appointment power as follows:

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Court of Law, or in the Heads of Departments.<sup>141</sup>

If the President was not affirmatively making the appointments, it might be difficult to justify this approach as proper and nonviolative of the Appointments Clause. Special Trial Judges serve at the pleasure of the chief judge of the Tax Court and have been held to be officers subject to the Appointments Clause by the Supreme Court of the United States.<sup>142</sup> Similarly, senior judges serve at the request of the chief judge of the Tax Court. Affirmative action in the form of selection or recall by the chief judge or presidential nomination seems necessary for a proper appointment. Thus, simple presidential inaction may be inadequate to justify reappointment, particularly against the historical backdrop that intended for the judges to have less than life tenure, even if reappointment was in fact de rigueur.

The second possible approach is to extend the initial term of a Tax Court judge to twenty years. This approach would result in less disruption to the Tax Court's operation than occurs under current law and might reduce the number of instances in which reappointment is an issue. Currently, many judges who sought reappointment did not serve their entire second term. Extending the length of the first term resolves this problem in many cases, as the chart below demonstrates.

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141. *Id.*

142. *Freytag v. Comm'r*, 501 U.S. 868, 881 (1991); *see also Buckley v. Valeo*, 424 U.S. 1, 126-27 (1976) (limiting congressional authority to take the appointments power outside the terms set forth in the Constitution).

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Chart 2<sup>143</sup>

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143. See *Judges*, U.S. TAX COURT, <http://www.taxcourt.gov/judges.htm> (last visited Dec. 12, 2011) (providing the information used to compile this table).

Therefore, extending the length of the judicial term for Tax Court judges would address many of the problems relating to expiring terms. However, not all of the judges retire before the end of their second term, and many of the more recently appointed judges began their service at the Tax Court at a younger age, which equates to potentially longer judicial careers. Assuming their careers as attorneys will be productive and offer benefits and experience that makes them more efficient judges, this solution is far less efficient and beneficial. Especially since reappointment could be available or prohibited in conjunction with a longer term. As a result, simply extending the term to twenty years is not an ideal solution.

Moreover, extending the term for Tax Court judges to twenty years would take the Tax Court further out of step from the rest

of the federal judiciary at a time when it is working to bring its procedures into closer conformity with other federal courts.<sup>144</sup>

A third solution, which is the recommended solution, is to change the statute relating to recall. For Tax Court judges whose terms have expired, but who have expressed a desire to be reappointed during the appropriate time, Congress should rewrite the statute to permit the judge to be recalled with the same rights and duties as a Tax Court judge, unless the President indicates that the position will be left vacant or filled with another nominee. This approach is similar to that used by some states.<sup>145</sup> Under this approach, Tax Court judges whose terms have expired retain the rights and powers of their office until a replacement is named, the President announces an intention to not fill the position, or the judge retires. This approach alleviates concerns about violating the Appointments Clause because the chief judge of the Tax Court would be recalling the judge, first appointed by the President.

This solution would allow the Tax Court to have a full, or close to full complement of judges to engage in review of important tax issues coming before the court. It also provides the sitting President with the full discretion to reduce the number of sitting Tax Court judges by simply indicating his or her intention to not fill the vacancy. In cases where the President intended to cut the staffing of the court and made that intention clear at the expiration of a judge's term, recall as a senior judge would be at the discretion of the chief judge of the Tax Court, without any more power than currently exists. In addition, this solution would allow the President to choose to fill a vacancy created by the expiration of a judge's term with a nominee that the President believes to be more qualified, just as is the case now.

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144. See Press Release, U.S. Tax Court, Notice of Proposed Amendments to Rules (Dec. 10, 2010), available at <http://www.ustaxcourt.gov/press/122010.pdf> (explaining change to business hours, from closing on legal holidays in the District of Columbia to closing on federal holidays).

145. See MINN. STAT. ANN. § 271.01 (West 2011). ("Judges may serve until their successors are appointed and qualify. They shall be selected on the basis of their experience with and knowledge of taxation and tax laws."). Judges in Minnesota are appointed by the governor with the advice and consent of the state senate. *Id.*

The statute should be revised to clarify that the additional powers as senior judge last only so long as the expired term remains unfilled. Failing to define the length of a senior judge's powers would expand the powers of senior judges generally and might be viewed as an unintentional expansion of powers. The judge whose term expired retains full rights and powers only until a nomination and confirmation of that judge or a replacement occurs and the judicial position remains subject to presidential appointment. This approach is intended only to allow the Tax Court to continue its work at optimal levels until the President makes an appointment with the advice and consent of the Senate. The proposed changes should not result in structural changes to the Tax Court's normal course of operations.

#### CONCLUSION

Until recently, the Tax Court had three vacancies for which President Obama had nominated the sitting judge for reappointment. Currently, four vacancies exist with three nominees awaiting confirmation and other judges' terms set to expire before the next presidential election.

Providing a statutory mechanism to maintain a full complement of judges improves the quality and timeliness of justice from the Tax Court. Although judges appointed to the Tax Court generally have significant tax experience, there is still a learning curve for sitting on the bench. The Tax Court benefits from judges who can bring experienced views to the court's cases and conferences. This is best accomplished by adopting an approach to appointing and reappointing these judges that ensures qualifications trump politics.

Recent experiences demonstrate that even when politics are brought in to the appointment process, the appointment process is able to protect itself. Politics are merely a symptom, not the problem. However, the reappointment process is not working, and the failure to timely reappoint Tax Court judges at the expiration of their terms causes unnecessary disruption in the court's operation. Small changes to the Tax Court's operating statutes could allow the court to continue with little change and without the judges losing the ability to perform all of their normal functions, even if a time gap occurs between the expiration of their first



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term and the beginning of their second term. These changes make the court more effective and perhaps increase its attractiveness to potential nominees.