



TAX PROCEDURE: A RECENT “CLARIFICATION” OF THE TAX COURT OFFERS LITTLE CLARITY

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In its current form, the Tax Court was created by Section 951 the Tax Reform Act of 1969, which is currently codified as Section 7441 of the Internal Revenue Code and provides that “[t]here is hereby established, under article I of the Constitution of the United States, a court of record to be known as the United States Tax Court. The members of the Tax Court shall be the chief judge and the judges of the Tax Court.” I.R.C. § 7441.

As part of the [Consolidated Appropriations Act, 2016, Pub. L. 114-113](#), Congress amended a variety of provisions of the Code relevant to the Tax Court. The act included a section entitled “Clarification Relating to United States Tax Court,” which provided as follows: “Section 7441 is amended by adding at the end the following: ‘The Tax Court is not an agency of, and shall be independent of, the executive branch of the United States.’” Pub. L. 114-113, 129 Stat. _ § 441 (2015). Section 441 of the Consolidated Appropriations Act originated in Senate Bill S. 930, and the accompanying Senate Committee Report indicated that the amendment to Section 7441 of the Code was enacted in response to the [Kuretski v. Comm’r](#), 725 F.3d 929 (D.C. Cir. 2014):

The Committee is concerned that statements in *Kuretski v. Commissioner* may lead the public to question the independence of the Tax Court, especially in relation to the Department of Treasury or the Internal Revenue Service. The Committee wishes to remove any uncertainty caused by *Kuretski v. Commissioner*, and to ensure that there is no appearance of institutional bias.

S. Rep. No. 114-14, 114th Cong., 1st Sess. 10 (Apr. 14, 2015). The committee report further explained that “the Tax Court is not an agency of, and shall be independent of, the Executive Branch.” *Id.*

As the Committee report notes, *Kuretski* did involve a challenge to the independence of the Tax Court; the taxpayers argued that Section 7443(f) of the Code, which authorizes the President to remove a Tax Court judge for “inefficiency, neglect of duty, or malfeasance in office, but for no other cause,” I.R.C. § 7443(f), infringed upon separation of powers. *Kuretski*, 725 F.3d at 932. Specifically, the taxpayers argued that “Tax Court judges exercise the judicial power of the United States under Article III of the Constitution,” and that the ability of the President to remove a Tax Court judge was therefore an “interbranch” removal power that violated the separation of powers doctrine. *Id.* The taxpayers further contended that this threat of removal created an inherent bias in favor of the Executive Branch that prejudiced them. *Id.* The D.C. Circuit rejected the taxpayers’ separation of powers argument, summarizing its holding as follows: “the Tax Court, in our view, exercises Executive authority as part of the Executive Branch. Presidential removal of a Tax Court judge, would constitute an intra—not inter—branch removal.” *Id.*

Thus, at the outset, there is an apparent disconnect between the D.C. Circuit’s opinion in *Kuretski* and the Congressional response in section 441 of the Consolidated Appropriations Act:

- The alleged bias of the Tax Court was the product of the President’s power to remove judges, which Section 441 did not change; and
- The rationale for rejecting the Kuretskis’ challenge to the Tax Court’s legitimacy was that the court “exercised Executive authority as part of the Executive Branch,” *id.* at 932, which appears to be inconsistent with Section 441’s directive that the Tax Court “shall be independent of [] the executive branch of the United States.”

Consequently, further exploration of *Kuretski* is in order. After rejecting challenges based on waiver and lack of standing, the D.C. Circuit turned initially to a major premise of the taxpayers’ challenge to the President’s removal power, the assertion that intra—branch removal would be unconstitutional. Here, the Court expressed doubt on the viability of the taxpayers’ position, but elected not to address the issue in detail as “the Kuretskis have failed to persuade us that Tax Court judges exercise their authority as part of any branch other than the Executive.” *Id.* at 939.

The D.C. Circuit’s rejection of the taxpayers’ contention that Tax Court judges exercised judicial power under Article III rested upon its recognition that disputes involving “public rights” can be assigned by Congress to a non-Article III forum. *Id.* Tax disputes historically fell within the range of public rights that could be heard in a non-Article III forum, and the D.C. Circuit concluded that they continue to do so. The D.C. Circuit specifically addressed the Supreme Court’s determination in [Freytag v. Commissioner](#), 501 U.S. 868, 890 (1991) that the Tax Court was a “Court of Law,” but found that determination did not make the President’s removal power unconstitutional. 755 F.3d at 940. In the D.C. Circuit’s view, a tribunal could be a “Court of Law,” even if the President could remove its members. *Id.* at 940-41. In concluding its analysis of whether the Tax Court exercised Article III powers, the D.C. Circuit specifically referenced the Supreme Court’s holding in *Freytag* that the judicial power of the United States is exercised by both Article III and non-Article III tribunals. *Id.* at 941 (quoting *Freytag*, 501 U.S. at 889).

Next, the D.C. Circuit quickly rebuffed the taxpayers’ alternative argument that the Tax Court was part of the legislature under Article I, reasoning that the court’s status as a “legislative court” did not mean that it exercised legislative power, any more than the various administrative agencies that Congress has created in the Executive Branch do so. *Id.* at 943.

Since the Tax Court did not exercise Article III powers, and since its establishment as an Article I court did not place it in the legislative branch, the D.C. Circuit concluded that "the Tax Court exercises its authority as part of the Executive Branch." *Id.*

Against this background, it appears that Section 441 of the Consolidated Appropriations Act has not met its goal of removing uncertainty concerning the Tax Court; if the Tax Court exercises its authority as part of the Executive Branch, it is difficult to understand how it can be "independent of" that branch, particularly since the President's power to remove Tax Court judges remains in place.

If the goal was to remove potential institutional bias, a change in the Presidential removal power might have accomplished that without creating additional questions concerning the Tax Court's status.



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