

A Reminder Regarding The Need To Defend Judicial Integrity

By **Saul Mezei** (March 22, 2019, 5:48 PM EDT)

I read with interest Law360's March 8, 2019, interview of Kenneth Wood, titled "Kenneth Wood Looks Back on 3 Decades in International Tax." Wood recently retired after a long and distinguished career with the IRS and a public accounting firm. He spent the last seven years of his career with the IRS. Reporter Molly Moses' questions were thoughtful, and some of Wood's responses were interesting and insightful.



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I am not writing to criticize the interview in general but because I am dismayed by how certain of Wood's statements portray judges and courts, including the United States Court of Appeals for the Ninth Circuit and the United States Tax Court. The public deserves another perspective.

I represent some of the taxpayers Wood mentions in his interview. But the concerns that prompted me to write this piece in no way relate to Wood's comments regarding those taxpayers (or any other taxpayers) or his views with respect to the substantive merits of any judicial opinions. Court opinions should be carefully scrutinized and are subject to legitimate criticism on their merits. I am writing not because I am troubled by the fact that Wood criticizes judicial opinions but because he crosses the line and unjustifiably questions the integrity of judges and the judicial process. His statements regarding the courts' motives are careless at best. And they are dangerous because they potentially undermine public confidence in the judiciary.

The first of Wood's statements that alarmed me concerns *Altera Corp. v. Commissioner*, a widely followed case involving a challenge to the Treasury Department's 2003 regulation requiring that stock-based compensation costs be treated as costs to be shared by parties to a qualified cost-sharing arrangement.

In 2015, the Tax Court invalidated the challenged regulation.[1] In July 2018, a divided Ninth-Circuit panel issued an opinion reversing the Tax Court's decision in *Altera*. [2] But the judge who was the swing vote on the Ninth-Circuit panel — Judge Stephen Reinhardt — passed away approximately four months before the Ninth Circuit issued the opinion. The opinion noted that Judge Reinhardt had formally concurred in the majority opinion prior to his death. In August 2018, the court replaced Judge Reinhardt with another judge, withdrew its opinion to allow the reconstituted panel to confer and scheduled the case for reargument.[3] The case was reargued in October 2018 and is awaiting an opinion.

In the published Law360 interview, Wood speculates that the Ninth Circuit's decision to withdraw and rehear Altera "really suggests to me that somebody in the private sector was successful at lobbying the court." He proceeds to characterize the plot he conjures as "kind of disturbing." Wood suggests an unethical conspiracy despite an iota of supporting evidence. He is wrong. But you needn't take my word for it.

On Feb. 25, a unanimous Supreme Court vacated a Ninth Circuit judgment in a case in which Judge Reinhardt was listed as the author of an en banc decision issued 11 days after he passed away.[4] The Supreme Court observed that the Ninth Circuit had vacated its opinion in Altera and reconstituted the panel but had taken no similar action in Yovino. The Supreme Court proceeded to conclude that the Ninth Circuit erred in counting Judge Reinhardt as a member of the majority in a decision filed after he died. In the Supreme Court's words:

That practice effectively allowed a deceased judge to exercise the judicial power of the United States after his death. But federal judges are appointed for life, not for eternity.[5]

Although the Ninth Circuit's Aug. 7, 2018, order did not explain why the court had suddenly decided to withdraw its Altera opinion, it is far more reasonable to assume that the court was prudently getting out in front of the problem addressed in Yovino than that the court had succumbed to secret lobbying by the private sector.

Later in the Law360 interview, Wood was asked whether courts look at the political climate when they decide cases. In response, he launched into the following tirade:

I think they look at the big numbers, and they say, "Wow, if I uphold the IRS this is going to be a major hit on the earnings for this company." I think they're very nervous because it's a billion-dollar adjustment and it's a \$300 million tax hit, the taxpayer is going to appeal and their opinion is going to be challenged. I think they'd rather have the IRS appeal than the taxpayer.

That's just human nature. I've never talked to a judge about that.[6]

As an initial matter, I fail to comprehend the logic behind Wood's "human nature" justification for his attack on the courts. But the assertion that judges are generally biased against the government in large-dollar cases because they are more fearful of judicial appeals by taxpayers than the government is both baseless and absurd. It is also disrespectful to the fine appellate lawyers at the U.S. Department of Justice who defend the government's positions on appeal.

Over the years, I have heard many criticize the Tax Court. Wood conjures pro-taxpayer conspiracies, but most of the criticisms I have heard tend to take the opposite point of view. Many are expressed by tax protesters. All are nonsense. I clerked for a Tax Court judge before entering private practice. And I talked to many other judges and clerks during my time with the Tax Court. Not once did I ever witness or learn of anything that even remotely supports what Wood suggests.

Federal judges do not typically defend their independence and integrity against public criticism because to do so could violate their code of conduct. So it is vital that others lead the charge. Judicial independence and integrity are vital to the health of our democracy. In the current political environment, it is especially important that we defend the judiciary against conspiracy theories and other baseless attacks. As a lawyer, Wood should know this.

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Disclosure: Mezei is involved in Tax Court litigation mentioned in Law360's interview with Kenneth Wood. He represents The Coca-Cola Co. in The Coca-Cola Company & Subsidiaries v. Commissioner, Tax Court Docket No. 31183-15 (pending) and Amazon.com Inc. in Amazon.com Inc. & Subsidiaries v. Commissioner, Tax Court Docket No. 31197-12 (pending).

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[1] *Altera Corp. v. Commissioner*, 145 T.C. 91 (2015).

[2] *Altera Corp. v. Commissioner*, 2018 WL 3542989 (9th Cir. July 24, 2018).

[3] *Altera Corp. v. Commissioner*, 898 F.3d 1266 (9th Cir. Aug. 7, 2018).

[4] *Yovino v. Rizo*, 139 S. Ct. 706 (2019).

[5] *Id.* (slip op. at 5).

[6] Wood also goes on to baselessly accuse the Tax Court of not permitting the IRS to fully develop the record in large cases with complex structures. Anyone who is familiar with the discovery processes and records in some of the recent large cases would disagree.