No. 17-72701

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN MICHAEL CRIM,

Petitioner-Appellant

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee

ON APPEAL FROM THE ORDER OF THE
UNITED STATES TAX COURT

BRIEF FOR THE APPELLEE

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GLOSSARY

Acronym	Definition
Appeals Office	IRS Office of Appeals
CDP	Collection due process
I.R.C.	Internal Revenue Code of 1986 (26 U.S.C.)
Internal Revenue Service	IRS

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STATEMENT OF JURISDICTION

John Michael Crim (taxpayer) brought this action by filing a petition in the Tax Court on January 20, 2015. (ER 56.)[1] In his brief on appeal (Br. 3), he asserts that the Tax Court had jurisdiction over the petition pursuant to I.R.C. § 6330(d), relating to the review of collection

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[1] "ER" refers to taxpayers' excerpts of record. "Doc." refers to the documents of record in the Tax Court, as numbered by the Clerk of that court. Unless otherwise indicated, all statutory references are to the Internal Revenue Code of 1986 (26 U.S.C.) (the Code or I.R.C.), as amended and in effect with respect to the time in question.

due process (CDP) determinations. The Tax Court rejected that argument and dismissed the case for lack of jurisdiction. (ER 6, 9.) As we explain in the Argument, *infra*, this order was correct and should be affirmed.

The Tax Court entered its order dismissing the case for lack of jurisdiction on September 5, 2017. (ER 1.) That order was a final, appealable decision resolving all claims of all parties. On September 29, 2017, taxpayer timely appealed that order to this Court. (ER 29.) *See* I.R.C. § 7483; Fed. R. App. P. 13(a)(1)(A). This Court's jurisdiction over the appeal rests upon I.R.C. § 7482(a)(1).

STATEMENT OF THE ISSUES

1. Whether the Tax Court correctly dismissed taxpayer's petition for lack of subject matter jurisdiction.

2. If the Tax Court had jurisdiction over the case, whether the President's power to remove Tax Court judges for cause under I.R.C. § 7443(f) violates the separation of powers inherent in the Constitution.

APPLICABLE STATUTES AND REGULATIONS

The constitutional provisions and statutes relevant to this appeal are included as an addendum to this brief. *See* Fed. R. App. P. 28(f); 9th Cir. R. 28-2.7.

STATEMENT OF THE CASE

A. The nature of the case and disposition by the court

Taxpayer brings this appeal from a Tax Court order dismissing his petition for lack of jurisdiction. (ER 1.) One month after filing his petition, and before this case had been assigned to any particular Tax Court judge, taxpayer moved to recuse the judge (and indeed, all judges of the Tax Court). (Doc. 4; *see* ER 10.) In seeking recusal, taxpayer contended that the President's power to remove Tax Court judges for cause under I.R.C. § 7443(f) offends the constitutional separation of powers.[2] (*See* ER 10.) On appeal, however, taxpayer appears to have abandoned any argument that Tax Court judges should be disqualified.

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[2] As is explained in detail below, the Tax Court is an Article I court, I.R.C. § 7441, and its judges, appointed by the President with the advice and consent of the Senate to 15-year terms, I.R.C. § 7443(b), (e), "may be removed by the President, after notice and opportunity for public hearing, for inefficiency, neglect of duty, or malfeasance in office, but for no other cause," I.R.C. § 7443(f).

He simply asks this Court "to remand this case with instructions to declare Section 7443(f) unconstitutional." (Br. 46.)

While taxpayer's motion to recuse was pending, the Commissioner moved to dismiss for lack of jurisdiction. (Doc. 6; *see* ER 1.) Taxpayer opposed the motion, and he also sought jurisdictional discovery. (Docs. 8, 9; *see* ER 1.) The Tax Court denied taxpayer's recusal motion (ER 11), granted the Commissioner's motion to dismiss (ER 9), and denied taxpayer's motion for jurisdictional discovery because such discovery "would serve no useful purpose" (ER 9). Taxpayer appealed. (ER 29.)

B. Allegations and proceedings regarding the jurisdictional issue

1. The allegations in the petition

On January 20, 2015, taxpayer petitioned the Tax Court "for a determination that the [Commissioner's] rejection of Petitioner's Form 656-L Offer in Compromise based on doubt as to liability, as set forth by [the Commissioner] in his December 19, 2014 letter rejecting the Offer in Compromise ("Offer Rejection Letter") was incorrect as a matter of law and hence an abuse of discretion." (ER 56.) Nowhere in his petition did taxpayer invoke a statutory basis for Tax Court jurisdiction. The

petition is, however, entitled "petition for redetermination of [the Commissioner's] *de facto* notice of determination." (ER 56.) In a footnote, moreover, taxpayer invoked the Tax Court's opinion in *Craig v. Commissioner*, 119 T.C. 252 (2002), which relates to the Tax Court's jurisdiction under I.R.C. § 6330(d) to review determinations of the IRS Office of Appeals ("Appeals Office") regarding collection action. He contended that the Tax Court "has jurisdiction because the Offer Rejection Letter 'reflects a 'determination' sufficient to invoke the [Tax] Court's jurisdiction.'" (ER 56 n.1, quoting *Craig*).

In his petition, taxpayer also reviewed the history of his criminal indictment, conviction, and sentencing. (ER 57-61.) *See United States v. Crim* (*Crim I*), 451 F. App'x 196, 210 (3d Cir. 2011) (upholding the conviction). Taxpayer was convicted of conspiracy to defraud the United States, in violation of 18 U.S.C. § 371 and corruptly endeavoring to impede the due administration of internal revenue laws in violation of I.R.C. § 7212(a), and he was ordered to pay restitution of $17,242,806.57 as an independent part of his sentence. *Id.* As the Third Circuit explained in taxpayer's second criminal appeal, *United States v. Crim (Crim II)*, 553 F. App'x 170, 173 (3d Cir. 2014), because

his crime involved inducing and assisting others to evade their own tax obligations, "the District Court held Crim jointly and severally liable for the full amount of loss to the United States." Because the liability was joint and several, taxpayer's "restitution liability would be decreased by the payments collected by the IRS from his co-defendants and former clients." *Id.*

At the resentencing hearing conducted after taxpayer's first criminal appeal, the IRS indicated that substantial portions of the original restitution order had been paid by taxpayer's former clients. *Id.*; *see also* ER 40-41. As a result, in its resentencing order (as summarized by the Third Circuit), the "District Court noted that the IRS's calculations showed that the balance on the original $17,242,806.57 restitution order was now $3,782,358.11," but did not exercise its discretion to apportion liability. *Crim II*, 553 F. App'x. at 173. On appeal, the Third Circuit found no abuse of discretion. *Id.* "In fact," the court held, the District Court "lacked any discretion at all on this question in light of our remand order" from the first criminal appeal. *Id.*

In his second criminal appeal, taxpayer also argued that the restitution ordered as part of his sentence violated the *ex post facto* Clause, U.S. Const. art. I, § 9. Taxpayer noted that in 2010 — before his conviction but after his crimes were committed — Congress passed the Firearm Excise Tax Improvement Act of 2010, Pub. L. No. 111-237, § 3, 124 Stat 2497. That legislation added subsection (4) to I.R.C. § 6201(a), which, as the Third Circuit has explained, "authorize[d] the IRS to use its administrative powers to collect on criminal restitution when the Government is the victim by treating the criminal restitution as a tax." *Crim II*, 553 F. App'x. at 172. The Third Circuit declined to rule on that matter, characterizing it as "contingent and premature." *Id.* The court held that "[i]f the IRS chooses to use this power against Crim, he may challenge its legality at that time." *Id.*

After reciting these facts in his Tax Court petition (ER 57-61), taxpayer asserted, "[t]his is the Petitioner's challenge," and "[t]he IRS/Federal Government is bound by the decision in *United States v. Crim*, 553 Fed. Appx. 170 (3d Cir. 2014)." (ER 61.)

2. Proceedings on the motion to dismiss for lack of jurisdiction

The Tax Court is a court of limited jurisdiction that possesses only such jurisdiction as is expressly conferred upon it by Congress. I.R.C. § 7442. The Commissioner moved to dismiss for lack of jurisdiction. (Doc. 6.) As noted above, although taxpayer did not invoke any statutory basis for jurisdiction in his petition, he did mention *Craig v. Commissioner*, 119 T.C. 252 (2002), which concerns Tax Court jurisdiction under I.R.C. § 6330(d) to review a notice of determination issued by the IRS Office of Appeals after a CDP hearing.[3]

In his motion to dismiss, the Commissioner argued that the letter of December 19, 2014, "does not constitute [a] notice that would confer jurisdiction on this Court." (ER 4.) The Commissioner also stated that he had "diligently searched his records and contacted I.R.S. personnel," and "review[ed] [his] records kept in the ordinary course of business," and concluded that "there is no record, information, or other evidence

[3] Taxpayer's brief on appeal appears to confirm his intention to invoke the Tax Court's CDP jurisdiction. (Br. 3.) Although he asserts that Tax Court jurisdiction exists under I.R.C. § 6330(d) (*id.*), he offers no argument that the Tax Court erred in concluding that it lacked such jurisdiction.

indicating that a notice of determination was mailed to petitioner with respect to taxable years 1999 through 2013." (ER 34; *see also* ER 4.)

In response, taxpayer moved for jurisdictional discovery. (ER 33.) He argued that he should be permitted "discovery to ascertain the veracity of the proffered factual allegations and to ascertain the nature, extent, and timing of any purported 'diligent search.'" (ER 34.) Taxpayer also argued that his own "case is far from normal": because of the criminal proceedings, he argued, "the records in this case may not have been kept in the ordinary course of the IRS' business." (ER 34-35.)

3. The Tax Court's order of dismissal

The Tax Court granted the Commissioner's motion to dismiss and denied taxpayer's motion for jurisdictional discovery. (ER 9.) "The Tax Court is a court of limited jurisdiction," the Tax Court held, which "may exercise jurisdiction only to the extent expressly authorized by statute." (ER 5.) The court further observed that "jurisdiction must be proven affirmatively, and a party invoking [the Tax Court's] jurisdiction bears the burden of proving that the Court has jurisdiction over the party's case." (ER 5.)

The Tax Court construed taxpayer's petition as "invok[ing] the Court's collection review jurisdiction under I.R.C. sec. 6330(d)(1) relating to liens . . . and levies." (ER 5.) In such a review action, the Tax Court held, "jurisdiction . . . depends, in part, on the issuance of a notice of determination by [the Commissioner's] Appeals Office after the taxpayer has requested an administrative hearing following the issuance by respondent's collection division of either a final notice of intent to levy . . . or a notice of filing of Federal tax lien." (ER 5.)

The letter submitted by taxpayer for Tax Court review, the court found, "is not a notice of determination within the meaning of I.R.C. section 6320 or 6330" for four reasons. (ER 6.) Two reasons were evident from the letter itself. First, it was issued by a tax examiner in a service center, rather than by the IRS Appeals Office, and second, it did not purport to sustain a notice of tax lien or proposed levy. (ER 6.) Third, there was no indication (including any assertion by taxpayer) that taxpayer had requested a CDP hearing. (ER 6.)

Fourth, there was no evidence that the IRS had issued a notice of intent to levy or filed a notice of federal tax lien. (ER 6.) In this regard, the Tax Court took judicial notice of the fact that the Commissioner has

indeed issued to taxpayer a notice of intent to levy respecting an income tax liability for 2014 and I.R.C. § 6700 penalties for the years 1999, 2000, 2001, 2002, and 2003; that taxpayer has responded by requesting a CDP hearing; that in July 2017, after that hearing was complete (and after the March 2015 the motion to dismiss was filed in this case), a notice of determination was sent to taxpayer; and that in August 2017, taxpayer petitioned the Tax Court for review of that determination. (ER 4 n.2, ER 6 n.3.) That petition is pending in the Tax Court as No. 16574-17L. (*Id.*)

The Tax Court rejected taxpayer's reliance on *Craig*. (ER 6-8.) That case, the court explained, concerned the distinction between a timely-requested CDP hearing, the outcome of which is subject to Tax Court review, and the unreviewable equivalent hearing available to taxpayers whose request for a CDP hearing is untimely. (ER 6-8.) The Tax Court concluded that *Craig* was "clearly distinguishable" and had "no application to the present case." (ER 8.)[4]

The Tax Court also observed that taxpayer "seems to imply that this Court has jurisdiction in the present case as a result of the

[4] Taxpayer does not cite *Craig* in his opening brief on appeal.

statement by the Court of Appeals" in *Crim II*. (ER 8.) But that statement, the court held, "does not confer jurisdiction on [the Tax Court] in the absence of a statutory provision conferring this Court's jurisdiction." (ER 8.)

Having determined that it lacked jurisdiction over taxpayer's petition, the Tax Court concluded that jurisdictional "discovery would serve no useful purpose." (ER 9.) Accordingly, the Tax Court denied taxpayer's motion for jurisdictional discovery and granted the Commissioner's motion to dismiss for lack of jurisdiction. (ER 9.)

C. Allegations and proceedings regarding the constitutional issue

1. The history of the Tax Court

Prior to 1921, taxpayers had no formal opportunity to dispute the amount of federal tax owed prior to assessment. In 1921, Congress granted taxpayers a hearing prior to the assessment of a deficiency, but only before the Bureau of Internal Revenue. Revenue Act of 1921, ch. 136, § 250(d), 42 Stat. 227, 266. In 1924, however, Congress established the Board of Tax Appeals as "an independent agency in the Executive Branch of Government," thereby granting preassessment review of deficiencies before a tribunal separate from the Bureau. Revenue Act of

1924, ch. 234, § 900(a), (e), 43 Stat. 253, 336, 337. The members of the Board were appointed by the President to 10-year terms with the advice and consent of the Senate, *id.*, § 900(b), 43 Stat. at 336-337, but could be removed by the President "for inefficiency, neglect of duty, or malfeasance in office, but for no other reason," *id.* at 337.

In 1926, Congress extended the term of Board members to 12 years and amended the removal provision to guarantee "notice and opportunity for a public hearing" before the President could remove a Board member for cause. Revenue Act of 1926, ch. 27, § 1000, 44 Stat. 9, 105-106. The 1926 Act also made the Board's decisions directly reviewable by the courts of appeals. *Id.* § 1001(a), 44 Stat. at 109-110. In 1942, Congress changed the name of the Board to "the Tax Court of the United States" and declared that the court's members "shall be known" as "judges," but did not otherwise change the provisions that had governed the Board. Revenue Act of 1942, ch. 619, § 504(a), 56 Stat. 798, 957.

In 1969, Congress amended the statute addressing the court's status. It "established, under article I of the Constitution . . . , a court of record to be known as the United States Tax Court." Tax Reform Act

of 1969, Pub. L. No. 91-172, § 951, 83 Stat. 487, 730 (codified at I.R.C. § 7441). The reconstituted court was "a continuation of" the old court, and judges of the prior court became its judges. Tax Reform Act of 1969, § 961, 83 Stat. 735-736. In addition, Congress amended § 7441 to delete the designation of the Tax Court as an "independent agency in the Executive Branch of the Government." *Id.* § 951, 83 Stat. 730; *see* S. Rept. No. 91-552, at 302-303 (1969) (noting that "the amendments are also concerned with making the Tax Court an Article I court rather than an executive agency and expanding its powers accordingly."). The only other substantive change was that the Tax Court was granted the contempt power. *Id.,* § 956, 83 Stat. 732 (codified at I.R.C. § 7456(c)).

Under I.R.C. § 7442, the Tax Court has "such jurisdiction as is conferred upon [it] by this title." The Tax Court is composed of 19 judges appointed by the President with the advice and consent of the Senate. I.R.C. § 7443(b). Although a Tax Court judge is paid the same salary as judges of the federal district courts, I.R.C. § 7443(c)(1), the term of office is 15 years, I.R.C. § 7443(e). Under I.R.C. § 7443(f), moreover, judges of the Tax Court "may be removed by the President,

after notice and opportunity for public hearing, for inefficiency, neglect of duty, or malfeasance in office, but for no other cause."

The Presidential removal power in § 7443(f) was upheld against a separation-of-powers challenge in *Kuretski v. Commissioner*, 755 F.3d 929, 939 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 2309 (2015). The court reasoned that the taxpayers "have failed to persuade us that Tax Court judges exercise their authority as part of any branch other than the Executive," making it unnecessary to reach the separation-of-powers question. *Id.*

2. The Tax Court's opinion and order regarding I.R.C. § 7443(f)

On February 24, 2015, taxpayer moved to recuse all Tax Court judges on the theory that I.R.C. § 7443(f), which permits the President to remove Tax Court judges for cause, violates the separation of powers by allowing the President to exercise any removal power whatsoever over those judges. (Doc. 4; *see* ER 10.)

Late in 2015, after the decision in *Kuretski* and after taxpayer's motion was filed, Congress amended I.R.C. § 7441 by adding a new sentence at the end, providing that "[t]he Tax Court is not an agency of, and shall be independent of, the Executive Branch of the Government."

Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Div. Q, Title IV, § 441, 129 Stat. 2242, 3126 (Dec. 18, 2015). An accompanying report notes that, in response to concern "that statements in *Kuretski* . . . may lead the public to question the independence of the Tax Court," the provision "clarifies" the Tax Court's status. S. Rept. No. 114-14, at 10 (2015).

Against this backdrop, the Tax Court held, in *Battat v. Commissioner*, 148 T.C. No. 2 at 16 (Feb. 2, 2017), that the President's power "to remove Tax Court judges for cause does not violate separation of powers principles." It reasoned that the judicial power assigned to the Tax Court "includes only public law disputes and does not include matters which are reserved by the Constitution to Article III courts." *Id.*

On August 10, 2017, the Tax Court issued an order denying the recusal motion in this case. (ER 10-11.) In rejecting taxpayer's argument that I.R.C. § 7443(f) required the recusal of the Tax Court judge, the court relied (ER 5) upon the decisions in *Battat v. Commissioner*, 148 T.C. No. 2 (Feb. 2, 2017), and *Kuretski v. Commissioner*, 755 F.3d 929 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct.

2309 (2015), both of which had held that the President's power to remove Tax Court judges does not violate the separation of powers.

Taxpayer brings this appeal.

SUMMARY OF ARGUMENT

Congress has granted the President the power to appoint Tax Court judges with the advice and consent of the Senate and to remove them for "inefficiency, neglect of duty, or malfeasance in office." I.R.C. § 7443(b), (f). After filing his Tax Court petition, taxpayer moved to recuse all Tax Court judges on the ground that this removal power violated the separation of powers. The Tax Court, relying on its opinion in *Battat v. Commissioner*, 148 T.C. No. 2 (Feb. 2, 2017), as well as that of the D.C. Circuit in *Kuretski v. Commissioner*, 755 F.3d 929 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 2309 (2015), held that this removal power was not unconstitutional. In a separate order, the Tax Court then dismissed taxpayer's petition for lack of jurisdiction and denied taxpayer's motion for jurisdictional discovery. Taxpayer then took this appeal.

1. The Tax Court is a court of limited jurisdiction that possesses only such powers as are granted to it by Congress. The only conceivable basis for Tax Court jurisdiction is the one mentioned by taxpayer in his jurisdictional statement (Br. 3), the Tax Court's jurisdiction to review collection due process (CDP) determinations of the IRS Office of Appeals

regarding collection by lien or levy under I.R.C. §§ 6320(c) and 6330(d)(1). That jurisdiction, however, is contingent upon (i) the issuance of the requisite notice or "ticket" to the Tax Court, *i.e.*, the issuance, by the Appeals Office, of a notice of determination regarding collection action after a collection due process (CDP) hearing, and (ii) the timely filing of a petition (within 30 days of that notice).

Taxpayer did not acquit his burden of showing such a notice had issued in his case. The letter he presented to the Tax Court for review does not purport to be such a notice, and he does not argue otherwise on appeal. He has abandoned his reliance on *Craig v. Commissioner*, 119 T.C. 252 (2002), which he cited in the Tax Court. And at all events, the Tax Court correctly distinguished that case from this one. *Craig* involved the timeliness of the taxpayer's request for a CDP hearing before the Appeals Office, which was dispositive of the further question whether the result of that hearing was a nonreviewable decision letter or a notice of determination subject to Tax Court review. Here, there was no basis for treating the offer rejection letter issued to taxpayer as a reviewable notice of determination regarding collection action. Moreover, any reliance on the Third Circuit opinion in taxpayer's prior

criminal appeal, *United States v. Crim*, is misplaced. The Third Circuit stated that taxpayer's *ex post facto* challenge to I.R.C. § 6201(a)(4), which allows court-ordered restitution to be assessed and collected as a tax, was premature. But it did not (and could not) create Tax Court jurisdiction by saying so. Nor did the Tax Court abuse its discretion in concluding that taxpayer's motion to conduct jurisdictional discovery was not calculated to uncover evidence of a notice of determination.

2. Although this Court need not reach the issue if it concludes that the Tax Court lacked jurisdiction over taxpayer's petition, the Tax Court's order denying the recusal motion is also correct. The President's power to remove Tax Court judges does not violate the separation of powers. Indeed, taxpayer's reading of *Bowsher v. Synar*, 478 U.S. 714 (1986), as establishing a strict rule against interbranch removal was rejected by the Court in *Mistretta v. United States*, 488 U.S. 361 (1989). Similarly, *Myers v. United States*, 272 U.S. 52 (1926), upon which taxpayer also relies, regards its own analysis as inapplicable to Article I courts.

Moreover, the Tax Court does not exercise either legislative power within the meaning of Article I or judicial power within the meaning of

Article III. Although the matters decided by the Tax Court, prepayment issues of tax liability and issues regarding administrative collection, may appear to have a judicial character, the Supreme Court held more than 150 years ago in *Murray's Lessee v. Hoboken Land & Improv. Co.*, 59 U.S. 272 (1856), that these determinations are matters of public rights that may properly be decided by adjudicators other than the constitutional courts. Indeed, the Tax Court originally was established as an independent agency within the Executive Branch. Although that body is now characterized as a "court of record" "established[ ] . . . under article I," I.R.C. § 7441, and Congress has recently clarified that it is "not an agency of, and shall be independent of, the executive branch of the government," its duties and personnel were unaltered by that change. To be sure, the Tax Court takes a judicial form and is a Court of Law within the meaning of the Appointments Clause. It has even been said by the Supreme Court to exercise "judicial power," *Freytag v. Commissioner*, 501 U.S. 868 (1991). Nevertheless, the Tax Court does not exercise that part of the "judicial power" of the United States that is reserved for the constitutional courts. Because the Tax Court does not exercise either legislative

power within the meaning of Article I or judicial power within the meaning of Article III, the President's power to remove Tax Court judges cannot violate the separation of powers.

Furthermore, even though the independence of Tax Court judges gives them a quasi-judicial character, it does not follow that they may not be subject to for-cause removal by the President. If Congress could constitutionally establish the Tax Court as a governmental body, it could also, as part of the structure of that body, confer on the President at least limited, for-cause removal power. At the end of the day, the President's limited power to remove the judges of the Tax Court is largely what James Madison suggested would be appropriate for the Comptroller of the Treasury, the officer of the United States who, in the First Treasury Act, was charged with substantially the same duties presently carried out by the Tax Court. 1 Annals of Cong. 611-614 (Joseph Gales, ed., 1834).

The Tax Court order dismissing this case for lack of jurisdiction should be affirmed. Alternatively, the Tax Court order denying taxpayer's recusal motion should be affirmed.

ARGUMENT

I

The Tax Court correctly dismissed taxpayer's petition for lack of subject matter jurisdiction

Standard of review

An order of the Tax Court is subject to review on the same standard as an order issued by a District Court judge. I.R.C. § 7482(a)(1). This Court reviews *de novo* the Tax Court's dismissal of an appeal for lack of subject matter jurisdiction. *Gorospe v. Commissioner*, 451 F.3d 966, 968 (9th Cir. 2006). Whether an issue is waived on appeal is a matter of this Court's discretion. An order denying jurisdictional discovery is reviewed for abuse of discretion. *Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008).

A. This case does not fall within the limited jurisdiction of the Tax Court

The Tax Court is a court of limited jurisdiction that possesses only such jurisdiction as is expressly conferred upon it by Congress. *Freytag v. Commissioner*, 501 U.S. 868, 870-871 (1991); *Commissioner v. McCoy*, 484 U.S. 3, 6-7 (1987); *Gorospe*, 451 F.3d at 968; *Estate of Branson v. Commissioner*, 264 F.3d 904, 908 (9th Cir. 2001). The various grants of

such jurisdiction are effectively cataloged in Tax Court Rule 13(a) and (b).

Only one head of jurisdiction is potentially in issue here. In his jurisdictional statement (Br. 3), taxpayer invokes the Tax Court's jurisdiction under I.R.C. § 6330(d)(1) to review determinations of the IRS Office of Appeals in CDP cases. In order for the Tax Court to exercise jurisdiction in a CDP proceeding, however, a notice must first be issued to the taxpayer, and the taxpayer must file a timely petition. Tax Ct. R. 13(c), 330(b). *Booth v. Commissioner*, 338 F.App'x 732, 733 (9th Cir. 2009) (I.R.C. §§ 6320 and 6330 "confer[ ] jurisdiction to the Tax Court for review of a lien [or levy] notice only after a taxpayer requests and receives a CDP hearing and the IRS issues a determination letter based upon the hearing").

These notices therefore have been called "tickets" to Tax Court, without which the court may not review a taxpayer's petition. *Weber v. Commissioner*, 122 T.C. 258, 263 (2004). *Cf. Laing v. United States*, 423 U.S. 161, 206 (1976) (describing a notice of deficiency as a "ticket" to Tax Court under I.R.C. § 6213(a)); *Corbett v. Frank*, 293 F.2d 501, 502 (9th Cir. 1961) (same). *See also Offiler v. Commissioner*, 114 T.C. 492,

498 (2000) ("The notice of determination provided for in section 6330 is, from a jurisdictional perspective, the equivalent of a notice of deficiency.").

In this case, the Commissioner moved to dismiss. He asserted (*see* ER 4) that the letter attached by taxpayer to his petition was not a notice of determination and that, upon a diligent search of his records, there was no notice of determination regarding collection action that would confer jurisdiction on the Tax Court to entertain taxpayer's petition. The Tax Court agreed and dismissed the case. (ER 9.) As we show below, that conclusion is correct and should be affirmed.

B. Taxpayer failed to establish the existence of a notice of determination that would confer jurisdiction upon the Tax Court

Taxpayer bore the burden of proving the existence of jurisdiction in the Tax Court. *See McNutt v. Gen. Motors Acceptance Corp. of Indiana*, 298 U.S. 178, 189, 56 S.Ct. 780, 785 (1936). A motion to dismiss for lack of subject matter jurisdiction is properly granted if the nonmoving party fails to allege a necessary element of jurisdiction. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). To survive a motion to dismiss, the nonmoving party must present

evidence showing that subject matter jurisdiction exists. *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989).

In this case, taxpayer failed to show that any notice of determination was sent to him that would confer jurisdiction upon the Tax Court under I.R.C. § 6330(d) with respect to the liability he sought to dispute. Taxpayer failed to attach to his petition, or later to submit to the Tax Court, any notice of deficiency or notice of determination, let alone one sufficient to confer jurisdiction upon that court. In addition, as the Tax Court found (ER 4), when faced with the Commissioner's motion to dismiss, taxpayer failed to produce a notice of determination to counter the Commissioner's arguments.

Against this background, the Tax Court correctly found that the letter submitted by taxpayer with his petition "is not a notice of determination within the meaning of I.R.C. section 6320 or 6330." (ER 6.) As noted above, the court's CDP jurisdiction is contingent upon the issuance of a notice of determination regarding collection action and the timely filing of a petition. I.R.C. §§ 6230(c), 6330(d)(1); Tax Ct. R. 13(a), (c), 330(b). As a result, the Tax Court clearly was correct in concluding that the case must be dismissed for lack of subject matter

jurisdiction. *Duggan v. Commissioner*, 879 F.3d 1029, 1035 (9th Cir. 2018) (holding that the 30-day period of I.R.C. § 6330(d) is jurisdictional under *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015)).

Except to argue that the Tax Court should have granted jurisdictional discovery, an argument we refute *infra*, taxpayer makes no argument in his brief that the Tax Court erred in concluding it lacked jurisdiction over this case. In his statement of jurisdiction (Br. 3), taxpayer baldly states that "[t]he Tax Court had jurisdiction under 26 U.S.C. § 6330(d)." In the Argument, he quotes the Tax Court's conclusion that "the letter on which petition relies is not a notice of determination within the meaning of [26 U.S.C.] section 6320 or 6330." (Br. 42, quoting ER 6 (alteration in taxpayer's brief).) He does not, however, assert that the letter attached to his petition *is* a notice of determination within the meaning of I.R.C. § 6320 or 6330. Nor did he so contend below. He appears to have abandoned his reliance on both *Craig v. Commissioner*, 119 T.C. 252 (2002), which he does not cite in his opening brief on appeal. And although he mentions the opinion in his own prior criminal appeal, *United States v. Crim (Crim II)*, 553 F. App'x 170, 173 (3d Cir. 2014), in his statement of the case (Br. 8-9), he

does not mention it either in his jurisdictional statement or his argument.

Any reliance on these arguments therefore may be considered waived. This Court "will not ordinarily consider matters on appeal that are not specifically and distinctly argued in appellant's opening brief." *In re Riverside-Linden Inv. Co.*, 945 F.2d 320, 324 (9th Cir. 1991) (quoting *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 738 (9th Cir. 1986)). An issue mentioned in the appellant's opening brief but not supported by argument is waived. *Cachil Dehe Band of Wintun Indians of Colusa Indian Community v. California*, 547 F.3d 962, 968 n.3 (9th Cir. 2008) (issue listed as grounds for appeal but not argued is waived); *Ghahremani v. Gonzales*, 498 F.3d 993, 997-98 (9th Cir. 2007) (issue mentioned "three times" but "each time only in passing," and not argued); *Acosta-Huerta v. Estelle*, 7 F.3d 139, 144 (9th Cir. 1992) (issue mentioned in brief but not argued).

At all events, the Tax Court correctly distinguished *Craig*. That case concerned the timing of taxpayer's request for a CDP hearing. The outcome controlled whether the Appeals Office issued an unreviewable decision letter or a notice of determination regarding collection action

that could be reviewed by the court. 119 T.C. at 259. In this case, taxpayer has presented the Tax Court with an offer rejection letter that does not on its face purport to be a notice of determination after a CDP hearing. And taxpayer does not even support it with an allegation that he requested a CDP hearing, let alone that one was conducted or led to a determination by the Appeals Office. (ER 7-9.)

The Tax Court also correctly held that the Third Circuit cannot create Tax Court jurisdiction. (ER 8.) *See* I.R.C. § 7442 ("The Tax Court and its divisions shall have such jurisdiction as is conferred on them by this title, by chapters 1, 2, 3, and 4 of the Internal Revenue Code of 1939, by title II and title III of the Revenue Act of 1926 (44 Stat. 10-87), or by laws enacted subsequent to February 26, 1926."). The Third Circuit dismissed as premature taxpayer's *ex post facto* challenge to a new provision in I.R.C. § 6201(a)(4) that allows court-ordered restitution to be assessed and collected as a tax. But it did not (and could not) create Tax Court jurisdiction by saying so.

The sole jurisdictional argument advanced by taxpayer in his brief is the contention (Br. 42-43) that the Tax Court abused its discretion in not granting him jurisdictional discovery. But he offers no reason to

believe that jurisdictional discovery, if granted, would produce evidence of a notice of determination sufficient to sustain the Tax Court's jurisdiction. To the contrary, taxpayer argues that the information he seeks in discovery "may not have been kept in the ordinary course of the IRS's business" and might "be unrelated to his Social Security Number (and related file kept by the IRS)." (Br. 44.) Rather, taxpayer argues, this information "might be in the possession of the Department of Justice (including but not limited to the U.S. Attorney's Office for the Eastern District of Pennsylvania) or the Criminal Investigation Division of the IRS." (Br. 44-45.)

Suffice it to say that a CDP hearing, which must be conducted by the IRS Appeals Office, could only be conducted in the ordinary course of agency business. Neither the Department of Justice (including the U.S. Attorney's Offices) nor the Criminal Investigation Division of the IRS conducts CDP hearings, or issues notices of determination after CDP hearings, or may do so consistent with the statute. I.R.C. § 6330(b)(1). Whatever documents taxpayer purports to be seeking, therefore, those documents would not establish Tax Court jurisdiction under I.R.C. § 6330(d).

As a result, taxpayer's effort to unearth various documents he believes are in the possession of various government offices other than the Appeals Office is not calculated to establish that that office has even conducted a CDP hearing, let alone issued a notice of determination. That being so, the Tax Court correctly concluded that, within the context of this Tax Court suit, "discovery would serve no useful purpose." (ER 9.) The Tax Court by no means abused its discretion in denying taxpayer's motion for jurisdictional discovery. And it correctly dismissed the petition for lack of jurisdiction. (ER 9.)

In sum, the Tax Court correctly determined that it lacked jurisdiction to review the matters that taxpayer, in his petition, asked it to review. On appeal taxpayer has abandoned the *Craig* and *Crim II* arguments he relied on, in the Tax Court, to establish jurisdiction, and at all events, the Tax Court correctly rejected those arguments. Because the jurisdictional discovery taxpayer proposes to conduct is not calculated to produce the evidence that would establish Tax Court jurisdiction, as the Tax Court held, it would serve no purpose. The Tax Court's order dismissing the case for lack of jurisdiction should therefore be affirmed.

II

The President's power to remove Tax Court judges for cause does not violate the constitutional separation of powers

Standard of review

A challenge to the constitutionality of a federal statute is reviewed de novo. *Doe v. Rumsfeld*, 435 F.3d 980, 984 (9th Cir. 2006).

A. Introduction

If this Court concludes that the Tax Court correctly dismissed taxpayer's petition for lack of jurisdiction, there is no need to reach the issue whether the court also was correct in denying his motion for recusal. Moreover, although interlocutory orders merge into the final decision, this Court has "discretionary jurisdiction" to review such orders, and may decline to review them even in final appeals. *Gruver v. Lesman Fisheries Inc.*, 489 F.3d 978, 981 n.4 (9th Cir. 2007). Notably, this Court has "repeatedly declined to exercise such discretion . . . 'where . . . the final order in the case was a dismissal for lack of subject matter jurisdiction'" and the case was "remand[ed] to the [trial] court for further proceedings." *Id.* (quoting *Jones–Hamilton Co. v. Beazer Materials & Servs., Inc.*, 973 F.2d 688, 694 n.2 (9th Cir. 1992)). As a result, even if the Court were to reverse the Tax Court's order of

dismissal, there would be no need to address the constitutional issue raised by taxpayer. At all events, as we explain below, the Tax Court's order denying taxpayer's recusal motion was correct.

1. The power of removal generally is incident to the power of appointment

The Appointments Clause of the Constitution gives the President the power to "nominate, and by and with the Advice and Consent of the Senate, . . . appoint Ambassadors, other public Ministers and consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not . . . otherwise provided for" in the Constitution, "but Congress may by Law vest the Appointment of such inferior Officers as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2. Except in its discussion of impeachment, *id.*, art. I, § 2, cl. 5; *id.*, § 3, cl. 6, 7, the Constitution is silent regarding the removal of officers. Early in the history of the Republic, however, it became "the settled and well understood construction of the Constitution" that the power to remove officers "whose appointment was by the President and the Senate" "was vested in the President alone." *Ex parte Hennen*, 13 Pet. 230, 259 (1839).

The default rule that the President may remove those officers he has the power to appoint does not govern the removal of judges from constitutional courts. Article III, § 1, of the Constitution provides that "[t]he 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." Judges of these constitutional courts "enjoy life tenure, subject only to removal by impeachment," under the "good Behaviour" Clause of Article III. *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59 (1982) (plurality opinion). This arrangement "give[s] judges maximum freedom from possible coercion or influence by the executive or legislative branches of the Government." *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955).

This default rule that the President may remove at will officers appointed by him is known as the "Decision of 1789," because it was adopted by the First Congress in 1789 at the urging of James Madison (among others). *See Bowsher v. Synar*, 478 U.S. 714, 723 (1986); *Myers v. United States*, 272 U.S. 52 (1926). From the beginning, this rule regarding the scope of the President's at-will removal power has been

grounded in the theory of the separation of powers. *Bowsher*, 478 U.S. at 723-24.

The Court in *Myers* expressly reserved the question whether to apply this default rule to Article I courts. As the Court noted,

> The questions, first, whether a judge appointed by the President with the consent of the Senate under an act of Congress, not under authority of article 3 of the Constitution, can be removed by the President alone without the consent of the Senate; second, whether the legislative decision of 1789 covers such a case; and, third, whether Congress may provide for his removal in some other way—present considerations different from those which apply in the removal of executive officers, and therefore we do not decide them.

272 U.S. at 157-158. The Court further observed that "there may be duties of a quasi judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control." *Id.* at 135.

Subsequent cases have held, however, that Congress may by statute limit the terms on which officers of the United States appointed by the President (other than judges of the constitutional courts) may be removed, provided the officer in question serves for a term of years and exercises "quasi judicial" or "quasi legislative" power. *Humphrey's*

Executor v. United States, 295 US. 602, 620 (1935). As the Court observed in *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010), "Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause." Limitations on the Presidential removal power are considered appropriate, for example, as to officers exercising quasi legislative or quasi judicial functions because "the President's need to control the [officer]'s exercise of . . . discretion is [not] so central to the functioning of the Executive Branch as to require as a matter of constitutional law that [the officer] be terminable at will by the President." *See Morrison v. Olson*, 487 U.S. 654, 691-692 (1988). And when the officer's duties have an "intrinsic judicial character," the Court has held, "a power of removal exists only if Congress may fairly be said to have conferred it." *Wiener v. United States*, 357 U.S. 349, 355, 353 (1958).

Working within this framework, Congress has exercised its power to grant the President a limited power to remove Tax Court judges. In I.R.C. § 7443(f), Congress has provided that "[j]udges of the Tax Court

may be removed by the President, after notice and opportunity for public hearing, for inefficiency, neglect of duty, or malfeasance in office, but for no other cause."

As a practical matter, no President ever has removed a Tax Court judge. Nor is there any public record of any attempt by any President to do so, either on one of the grounds enumerated in the statute or otherwise. And no question has been raised here whether the statutory limitations on the President's removal power are valid under *Humphrey's Executor* and related precedents. Instead, taxpayer seeks to upend the analytic framework of removal. He asks this Court not only to reject the general rule that the President may remove those officers he has the authority to appoint, as well the narrower rule that Congress may expressly allow the President more limited power to remove officers of an intrinsically judicial character. He asks the Court go further, and to hold that Congress may not even grant this power to the President by statute. There is no precedent whatsoever for this position.

Taxpayer admits the lack of direct authority for his position. (Br. 23.) He instead relies (Br. 27-31) on a quartet of cases that

consider removal in the context of the separation of powers. In none of these cases, however, did the Court depart from the default rule that, absent statutory provision to the contrary, the President may remove those he has the power to appoint. Indeed, two of the four cases relied upon by taxpayer uphold the President's power to remove judges appointed with the advice and consent of the Senate under certain conditions. In *Mistretta v. United States*, 488 U.S. 361, 368 (1989) (Br. 29-30), the Court upheld the President's power to remove Article III judges from the Sentencing Commission. In *McAllister v. United States*, 141 U.S. 174 (1891) (Br. 30-31), the Court upheld the President's power to remove a judge from the territorial court of Alaska.

The other two cases relied upon by taxpayer do no more to advance his case. In *Bowsher v. Synar*, 478 U.S. 714 (1986) (Br. 27-29), the Court held that *Congress* may not be permitted removal power over an officer, appointed by the President with the advice and consent of the Senate, who exercises executive power. Because the removal power at issue in *Bowsher* lay with Congress, which lacked the appointment power, that decision does nothing to upset the default rule that the power to remove is incident to the power to appoint. Also consistent

with this rule is *Morrison v. Olson*, *supra* (Br. 29), in which the Court upheld the power of a special court ("the Special Division") both to appoint an independent prosecutor and to remove him upon completion of the investigation, where the Attorney General otherwise had the power to remove for cause.

None of these decisions supports taxpayer's contention that the President may not remove officers appointable by him despite statutory language allowing him that power. Indeed, the Supreme Court has already rejected taxpayer's interpretation of these cases, holding in *Mistretta* that "[n]othing in *Bowsher* . . . suggests that one Branch may never exercise removal power, however limited, over members of another Branch." 488 U.S. at 411 n.35. Taxpayer's argument that I.R.C. § 7443(f) is unconstitutional may be rejected for this reason alone, without any discussion of where the Tax Court fits in the constitutional scheme. For the sake of completeness, however, we explain below that, as the D.C. Circuit held in *Kuretski*, the Tax Court does not exercise either the legislative power within the meaning of Article I, 755 F.3d at 943, or the judicial power within the meaning of Article III, 755 F.3d at 939. Because the President's power to remove

Tax Court judges for cause does not infringe upon either the legislative power reserved to Congress or the judicial power reserved to the Article III courts, it does not violate the separation of powers.

Taxpayer's argument that the removal of a Tax Court judge by the President would violate separation of powers depends on the proposition that, of the three governmental powers identified by Montesquieu and codified in the first three Articles of the Constitution, *viz.*, the legislative, executive, and judicial powers, the President and Tax Court judges exercise different powers. The fact that the President exercises executive power is beyond dispute. Const. art. II § 1. In support of his argument, therefore, taxpayer argues that the Tax Court exercises legislative (Br. 16) or judicial power (Br. 22).[5]

But as we demonstrate below, the Tax Court does not exercise either legislative power within the meaning of Article I or judicial power within the meaning of Article III. And the recent amendment of I.R.C.

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[5] Taxpayer's further argument (Br. 39) that the separation of powers would be violated even if the President and the Tax Court are both regarded as exercising executive power is not worthy of extended comment. To the extent that this argument might be interpreted as requesting that the statutory limitations on the removal power be upheld, the matter is uncontested.

§ 7441, clarifying that the "Tax Court is not an agency of, and shall be independent of, the Executive Branch of the Government," does not demand a different conclusion.

2. Tax assessment and collection and the separation of powers

By way of introduction, it is helpful to review the role of a Tax Court judge in matters bearing upon tax assessment and collection and the place of those actions in the constitutional scheme. The Tax Court judge whose office is challenged by taxpayer here has two principal responsibilities corresponding to the two major phases of tax administration: assessment and collection. A tax assessment "is 'essentially a bookkeeping notation,' recording a taxpayer's liability." *Kim v. United States*, 632 F.3d 713, 716 (D.C. Cir. 2011) (quotation omitted). The assessment "serves as a 'trigger'" for the government's "efforts . . . to collect outstanding taxes." *Id.*

The Secretary of the Treasury is responsible for the assessment and collection of taxes. I.R.C. §§ 6201(a), 6301. The Tax Court, however, has jurisdiction redetermine *de novo* a deficiency in income, estate, gift, and certain excise taxes determined by the Commissioner before such a deficiency may be assessed. *See* I.R.C. §§ 6211 *et seq.*

This is the Tax Court's "deficiency" jurisdiction. As discussed in the jurisdictional argument, *supra*, the Tax Court also has jurisdiction to review the determination of the IRS Office of Appeals regarding lien filings and levies. *See* I.R.C. §§ 6320, 6330. This is the Tax Court's collection due process, or CDP, jurisdiction. The Tax Court's CDP jurisdiction was created in 1998. *See* Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3401, 112 Stat. 685, 746. Its deficiency jurisdiction (through its predecessor, the Board of Tax Appeals) dates from 1924. Revenue Act of 1924, § 900, 43 Stat. 336-338.[6]

The responsibility for assessing and collecting debts owed to the United States has rested with the Secretary of the Treasury since the establishment of that office in 1789. Act of Sept. 2, 1789, c. 12, §§ 1, 3, 5, 1 Stat. 65, 66. The procedures for tax assessment and collection assigned by the First Congress to the Treasury Department were not invented by that Congress. Rather, they were adopted from the familiar procedures of English law and the laws of the States under the

[6] Congress has granted the Tax Court jurisdiction over several other types of matters. It is not necessary to catalog those other jurisdictional grants here.

Articles of Confederation. *See Murray's Lessee v. Hoboken Land & Improv. Co.*, 59 U.S. 272, 277-280 (1856) (tracing tax procedure from the English Court of the Exchequer, to the States under the Articles of Confederation, and to the Federal Government in the early years of this Republic). *See also Bull v. United States*, 295 U.S. 247, 259 (1935) (summary administrative tax collection procedures date to "[t]ime out of mind"). In short, the traditional procedures of tax assessment and collection predate the idea of the separation of powers.

Taxpayer here is not the first who, finding himself subject to the Treasury Department's summary powers to collect tax, has challenged some aspect of those procedures as violating the separation of powers. In the keystone case *Murray's Lessee*, 59 U.S. at 280, the Supreme Court rejected those arguments. After surveying the history of English and American law on this point, the Court concluded that even though such summary executive proceedings diverged from the general rule that "'due process of law' . . . implies and includes . . . regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings," the long history of these proceedings, and their regular use at the time of ratification, meant that they

constituted "due process," within the meaning of the Fifth Amendment, "unless there exists in the constitution some other provision which restrains congress from authorizing such proceedings." *Id.* at 280.

That conclusion brought the Court to the question whether such summary proceedings were consistent with the constitutional separation of powers. 59 U.S. at 280. The assignment of this duty to the Executive Branch, the Court concluded, was constitutional. Although "the auditing of . . . accounts . . . may be, in an enlarged sense, a judicial act," *id.*, that fact alone did not mean that the function must be submitted to the Article III Judiciary. After all, "[s]o are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law." *Id.* Accordingly, the Court held, such administrative duties did not rise to the level of a "judicial controversy" within the meaning of Article III. *Id.* at 281.

To distinguish those matters which must be judicial in the constitutional sense from those that are merely judicial in the "enlarged sense," and accordingly are not reserved for the Article III judiciary, the Court in *Murray's Lessee* for the first time described the category of

"public rights" – "matters . . . which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." 59 U.S. at 284. *Cf. Stern v. Marshall*, 564 U.S. 462, 485 (2011) (defining public rights as "'matters arising between' individuals and the Government 'in connection with the performance of the constitutional functions of the executive or legislative departments . . . that historically could have been determined exclusively by those' branches" and confirming that "[t]here [is] a category of cases involving 'public rights' that Congress [may] constitutionally assign to 'legislative' courts for resolution") (quotation omitted).

The holding of *Murray's Lessee* – that Congress may choose to consign to purely executive officers the prepayment determination of certain taxes owed, as well as decisions concerning the collection of those amounts – has been repeatedly confirmed. *E.g.*, *Cheatham v. United States*, 92 U.S. 85, 89 (1875) ("If there existed in the courts, State or National, any general power of impeding or controlling the collection of taxes, or relieving the hardship incident to taxation, the

very existence of the government might be placed in the power of a hostile judiciary"); *Phillips v. Commissioner*, 283 U.S. 589, 595-597 (1931) (collecting cases, confirming that the holding of *Murray's Lessee* applies to individual taxpayers, and stating that "[t]he right of the United States to collect its internal revenue by summary administrative proceedings has long been settled. Where, as here, adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained.") (footnote omitted); *Bull v. United States*, 295 U.S. 247, 259-260 (1935) ("[T]axes are the lifeblood of government, and their prompt and certain availability an imperious need. Time out of mind, therefore, the sovereign has resorted to more drastic means of collection."); *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 352 n.18 (1977) (collecting cases) ("The rationale underlying these decisions, of course, is that the very existence of government depends upon the prompt collection of the revenues."). This rule also supports the statutory prohibition on suits seeking injunctive or declaratory relief against the assessment or collection of federal taxes (the Anti-

Injunction Act, I.R.C. § 7421(a), and the tax exception to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 *et seq.*). *See generally Bob Jones University v. Simon*, 416 U.S. 725, 731 (1974).

3. The organization and function of the Tax Court

Against the backdrop of *Murray's Lessee*, and the prohibitions on prepayment suits, Congress created the Tax Court (originally the Board of Tax Appeals) to "provide taxpayers an opportunity to secure an *independent review* of the Commissioner of Internal Revenue's determination of additional income and estate taxes . . . in advance of their paying the tax found by the Commissioner to be due." *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716, 721 (1929) (emphasis added). Tax Court judges are appointed by the President, and confirmed by the Senate, "solely on the grounds of fitness to perform the duties of the office." I.R.C. § 7443(b). They serve 15-year terms. I.R.C. § 7443(e). Their decisions are reviewable by the Courts of Appeals, I.R.C. § 7482(a), and the Supreme Court, 28 U.S.C. § 1254. And they "may be removed by the President, after notice and opportunity for public hearing, for inefficiency, neglect of duty, or malfeasance in office, but for no other cause." I.R.C. § 7443(f).

Since 1969, Congress has characterized the Tax Court as "a court of record established[ ] under article I of the Constitution." I.R.C. § 7441. *See* Tax Reform Act of 1969, *supra*, § 951, 83 Stat. 730. In 2015, after the decision in *Kuretski*, Congress amended I.R.C. § 7441 by adding a new sentence at the end stating that "[t]he Tax Court is not an agency of, and shall be independent of, the Executive Branch of the Government." Consolidated Appropriations Act, 2016, *supra*, § 441, 129 Stat. 3126. In this regard, it is analogous to the United States Court of Appeals for the Armed Forces, a "court of record" "established under Article I" which is "located for administrative purposes only in the Department of Defense." 10 U.S.C. § 941. *See Kuretski*, 755 F.3d at 944 (discussing the similarities between the Tax Court and the Court of Appeals for the Armed Forces); *see Edmond v. United States*, 520 U.S. 651, 664 n.2 (1997) (stating that the latter court is "within the Executive Branch").

B. The Tax Court does not exercise legislative power within the meaning of Article I

Taxpayer invokes the language of I.R.C. § 7441 to insist that the Tax Court is "located under Article I." (Br. 21.) He stops short of contending, however, that the Tax Court exercises legislative power.

That omission is, as the D.C. Circuit held in *Kuretski*, "[u]nderstandabl[e]": there simply is no argument that "the Tax Court could conceivably be considered a legislative body or conceivably be seen to possess legislative power." 755 F.3d at 942. "[L]egislative power" consists of decisionmaking authority without any "'intelligible principle to which the person or body authorized . . . is directed to conform'" *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472-473 (2001) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). *Cf. Kuretski*, 755 F.3d at 942.

In form, the Tax Court is entirely judicial, as the Supreme Court held in *Freytag v. Commissioner,* 501 U.S. 868, 890-891 (1991). It is "in the business of interpreting and applying the internal revenue laws, . . . not in the business of making those laws." *Kuretski*, 755 F.3d at 943 (citation omitted). It is also, as the Court held in *Freytag*, "independent of the . . . Legislative Branch[ ]." 501 U.S. at 890. The Tax Court no more legislates than does a federal district court.

The Supreme Court has recognized the "clear intent of Congress," in establishing the Tax Court under Article I, *see* I.R.C. § 7441, was "to transform the Tax Court into an Article I legislative court." *Freytag*,

501 U.S. at 888. Contrary to taxpayer's arguments, however (Br. 18-22), these statements do not mean that the Tax Court exercises legislative power for purposes of a separation-of-powers analysis, or even that it should be considered part of the legislative branch for administrative purposes. *Kuretski*, 755 F.3d at 942. The phrases "Article I court" and "legislative court" merely indicate that the Tax Court's power "is not conferred by the third article of the Constitution, but by Congress in the execution of other provisions of that instrument." *Williams v. United States*, 289 U.S. 553, 565-566 (1933). In the case of the Tax Court, these legislative powers are Congress's power "To lay and collect Taxes . . . to pay the Debts and provide for the common Defense and general Welfare," U.S. Const. art. I, § 8, cl. 1, and "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers," *id.* art. I, § 8, cl. 18. *See Kuretski*, 755 F.3d at 942; *Burns, Stix Friedman & Co. v. Commissioner*, 57 T.C. 392, 394-395 (1971).

The Tax Court interprets, but does not make, the tax laws. It therefore does not exercise legislative power within the meaning of Article I of the Constitution, as both courts that have considered this

matter have held. *Kuretski*, 755 F.3d at 943 ("The Tax Court's status as an Article I legislative court . . . does not mean that its judges exercise legislative power under Article I" (internal quotation marks and citation omitted)); *Battat*, 148 T.C. No. 2 at 16 ("the Tax Court . . . does not exercise . . . legislative . . . power").

C. The Tax Court does not exercise judicial power within the meaning of Article III

In the alternative, taxpayer argues (Br. 25-27) that the Tax Court exercises judicial power. The judicial power of the United States is vested by the Constitution "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. Congress may not withdraw from these constitutional courts "any matter which, from its nature, is the subject of a suit at common law, or in equity, or admiralty." *Murray's Lessee*, 59 U.S. at 284; *see Stern v. Marshall*, 564 U.S. at 484. As a result, "[w]hen a suit is made of the stuff of the traditional actions at common law tried by the courts at Westminster in 1789, and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts." *Stern v. Marshall*, *supra* (internal quotation marks and citation omitted).

The Tax Court cannot exercise judicial power of this nature under the Constitution because its judges serve only for terms of years under I.R.C. § 7443(e). A court whose "judges . . . enjoy neither tenure during good behavior nor salary protection" may not "exercise[ ] the judicial power of the United States," notwithstanding statutory authorization, because that court "lack[s] constitutional authority" to exercise that power. *Stern v. Marshall*, 564 U.S. at 469.

Of course, it is beyond dispute that the Tax Court takes judicial form, and therefore exercises something that may be described, in some contexts as "judicial power." As the Supreme Court has held –

> The Tax Court exercises judicial, rather than executive, legislative, or administrative, power. It was established by Congress to interpret and apply the Internal Revenue Code in disputes between taxpayers and the Government. By resolving these disputes, the court exercises a portion of the judicial power of the United States.

Freytag, 501 U.S. at 890-891. But the Court also explicitly stated in *Freytag* that "the judicial power of the United States is not limited to the judicial power defined under Article III." *Id.* at 889 (describing *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828)). By the terms of the opinion itself, then, the phrase "judicial power," in *Freytag*, means "judicial" in the "enlarged sense" of "involv[ing] an inquiry into

the existence of facts and the application to them of rules of law," *Murray's Lessee*, 59 U.S. at 280, at least when that inquiry is conducted with the formality of a court. *Freytag*, 501 U.S. at 891 (citing the Tax Court's procedures). *Cf. id.* at 908 (Scalia, J., concurring) ("'The judicial power,' as the Court uses it, bears no resemblance to the constitutional term of art we are all familiar with, but means only 'the power to adjudicate in the manner of courts.' So used, as I shall proceed to explain, the phrase covers an infinite variety of individuals exercising *executive* rather than *judicial* power (in the constitutional sense), and has nothing to do with the separation of powers"). Taxpayer's insistence that the judicial power exercised by the Tax Court implicates the constitutional separation of powers (Br. 27) ignores the Court's construction of its own opinion in *Freytag*.

Ultimately, what the Court held in *Freytag* was that the phrase "Courts of Law," in the Appointments Clause, does not refer only to the Article III courts. *See* 501 U.S. at 888; *id.* at 902 (Scalia, J., concurring). Similarly, in order for the Tax Court to be constitutional, the phrase "judicial power" must be taken to have different meanings in *Freytag* (holding that the Tax Court exercises "judicial power") and in

Stern (holding that judges serving terms of years cannot exercise "judicial power"). Although those conclusions may frustrate attempts at linguistic precision, they are the natural consequence of two centuries of using the word "court" to refer to governmental bodies applying similar procedures but having distinct constitutional bases. *See American Ins. Co.*, 26 U.S. (1 Pet.) at 546 (Marshall, C.J., approving territorial courts). It is the consequence of acknowledging that the word "judicial" has both a technical, constitutional meaning and an "enlarged sense" that incorporates "all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law." *Murray's Lessee*, 59 U.S. at 280. *See also Ex parte Bakelite*, 279 U.S. 438, 460 (1929) (statutory phrase "courts of the United States" includes Article I courts); *McAllister v. United States*, 141 U.S. 174, 184-185 (1891) (same statutory phrase excludes Article I courts); *see also Murray's Lessee*, 59 U.S. at 282 ("it would be an unwarrantable assumption to conclude that, because the accounts of receivers of revenue were settled in what was denominated the court of exchequer, they were judicial controversies between the king and his

subjects, according to the ordinary course of the common law or equity.").

Taxpayer argues (Br. 36) that this conclusion "has no limiting constitutional principle to only Tax Court judges." Pointing out that the federal district courts and the Court of Federal Claims also have jurisdiction to adjudicate like "public rights" cases involving tax liability under 28 U.S.C. §§ 1346(a)(1) and 1491, respectively, he suggests that, if it is constitutional for the President to remove a Tax Court judge, it would follow that there would be "no constitutional impediment" (Br. 37) to removing judges of those other courts. Taxpayer overlooks that the significance of the "public rights" jurisdiction of the Tax Court is that it never exercises Article III judicial power. Besides, District Court judges are protected against removal by the "good Behaviour" clause of Article III, § 1, whatever cases Congress may assign to their jurisdiction. And judges of the Court of Federal Claims are governed by a still different provision, allowing their removal for specified causes by a majority of judges on the Federal Circuit. *See* 28 U.S.C. § 176.

The D.C. Circuit and the Tax Court are in accord, and they are correct: the Tax Court does not exercise judicial power within the

meaning of Article III. *Kuretski*, 755 F.3d at 940 ("the Tax Court is not a part of the Article III Judicial Branch, and . . . its judges do not exercise the 'judicial Power of the United States' under Article III"); *Battat*, 148 T.C. at 10 n.29 (characterizing this argument as "obviously incorrect").

D. The President's removal power extends to judges of the Tax Court

The D.C. Circuit held in *Kuretski* that because "Tax Court judges do not exercise the 'judicial power of the United States' pursuant to Article III," and because "Congress's establishment of the Tax Court as an Article I legislative court did not transfer the Tax Court to the Legislative Branch," it "follows that the Tax Court exercises its authority as part of the Executive Branch." 755 F.3d at 943. In response, in 2015, Congress added a sentence at the end of I.R.C. § 7441, providing that the "Tax Court is not an agency of, and shall be independent of, the executive branch of Government." In the wake of that amendment, the Tax Court declined to name which of the three powers delineated in Articles I, II, and III it exercises. *Battat*, 148 T.C. at 16. It reasoned that "the public rights holding . . . resolves the removal issue without requiring that we address the tension with

legislative intent that might be thought to arise under the opinion of the Court of Appeals in *Kuretski*." *Id.*

At the same time, however, the Tax Court referred the reader to an academic article containing "a discussion of the Tax Court's place in the branches of Government." *Id.* at 16 n.38 (citing Brant J. Hellwig, *The Constitutional Nature of the United States Tax Court*, 35 Va. Tax Rev. 269 (2016)). Prof. Hellwig, in turn, has noted that the Tax Court "has operated for almost half a century in a state of structural ambiguity, with hardly anyone pausing to notice," and he suggests that "perhaps there simply is no need, as a matter of legal analysis, to identify a particular branch of Government to which the Tax Court belongs." *Id.* at 323.

Notably, James Madison was of the view that the precise function assigned to the Tax Court in this case — "deciding upon the lawfulness and justice of the claims and accounts subsisting between the United States and particular citizens" — was "not purely of an Executive nature" but "partake[s] of a Judiciary quality as well." 1 Annals of Cong. 611-612 (Joseph Gales, ed., 1834). Madison proposed that the task therefore be assigned not to any one branch, but to an officer made

"thoroughly dependent" yet "impartial[ ] with respect to the individual" by means of appointment for a term of years, subject to reappointment, with his decisions to be reviewable by the Supreme Court. *Id.* at 612; *and compare* I.R.C. §§ 7443 (appointment, confirmation, and removal), 7482 (appeals).

At all events, in adding the final sentence to I.R.C. § 7441 without amending the President's removal power in I.R.C. § 7443(f), Congress has demonstrated that, in its view, the characterization of the Tax Court as "independent of[ ] the Executive Branch" is compatible with limited presidential removal power over Tax Court judges. It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989).

As noted above, this case falls within the recognized principle that, because the power of removal is incident to the power of appointment, the President may remove any officer appointed by him, except insofar as such removal is limited by the Constitution or by statute. Moreover, the courts have confirmed that the President's

removal power may extend to judges on Article I courts. *McAllister*, 141 U.S. 174 (approving President's removal of a judge on a territorial court); *compare Mistretta v. United States*, 488 U.S. 361, 411 (1989) (noting that the President could not by statute be empowered to remove Article III judges) and *id.* at n.35 ("we have already recognized that the President may remove a judge who serves on an Article I court" (citing *McAllister*, *supra*)). At all events, if an officer other than an Article III judge plays a role that is "intrinsic[ally] judicial," *Weiner*, 357 U.S. at 355, Congress may by statute provide for Presidential removal power, *id.* at 353, as it has done in I.R.C. § 7443(f). Taxpayer provides no support for his assertion (Br. 40) that such removal power is prohibited even where Congress has conferred it by statute.

In sum, if Congress has the power to create the Tax Court as an independent agency under Article I, as it surely does, it also has the power to give the President power to remove officers of such an agency. No case has gone beyond *Humphrey's Executor* and *Wiener* to hold what taxpayer argues here — that the Constitution may demand the complete elimination of the President's power to remove such officers, even where Congress has expressly conferred such removal power. *Cf.*

Free Enterprise Fund, 561 U.S. at 496-497 (declining to extend *Humphrey's Executor*). Nor is there any reason to extend those cases here.

CONCLUSION

The Tax Court order dismissing taxpayer's petition for lack of jurisdiction should be affirmed. If the Court elects to address taxpayer's argument regarding the constitutionality of I.R.C. § 7443(f), the Tax Court's order denying taxpayer's motion to recuse all Tax Court judges should be affirmed.

Respectfully submitted,

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FEBRUARY 2018

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, counsel for the Commissioner respectfully inform the Court that the case *Thompson v. Commissioner*, 9th Cir. No. 17-71027, now pending in this Court, raises the same constitutional issue addressed in Part II of our Argument. Although this issue is briefed in both cases, it need not be resolved in either: in this case, because there was no Tax Court jurisdiction; in the *Thompson* case, because there is no appellate jurisdiction.

ADDENDUM

The Constitution of the United States of America

* * *

Article. I.

Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section. 2. * * * The House of Representatives . . . shall have the sole Power of Impeachment.

Section. 3. * * *

The Senate shall have the sole Power to try all Impeachments. * * *

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

* * *

Section. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States * * *

* * *

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article. II.

Section. 1. The executive Power shall be vested in a President of the United States of America. * * *

* * *

Section. 2. The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein 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 Courts of Law, or in the Heads of Departments.

* * *

Section. 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

* * *

Article. III.

Section. 1. 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, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to Controversies to which the United States shall be a Party . . .

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

* * *

The Internal Revenue Code of 1954, as amended

Subtitle F—Procedure and Administration

Chapter 76—Judicial Proceedings

Subchapter C—The Tax Court

Section 7441. Status. (2015)

There 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 Tax Court is not an agency of, and shall be independent of, the executive branch of the Government.

Section 7441. Status. (1969)

There 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.

Section 7441. Status. (1954)

The Board of Tax Appeals shall be continued as an independent agency in the Executive Branch of the Government, and shall be known as the Tax Court of the United States. The members thereof shall be known as the chief judge and the judges of the Tax Court.

Section 7442. Jurisdiction.

The Tax Court and its divisions shall have such jurisdiction as is conferred on them by chapters 1, 2, 3, and 4 of the Internal Revenue Code of 1939, by title II and title III of the Revenue Act of 1926 (44 Stat. 10-87), or by laws enacted subsequent to February 26, 1926.

Sec. 7443. Membership.

(a) Number.—The Tax Court shall be composed of 19 members.

(b) Appointment.—Judges of the Tax Court shall be appointed by the President, by and with the advice and consent of the Senate, solely on the grounds of fitness to perform the duties of the office.

(c) Salary.—

(1) Each judge shall receive salary at the same rate and in the same installments as judges of the district courts of the United States.

(2) For rate of salary and frequency of installment see section 135, title 28, United States Code, and section 5505, title 5, United States Code.

(d) Expenses for Travel and Subsistence.—Judges of the Tax Court shall receive necessary traveling expenses, and expenses actually incurred for subsistence while traveling on duty and away from their designated stations, subject to the same limitations in amount as are now or may hereafter be applicable to the United States Court of International Trade.

(e) Term of Office.—The term of office of any judge of the Tax Court shall expire 15 years after he takes office.

(f) Removal From Office.—Judges of the Tax Court may be removed by the President, after notice and opportunity for public

hearing, for inefficiency, neglect of duty, or malfeasance in office, but for no other cause.

(g) Disbarment of Removed Judges.—A judge of the Tax Court removed from office in accordance with subsection (f) shall not be permitted at any time to practice before the Tax Court.

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-72701

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

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Signature of Attorney or Unrepresented Litigant [s/ Bethany B. Hauser] Date [Feb 16, 2018]

("s/" plus typed name is acceptable for electronically-filed documents)

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 16, 2018. Counsel for the appellant was served by the Notice of Docket Activity transmitted by the ECF system.

/s/ Bethany B. Hauser
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