Nos. 17-72701

In the United States Court of Appeals for the Ninth Circuit

JOHN MICHAEL CRIM,
Appellant/Petitioner,
v.
COMMISSIONER OF INTERNAL REVENUE,
Appellee/Respondent.

ON APPEAL FROM
THE UNITED STATES TAX COURT, No. 1638-15
Hon. L. Paige Marvel, C.J., Presiding

OPENING BRIEF & RULE 28 ADDENDUM FOR APPELLANT JOHN M. CRIM

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 26.1

Pursuant to 9th Cir. R. 26.1(a), the undersigned counsel certifies that:

Appellant John M. Crim is an individual, noncorporate Party, and neither he nor his counsel are aware of any interest in the outcome of this case to be disclosed.

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STATEMENT REGARDING ORAL ARGUMENT

Because of the complexity and constitutional significance of the issues involved, Appellant respectfully request oral argument, which he believes would assist this Court in the determination of the issues of first impression presented on appeal.

PROLOG

The Constitution is designed to ensure the structure of our tripartite system of government is maintained. Indeed, as the Supreme Court explained in *Freytag v. Comm'r*, "[f]ramers of our Constitution viewed the principle of separation of powers as the central guarantee of a just government." 501 U.S. 868, 870 (1991); *see also Bowsher v. Synar*, 478 U.S. 714, 725 (1986) ("[t]he fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question.").

To that end, the line between the three branches must remain clear and respected. *Accord United States Telecom Association v. FCC*, 855 F.3d 381, 414 (D.C. Cir. May 1, 2017) (Brown, J. dissenting from the denial of rehearing *en banc*) ("adhering to the separation of powers avoids 'the legislative and executive powers … com[ing] to be blended in the same hands')" (quoting THE FEDERALIST NO. 73 (Hamilton), p. 441 (Clinton Rossiter ed., 1961)). And even "slight encroachments"

on judicial independence threaten the separation of powers. *Stern v. Marshall*, 131 S. Ct. 2594, 2620 (2011); *see also United States v. Will*, 449 U.S. 200, 217-218 (1980) ("[a] Judiciary free from control by the Executive and the Legislative is essential if there is a right to have claims decided by judges who are free from the potential domination by other branches of government.").

INTRODUCTION

In the wake of D.C. Circuit Court's opinion in *Kuretski v. Comm'r*, 755 F.3d 929 (D.C. Cir. 2014) (holding that the Tax Court is part of the Executive Branch of and finding no separation of powers problem with 26 U.S.C. § 7443(f)[1]), the Appellant filed a Motion to Disqualify & Motion to declare 26 U.S.C. § 7443(f) Unconstitutional (the "7443 Motion"). R-066 (at docket no. 4).

In this case, the Tax Court's holding[2] that § 7443(f) does not violate the Separation of Powers Doctrine "relegates the Constitution's vital separation of powers framework to 'a mere parchment delineation of the boundaries;' a hollow guarantee of liberty." *United States Telecom Association*, 855 F.3d at 394 (Brown, J. dissenting

[1] Which provides, in full, that: "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." 26 U.S.C. § 7443(f).
[2] *See* R-010; citing *Battat v. Comm'r*, 148 T.C. No. 2, 2017 WL 449951 (2017).

from the denial of rehearing *en banc*) (citing THE FEDERALIST NO. 73 (Hamilton), p. 441 (Clinton Rossiter ed., 1961)).

STATEMENT OF SUBJECT MATTER & APPELLATE JURISDICTION

The Tax Court had jurisdiction under 26 U.S.C. § 6330(d). This Court has jurisdiction pursuant to 26 U.S.C. § 7482(a)(1).[3]

STATEMENT OF THE ISSUES

1. Does the President's removal power of the Tax Court, provided for in 26 U.S.C. § 7443(f), violate the Separation of Powers Doctrine?

Two sub-issues may have to be addressed in answering the main issue in this case, to wit:

A. Where, in our constitutional structure of government, is the Tax Court located?

B. Is the Separation of Powers Doctrine only implicated in respect to Article III judges, or does it apply to Article I judges as well?

2. Did the Tax Court abuse its discretion in failing to provide the Appellant with jurisdictional discovery?

[3] Venue is proper in this Court under 26 U.S.C. § 7482(b)(1)(A) because the Appellant/taxpayer was (at the time of the filing of his Tax Court petition) a resident of California.

STATEMENT OF RELATED CASES & PROCEEDINGS

Pursuant to 9th Cir. R. 28-2.6, Appellant informs the Court that the undersigned is litigating the same issue in *Thompson v. Comm'r*, case no. 17-71027 (9th Cir.).

STATEMENT OF ADDENDUM

Pursuant to 9th Cir. R. 28-2.7, the pertinent statutes, regulations, and rules have been included in an addendum attached and bound hereto.

STATEMENT OF THE CASE

I. FACTS & PROCEDURAL HISTORY.

In order to understand the how the Appellant came to the Tax Court a detailed understanding of the complex procedural and factual history is required.

A. The Appellant's Criminal Litigation

1. The Prosecution

In 2007, a superseding indictment was filed against the Crim, charging him with conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, and with corruptly endeavoring to interfere with the administration of the Internal Revenue laws, in violation of 26 U.S.C. § 7212(a). That case was styled as *United States of America v. John Michael Crim*, case no. 2:06-cr-0658 (E.D. Pa.).

Crim was found guilty and the District Court sentenced him to 96 months imprisonment and restitution in the amount of $17,242,806.57.

2. The First Appeal to the Third Circuit

The Third Circuit affirmed in part, vacated in part, and remanded Crim's case to the District Court because the District Court committed procedural error when it sentenced Crim by ordering restitution without taking into account Crim's financial resources. *United States v. Crim*, 451 Fed. Appx. 196, 209 (3d Cir. 2011) *cert. denied* 132 S.Ct. 2682 (2012). Additionally, the Third Circuit recognized that "[h]e Government maintained that the amount of tax loss was $17,242,806.57 whereas the pre-sentence report placed the amount at $15,415,279.00." *Id.* at 208.

3. On Remand to the District Court

On remand Crim moved the District Court to declare the Firearms Excise Tax Improvement Act of 2010 Unconstitutional, As Applied – Violation of *Ex Post Facto* Clause. *See United States v. Crim,* case no. 2:06-cr-0658 (E.D. Pa.) at docket no. 886.

Crim argued that the general rule is that a criminal defendant should be sentenced under the guidelines in effect at the time of sentencing. *See United States v. Diaz*, 245 F.3d. 294, 301 (3d Cir. 2001). And further argued that, consistent with *United States v. Larkin*, 629 F.3d 177, 193 (3d Cir. 2010), "[w]here an amendment to a section of the sentencing guidelines occurs following the convicted offense conduct and the amendment results in harsher penalties than were in effect at the time of the conduct, the *ex post facto* clause and U.S.S.G. § 1B1.11(a) both require the District

Court to apply the sentencing guidelines in effect on the date that the offense of conviction was committed."

Crim further argued that because clarifying amendments are given retrospective application, while substantive amendments are not, *see* U.S.S.G. § 1B1.11(b)(2), the retroactive application of a sentencing provision, including the Firearms Act, violated the Constitution's prohibition against *ex post facto* laws because the application of the Firearms Act put Crim at a disadvantage. *See Diaz*, 245 F.3d. at 303. Crim was, and still is, put at a disadvantage by the Firearms Act because the Act was substantive amendment to the Internal Revenue Code and gave the IRS a new-found ability to assess and collect the amount of court ordered restitution, which was also a substantive amendment to Crim's ability to contest such assessments in subsequent litigation. Indeed, before the Act's passage, the IRS could accept payments of restitution as a victim, but had no power to administratively collect on restitution because restitution is not a tax (which by definition is not subject to assessment procedures). *See* IRS Chief Counsel Notice 2011-018 (August 26, 2011). Presently, the Act empowers the IRS to use its administrative collection tools to enforce a restitution based assessment. *See id.* The purpose of the Act was to give the IRS additional collection tools that it previously lacked and prevent criminal defendants from contesting restitution amounts in subsequent litigation. Therefore, the Act established the IRS's newfound

ability to collect on restitution, in which it did not have before, instead of clarifying whether or not the IRS had such power in the first instance.

On September 19, 2012, the District Court denied Crim's motions in a written order. *See United States v. Crim*, case no. 2:06-cr-0658 (E.D. Pa.) at docket no. 895.

The District Court held Crim's resentencing on September 24, 2012. *See* R-037. At the resentencing IRS CI Special Agents Hueston and Boyer were present. *See* R-039.

The following exchange was had between the Assistant U.S. Attorney and the District Court:

> THE COURT: We can discuss what I received from you, Mr. Lott, which is that *the balance is now $3,782,358.11.* Is that ~ is that correct, [AUSA] Mr. Gauri?
>
> MR. GAURI: That's what IRS's calculation is currently, Your Honor, based on payments that have been made off the original $17.3 –
>
> THE COURT: The same –
>
> MR. GAURI: ~ million.
>
> THE COURT: the same amount?
>
> MR. GAURI: Yes, Your Honor. It would probably be more than that, but that gives the benefit to the defendants. In some of these cases the IRS civil revenue agents have zeroed out the amounts that are still due and owing that have not been paid, so, you know, Mr. Hueston has done his best through the Criminal Investigation Division to ~ *to determine what's been paid.* Some of the amounts that have been paid actually have not been paid, but just because this ~ the IRS civil has given

> up on collecting that money it shows it as having been paid, so this gives the most possible benefit to the defendant. It's probably higher than that, but for purposes of today –

R-040-041 (emphasis added). Accordingly, based on the AUSA's representations the IRS had determined that restitution amount was not $17.3 million, rather it was determined to be $3.7 million.

The District Court issued the amended judgment; Crim appealed.

4. The Second Appeal to the Third Circuit

Crim's conviction and resentencing was affirmed by the Third Circuit. *United States v. Crim*, 553 F. App'x 170 (3d Cir.) *cert. denied*, 134 S. Ct. 2851 (2014). The Third Circuit, in addressing Crim's *Ex Post Facto* challenge, the Third Circuit stated:

> Crim claims his sentence violated the *Ex Post Facto* Clause of the United States Constitution, which states: "No bill of attainder or *ex post facto* Law shall be passed." U.S. Const. art. I, § 9, cl. 3. This Clause proscribes laws that change a punishment and inflict a greater punishment than the standards in effect when the crime was committed....
>
> After Crim's conviction, Congress passed the Firearm Excise Tax Improvement Act of 2010. Among other things, the law authorizes 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. *See* 26 U.S.C. § 6201(a)(4). Before 2010, the IRS could receive restitution payments like any other victim entitled to criminal restitution but it lacked the authority to actively collect restitution. Because the IRS lacked this authority when Crim participated in the conspiracy, he claims this subsection is an unconstitutional *ex post facto* law as applied to him.
>
> Crim's argument is best described as contingent and premature, touching as it does on an enforcement mechanism that the IRS has not

> yet employed to collect the restitution Crim owes to the United States. *If the IRS chooses to use this power against Crim, he may challenge its legality at that time.*

Id. at 172 (emphasis added).

B. The Appellant's Challenge to IRS Collection Activities

On December 10, 2014, Crim filed his Offer in Compromise (Doubt as to Liability), where Crim challenged the IRS' determination that his criminal restitution could be collected as a "tax" pursuant to the Firearms Act and requested that Crim's account be amended to reflect that there was no "tax" regarding the criminal restitution assessed. Crim further requested that the restitution be amended to reflect an amount owed of $3.7M instead of the $17.3M as imposed by the District Court.

On December 19, 2014, the IRS issued correspondence (the "Offer Rejection Letter") to the Appellant informing Crim that the IRS could not consider Crim's request.

C. Procedural History before the Tax Court

Crim petitioned the Tax Court in early 2015, asserting that the Tax Court had jurisdiction because "the Offer Rejection Letter "reflects a 'determination' sufficient to invoke the [Tax] Court's jurisdiction." R-056.

In February 2015, Crim filed a Motion to Disqualify & Motion to declare 26 U.S.C. § 7443(f) Unconstitutional (the "Motion"). *See* R-066 (at docket no. 4). The

Motion argued that the President's ability to remove Judges of the Tax Court for inefficiency, neglect of duty, or malfeasance of office under § 7443(f) is unconstitutional. The Motion also argued that even if the Tax Court could properly be classified as part of the Executive Branch, the Tax Court exercises judicial power and thus the President's ability to remove Tax Court judges violates the Separation of Powers Doctrine and is still unconstitutional.

In March 2015, the Government moved to dismiss based on the allegation that Service had not made any determination that would confer jurisdiction on this Court. The Government's motion to dismiss is predicated upon the factual assertion that "Respondent has diligently searched his records and contacted I.R.S. personnel" and "[b]ased on said diligent search, and based on a review of respondent's records kept in the ordinary course of business… there is no record, information, or other evidence indicating that a notice of determination was mailed to petitioner with respect to the taxable years 1999 through 2013."

In response to the Government's motion to dismiss the Appellant filed a motion for jurisdictional discovery. R-033.

II. RULINGS PRESENTED FOR REVIEW.

A. The Section 7443 Motion

In February 2017, the Tax Court, in a case raising the very same issue, *see Battat v. Comm'r*, 148 T.C. No. 2, 2017 WL 449951 (2017), issued an opinion declining to declare Section 7443(f) unconstitutional.

In August 2017, the Tax Court issued an order in the case below citing the *Battat* decision and denied the Motion. R-010. In the *Battat* decision the Tax Court reasoned that while it exercises judicial power, it does not exercise Article III judicial power. Consequently, the Tax Court reasoned that the President's removal power does not unconstitutionally interfere with the Article III judicial power, does not violate the separation of powers, and does not compel recusal of Tax Court judges until § 7443(f) is modified.

Specifically, the Tax Court's *Battat* opinion held that because it has jurisdiction to adjudicate only public rights disputes (which generally, according to the Tax Court, can be defined as disputes with the government), the President's removal power does not infringe on the Article III judicial power reserved for judges appointed to lifetime terms. The Tax Court's opinion also held that interbranch removal is not necessarily unconstitutional because the President's removal power does not extend to the judicial power granted solely by the Constitution.

B. The Motion to Dismiss & Motion for Jurisdictional Discovery

In September 2017, the Tax Court entered an omnibus order of dismissal and order denying the Appellant's request for jurisdictional discovery. R-001.

The legal basis for the Tax Court's order of dismissal was the factual conclusion that the IRS had not made a "determination" sufficient to confer jurisdiction upon the Tax Court. R-006. The Tax Court relied upon the fact that: (i) the offer rejection letter was not issued by the IRS Appeals Office; (ii) the IRS simply rejected the Appellant's offer-in-compromise, nothing more; (iii) there was nothing in the record before the Tax Court to suggest that the IRS Appeal Office would have reason to issue a notice of determination because the IRS had not issued the Appellant a final notice of intent to levy or a notice of federal tax lien; (iv) there was nothing in the record before the Tax Court to suggest that the IRS collection division has issued a levy or lien in respect the restitution order entered against the Appellant. R-006. The Tax Court's decision succinctly summarized its conclusion be stating that: "[i]n short, the prerequisites for the exercise of [the Tax Court's] collection review jurisdiction are not present in the present case." R-006.

In respect to the Appellant's motion for leave to conduct jurisdictional discovery, the Tax Court determined, as a matter of law, that the offer rejection letter

was not a notice of determination. R-009. The Tax Court then reasoned that "discovery would serve no useful purpose." R-009.

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The Appellant timely appealed these decisions to this Court. R-029.

REVIEWABILITY & STANDARD OF REVIEW

The issues raised in this appeal were raised by the Appellant below. *See* R-033; R-066 (at docket no. 3).

This Court reviews *de novo* in respect to the Tax Court's statutory interpretation, *see United States v. Kollman*, 774 F.3d 592, 594 (9th Cir. 2014), a challenge to the constitutionality of a federal statute, *see Doe v. Rumsfeld*, 435 F.3d 980, 984 (9th Cir. 2006).

An abuse of discretion standard is used to review the denial of a motion for leave to conduction jurisdictional discovery. *Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008). But whether information sought by discovery is relevant may involve an interpretation of law that is reviewed *de novo*. *See Cacique, Inc. v. Robert Reiser & Co.*, 169 F.3d 619, 622 (9th Cir. 1998) (state law).

SUMMARY OF THE ARGUMENT

1. The Tax Court committed several legal errors in arriving at its decision below (in reliance on *Battat*) that § 7443(f) does not operate to provide the President with an unconstitutional removal power of Tax Court judges.

First, the Tax Court erred in failing to definitively conclude that it is located, by operation of the clear and unambiguous statutory language in 26 U.S.C. § 7441, within Article I. The Tax Court's atextual interpretation of § 7441 violated basic statutory construction rules, including the surplusage cannon.

Second, the Tax Court erred in concluding that because the Tax Court does not exercise the "judicial Power of the United States" in a manner that Article III Courts do, and that the Separation of Powers Doctrine does not apply to the Tax Court. Cases are legion that the Separation of Powers Doctrine applies in many instances outside of the Article II – Article III context.

Third, the Tax Court's decision is predicated upon the incorrect assumption that, for some reason, a separation of powers legal analysis is different for Article I judges (like the Tax Court) than for Article III judges. Supreme Court caselaw is clear – the Tax Court exercises judicial power – with the necessary logical extension being that any separation of powers of analysis must be the same for the Tax Court.

Further, the Tax Court's decision was based upon a flawed reading of Supreme Court precedent, none of which holds that a President's removal power over an Article I judge does not violate the Separation of Powers Doctrine. Indeed, in one case – *Bowsher* – the Supreme Court addressed nearly identical language and concluded that the language violated the Separation of Powers Doctrine.

Fourth, the Tax Court created an entirely new separation of powers analysis that focused, incorrectly, on the fact that the Tax Court adjudicated only public rights cases. The Tax Court's Public Rights Doctrine distinction has no support in the Constitution, nor in Supreme Court caselaw, and in all events should be rejected by this Court.

Fifth, and finally, assuming that the Tax Court is located in Article II, because the Tax Court operates as a court of law in adjudicating disputes between the American taxpayers and the federal government, its functions are strictly judicial in nature. Accordingly, a function-based separation of powers test leads to the necessary conclusion that an intra-branch removal by a Tax Court judge by the President would still violate the Separation of Powers Doctrine.

2. The Tax Court also erred in denying the Appellant's request for jurisdictional discovery as the unique facts of the case, combined with the extant case law, which permits plaintiffs/petitioners to engage in discovery when doing so would uncover

facts that would impact a trial court's jurisdictional analysis. The Appellant provided well-founded reasons why jurisdictional discovery was needed, which satisfied his burden of reasonably demonstrating how his jurisdictional allegations could be improved if he was allowed to contest the IRS's unsworn assertion that the IRS had not made a "determination" sufficient to allow Crim to invoke the Tax Court's jurisdiction.

ARGUMENT

I. THE TAX COURT ERRED IN CONCLUDING THAT SECTION 7443(f) DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE.

A. In Our Tripartite System of Government, The Tax Court is Located in Article I.

In the case below the Tax Court alluded to, but did not specifically state, where in the constitutional design the Tax Court was located.[4] However the D.C. Circuit

[4] Specifically, the Tax Court stated:

> In our view, the public rights holding above 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*. Having decided petitioners' motion on that basis, we will follow the lead of Congress and the Supreme Court in *Freytag* and not further address the branch placement of the Tax Court here.

Battat, 2017 WL 449951, at *16.

was explicit that "in our view, [the Tax Court] exercises Executive authority as part of the Executive Branch." *Kuretski*, 755 F.3d at 932.

This Court must resolve the location of the Tax Court because the location, at least in part, drives the analysis as to whether § 7443(f) is unconstitutional. *Compare Kuretski*, 755 F.3d at 932 ("Presidential removal of a Tax Court judge thus would constitute an intra—not inter—branch removal.") *with Battat*, 2017 WL 449951, at *16 ("We have the same choice in acting on petitioners' motion. In contrast to the approach taken by the Court of Appeals in *Kuretski*, we hold in Part B, supra pp. 33–42, that Presidential authority to remove Tax Court Judges for cause does not violate separation of powers principles. We so conclude because, even though Congress has assigned to the Tax Court a portion of the judicial power of the *United States*, *Freytag v. Commissioner*, 501 U.S. at 890, the portion of that 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.").

"Start[ing], as we always do, with the statutory language," *Advocate Health Care Network v. Stapleton*, 581 U.S. ___, 2017 WL 2407476, at *5 (June 5, 2017), and turning to the recent legislative amendments to the statutory language, it is clear where the Tax Court is located — Article I.

1. Section 7441.

In 1969 Congress amended[5] § 7441, by "designat[ing] the Tax Court as an Article I court." *Battat*, 2017 WL 449951, at *2. "As a result, section 7441 provided: '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....'" *Id.* (emphasis added). "Congress [also] amended section 7441 to delete the designation of the Tax Court as an 'independent agency in the Executive Branch of the Government." *Id.* (internal citation and quotation marks omitted).

Basic rules of statutory construction require courts to "give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (internal quotation marks omitted). Thus, by virtue of the statutory amendments in 1969, Congress removed the Tax Court from it the Executive Branch and squarely placed it in Article I.

2. The D.C. Circuit's *Kuretski* decision was wrong.

Contrary to the clear statutory language,[6] the D.C. Circuit stated:

> Rather, the Kuretskis have failed to persuade us that Tax Court judges exercise their authority as part of any branch other than the Executive.

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[5] *See* Pub. L. 91–172, 83 Stat. 487.

[6] And, for what it is worth, legislative history. *See Battat*, 2017 WL 449951, at *3 ("Thus, the Senate Committee on Finance intended that the Tax Court no longer be classified 'with' executive branch agencies.") (internal Senate Report and House Conference Report citations omitted).

> Consequently, if a President were someday to exercise the authority under 26 U.S.C. § 7443(f) to remove a Tax Court judge for cause, the removal would be entirely consistent with separation-of-powers principles.

Kuretski, 755 F.3d at 939. That is so, according to the D.C. Circuit, because "[e]ven if the 1969 Act transformed the Tax Court into an Article I legislative court, it did not thereby transfer the Tax Court to the Legislative Branch." *Id.* at 942. "It follows that the Tax Court exercises its authority as part of the Executive Branch." *Id.* at 943.

This conclusion cannot be squared with either the statutory language of § 7441, or the Supreme Court's statement in *Freytag* rejecting that the Tax Court was in the Executive Branch. *See Freytag,* 501 U.S. at 888 ("Treating the Tax Court as a "Department" and its Chief Judge as its "Hea[d]" would defy the purpose of the Appointments Clause, the meaning of the Constitution's text, *and the clear intent of Congress to transform the Tax Court into an Article I legislative court.*") (emphasis added). *See also Ostheimer v. Chumbley*, 498 F. Supp. 809, 892 (D. Mont. 1980) *aff'd* 746 F.2d 1487 (9th Cir. 1984) (noting that the Tax Court was established under Article I); *Megibow v. Clerk of the United States Tax Court*, 432 F.3d 387 (2d Cir. 2005) (same). Thus, contrary to the D.C. Circuit, the Tax Court is clearly located in the first branch of government.

At least one legal scholar has also reached the same conclusion. *See* Brant J. Hellwig, *The Constitutional Nature of the United States Tax Court,* 35 Va. Tax Rev. 269,

286 (2016) ("Although the Court in *Freytag* did not state with unmistakable clarity its conclusion that the Tax Court no longer resided in the Executive Branch, it is difficult to faithfully read the *Freytag* opinion in any other manner.").

Moreover, there is nothing in the Constitution's text, structure, or design that prohibits Congress from establishing an adjudicative body in one branch and moving it to another (just as there is nothing in the Constitution's text, structure, or design that prohibits Congress from establishing an adjudicative body under Article I in the first instance). Indeed, the *Kuretski* court did not cite to any legal authority that supported its conclusion that Congress could not transfer the Tax Court's location within our government from Article II to Article I.[7]

And, to boot, the *Kuretski* court violated "surplusage canon—the presumption that each word Congress uses is there for a reason." *Advocate Health Care Network*, 2017 WL 2407476, at *6 (citing A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 174–179 (2012)). Indeed, the D.C. Circuit's view that the Tax Court is still a part of the Executive Branch "is an entirely atextual reading," *Water Splash, Inc. v. Menon*, 581 U.S. ___, 2017 WL 2216933, at *5 (May 22, 2017), that the Supreme

[7] It appears that Congress has moved a court from within Article I to Article III, and back to Article I – the Claims Court. *Compare* 28 U.S.C. § 171, as amended by Act of July 28, 1953, c. 253, § 1, 67 Stat. 226 (establishing Court of Claims as an Article III court) *with* Act of April 2, 1982, Pub. L. 97-164, 96 Stat. 25 (establishing the Court of Claims as an Article I court).

Court has warned against, *see id.* At bottom, the *Kuretski* court rendered the 1969 legislative amendment to § 7441 a legal nullity, with the effect of rendering all of the added statutory language surplusage.

This Court should reject the reasoning of the D.C. Circuit in gross and hold that the Tax Court is, as Congress legislated and as the Supreme has stated, in Article I.

3. Congress addresses *Kuretski* and amends Section 7441.

In direct response to *Kuretski,* Congress amended § 7441 to add the following sentence: "The Tax Court is not an agency of, and shall be independent of, the executive branch of the Government." *Battat,* 2017 WL 449951, at *10. "In the explanation of the change contained in the report of the Senate Finance Committee, the Committee said it was—

> 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.

Id. (internal citations omitted). Thus, to remove the confusion as to the location of the Tax Court, Congress has spoken on the issue – the Tax Court is no longer in the Executive Branch and is clearly established and located under Article I.

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The Supreme Court has consistently reiterated that in interpreting a statue, courts are to presume "that the legislature says what it means and means what it says." *Henson v. Santander Consumer USA, Inc.*, 582 U.S. ___ (June 12, 2017) (slip op. at 10) (internal citation, ellipses, and bracket omitted). Accordingly, giving effect to the language Congress has chosen for § 7441, *see id., see Williams*, 529 U.S. at 404, this Court should not hesitate (as the Tax Court did) to conclude that the Tax Court is located in Article I for all purposes.

B. Because the Tax Court is not Located in the Executive Branch of Government, the President's Removal Power Provided for in Section 7443(f) Violates the Separation of Powers Doctrine and is Unconstitutional.

1. The Separation of Powers Doctrine is not limited to Article III judges.

The Tax Court reasoned that because Tax Court judges do not exercise the "judicial Power of the United States" (which, according to the Tax Court, is only exercised by Article III judges), separation of powers is not implicated. *Battat*, 2017 WL 449951, at *14.

The Tax Court's conclusion is as shocking as it is unprecedented, and, in all events, the conclusion is wrong.

"Our Constitution divided the 'powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial.'" *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010) (quoting *INS v. Chadha*, 462

U.S. 919, 951 (1983)). "Within our political scheme, the separation of governmental powers into three coordinate branches is essential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989).

"Stated in its simplest terms, the separation of powers doctrine prohibits each branch of the government from "intrud[ing] upon the central prerogatives of another.'" *United States v. Moussaoui*, 382 F.3d 453, 469 (4th Cir. 2004) (quoting *Loving v. United States*, 517 U.S. 748, 757 (1996)). "Such an intrusion occurs when one branch arrogates to itself powers constitutionally assigned to another branch or when the otherwise legitimate actions of one branch impair the functions of another." *Id.*

Accordingly, the Separation of Powers Doctrine applies throughout our tripartite system of government and is not limited, as the *Battat* decision necessarily implies, to the Executive Branch's intrusion into Article III. Indeed, to state the very premise of the *Battat* decision is to reject it.

Although the Appellants have not found a case explicitly rejecting the rationale in *Battat* (which is unsurprising given its unprecedented conclusion), there are cases which establish that the Separation of Powers Doctrine is not as limited as the Tax Court suggests. *See, e.g. Bowsher, supra* (Congress may not exercise removal power over officer performing executive functions); *Chadha, supra* (Congress may not control

execution of laws except through Article I procedures); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (Congress may not confer Article III power on Article I judges); *Plyler v. Moore*, 100 F.3d 365, 371 (4th Cir. 1996) ("Thus, as made clear by the Court in *Plaut [v. Spendthrift Farm, Inc.* 514 U.S. 211 (1995)], an attempt to alter legislatively a legal judgment violates the separation-of-powers doctrine."). Accordingly, the Separation of Powers Doctrine does apply to the Tax Court writ large and to § 7443(f) writ small; the Tax Court's conclusion to the contrary was inescapably incorrect.

Moreover, there are no Supreme Court cases that cabin in a separation of powers analysis to only Article III courts and/or judges. To that end, the Supreme Court in *Mistretta* refers to the "Judicial Branch" and not Article III courts/judges. *See Mistretta*, 488 U.S. at 383 (internal citations and quotation marks omitted) ("cases specifically involving the Judicial Branch, we have expressed our vigilance against two dangers: first, that the Judicial Branch neither be assigned nor allowed tasks that are more properly accomplished by other branches, and, second, that no provision of law impermissibly threatens the institutional integrity of the Judicial Branch."). The *Battat* decision fails to faithfully be vigilant against the threat that § 7443(f) is to the institutional integrity of the Tax Court.

2. The Separation of Powers Analysis is the same for Article I judges as Article III judges.

Having established that the Separation of Powers Doctrine applies to the Tax Court, Appellants submit that the analysis must be the same regardless whether the judge is an Article III judge or an Article I judge.

a. The Tax Court judges exercises judicial power.

The expansion of judicial functions and the reclassification of the Tax Court from independent agency to Article I Court was a point of discussion in *Freytag v. Comm'r*. In *Freytag*, the Supreme Court analyzed the Tax Court's status in the constitutional scheme. In analyzing this issue, the Supreme Court extensively examined the functions, form, and powers of the Tax Court and found that each is "quintessentially judicial in nature." 501 U.S. at 891.

In reaching such a position, the Supreme Court noted that Congress expressly amended that Tax Court's classification from an "independent agency of the executive branch" to one of a "court of record under Article I." *Id.* at 885. Further, the Supreme Court noted, that the Tax Court maintains a "function and role in the federal judicial system [that] closely resemble[s] those of the federal district courts." *Id.* at 891. Based on such findings, the Supreme Court concluded that the Tax Court is a "Court[] of Law" that exercises "a portion of the judicial power of the United States" and that the Tax Court "exercises judicial, rather than executive, legislative, or administrative, power.

. . ." *Id.* at 890-91. *Accord Williams v. United States*, 289 U.S. 553, 565 (1933) (holding that the Court of Claims, an Article I Court, exercised judicial power and noting: "By these provisions it is made plain that the Court of Claims, originally nothing more than an administrative or advisory body, was converted into a court, in fact as well as in name, and given jurisdiction over controversies which were susceptible of judicial cognizance. It is only in that the appellate jurisdiction of this court in respect of the judgments of that court could be sustained, or concurrent jurisdiction appropriately be conferred upon the federal District Courts. The Court of Claims, therefore, undoubtedly, in entertaining and deciding these controversies, *exercises judicial power*. . . .") (emphasis added).

Nor can it be reasonably argued that that the Tax Court cannot exercise judicial power because it is a legislative court. Here, merely because the Tax Court is not an Article III Court, does not mean it cannot exercise judicial power. As the Supreme Court has explained "non-Article III tribunals [can] exercise the judicial power of the United States." *Freytag*, 501 U.S. at 889 (citing *American Insurance Co. v. Canter*, 1 Pet. 511, 546 (1828) (the judicial power of the United States is not limited to the judicial power defined under Article III and may be exercised by legislative courts); *Williams*, 289 U.S. at 565-567 (same)). Put simply, whether a court is an Article III Court is not dispositive on the issue of whether that court exercises judicial power. Thus, the Tax

Court exercise judicial power substantially similar (if not identical) to other federal trial courts.

b. Because Tax Court judges exercise judicial power similar (if not identical) to other federal judges, the separation of powers analysis must be the same.

The *Battat* decision created, from whole cloth, an entirely new *sui generis* analysis for the Tax Court (and presumably for other Article I Courts) and concluded that interbranch removal was constitutionally permissible. This Court should reject the Tax Court's analysis and the attendant conclusion as (i) being unsupported by the weight of the Supreme Court Separation of Powers Doctrine caselaw and (ii) being unsupported by the text, structure, and design of the creation of other Article I judgeships.

i. The Supreme Court cases cited by the Tax Court do not support the holding in *Battat*.

The *Battat* decision relied upon four main Supreme Court cases –*Bowsher*, *Morrison*, *Minstretta*, and *McAllister* – none of which addressed the removal of a federal judge in the context of exercising a portion (or all) of the judicial power of the United States. Moreover, none of these four Supreme Court cases supported the logic below that the President's removal power over Tax Court judges does not run afoul of the Separation of Powers Doctrine. Indeed, they are to the contrary.

Each case will be addressed in turn.

Bowsher v. Synar

In *Bowsher*, the Supreme Court analyzed a remarkably similar provision regarding the ability of Congress to remove the Comptroller General. Specifically, in *Bowsher*, the Supreme Court addressed whether the for-cause removal provision of 31 U.S.C. § 703(e)(1)(B), which allowed Congress to remove the Comptroller General, an officer under the control of legislative branch executing inherently executive functions, for among other things, "inefficiency," "neglect of duty," or "malfeasance," violated the Constitution's separation of powers principles.[8]

In analyzing this identical language and finding that such a removal power was unconstitutional, the Supreme Court noted the "breadth of the grounds for removal." *Bowsher*, 478 U.S. at 729. "These terms are very broad and, as interpreted by Congress, could sustain removal of a Comptroller General for any number of actual or perceived transgressions of the legislative will." *Id.* As explained by the Supreme Court, this "very broad" removal power results in a "here-and-now subservience to another branch that raises separation-of-powers problems." *Id.* at 727 n. 5.

Moreover, the Supreme Court found that it was inconsequential that Congress had never before used such power to remove a sitting Comptroller General. Instead, mere threat alone was sufficient to make such removal authority "constitutionally

[8] *Cf.* § 7443(f) ("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." 26 U.S.C. § 7443(f) (emphasis added).

impermissible." *Id.* at 727; *see id.* at 726 ("To permit an officer controlled by Congress to execute the law would be, in essence, to permit a congressional veto. Congress could simply remove, or threaten to remove, an officer for executing the laws in any fashion found to be unsatisfactory to Congress."). *See also Edmond*, 520 U.S. at 664 ("The power to remove officers, we have recognized is a powerful tool for control.").

Morrision v. Olson

Cross-branch removal was addressed in *Morrison v. Olson*, 487 U.S. 654 (1988). In *Morrison*, the Supreme Court addressed the issue of whether 28 U.S.C. § 596(b)(2), which authorized judicial officers to terminate or remove an independent counsel, violated separation of powers. As is *Mistretta, infra*, in finding that the removal provision was not violative of the Separation of Powers Doctrine, the Supreme Court focused on the removal provision limited nature. "The termination provisions of the Act do not give the Special Division anything approaching the power to remove the counsel while an investigation or court proceeding is still underway. . . ." *Morrison*, 487 U.S. at 682. Instead, while an investigation or court proceeding was underway, removal power was "solely vested in the Attorney General." *Id.* In other words, because there was "no requirement of congressional approval of the Attorney General's removal decision," *id*. at 686, there was no separation of powers violation, and the act was constitutional.

Mistretta v. United States

Cross-branch removal was again the subject of the Supreme Court's opinion in *Mistretta*. In *Mistretta*, the Supreme Court considered whether the President's authority to remove Article III judges from the United States Sentencing Commission ("Commission") violated separation of powers when the Commission is located within the Judicial Branch. In finding that there was no constitutional violation under such a scheme, the Supreme Court focused on the powers exercised by judges serving on the Commission. As the Supreme Court noted, "[t]he Sentencing Commission unquestionably is a peculiar institution within the framework of our Government. Although placed by the Act in the Judicial Branch, it is *not a court and does not exercise judicial power*." *Mistretta*, 488 U.S. at 384-385 (emphasis added). The Supreme Court also found that judges were "serving on a nonadjudicatory commission" that "is not exercising judicial power." *Id.* at 411 n. 35. Thus, "because such limited removal power gives the President no control over judicatory functions, interbranch removal authority under these limited circumstances poses no threat to the balance of power among the Branches." *Id.*

McAllister v. United States

In *McAllister v. United States*, 141 U.S. 174 (1891), President Cleveland removed judge McAllister from his Article IV judgeship in the District of Alaska; importantly, McAllister did not challenge his removal. Instead, McAllister sued in the Claims Court

for the wages/salary that he was entitled to. The Supreme Court concluded that the District of Alaska, a then Article IV Court, was not a "court of the United States" (i.e. an Article III Court), hence unlike Article III judges who cannot have the salary diminished while in office "no such guaranties are provided by that instrument in respect to judges of courts created by or under the authority of congress for a territory of the United States." *Id.* at 187.

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The discussion in Tax Court's *Battat* decision, *Battat*, 2017 WL 449951, at *14, relied upon a footnote in *Mistretta*, which in turn cited *McAllister*, for the proposition that the Supreme Court had allowed the President to remove Article I judges. At best the reference in *Mistretta* was dicta.

However, a close inspection of *McAllister* reveals that it stands for the proposition that federal territorial judges could have their salaries reduced (or not paid at all), but does not stand for the broad proposition that the *Battat* court asserted. In other words, the Supreme Court did not condone removal of non-Article III judges, nor did it hold that the Separation of Powers Doctrine is not implicated when the President removes a non-Article III judge. To conclude otherwise would create a glaring hole in Separation of Powers Doctrine jurisprudence and, in all events, cannot be the correct outcome.

Without overstating the ramifications of such a conclusion of law, there would be no principle that would limit such an analysis to Tax Court judges.

Furthermore, *McAllister* can be distinguished as involving territorial courts, which are intended to be temporary (until statehood), unlike the Tax Court. Further, *McAllister*, when read closely, seems to assume that "the judicial power" is synonymous with Article III — a position flatly rejected in *Freytag*. Thus, it is not even clear that *McAllister* reflects good law anymore. That fact that the Supreme Court cited *McAllister* in a footnote in *Mistretta* is not a re-endorsement of the rationale of *McAllister* or that its holding should be extended from Article IV judges to Article I judges.

Moreover, the holding in *Battat* cannot be squared with the holding *Bowsher*, where the Supreme Court concluded identical language violated the Separation of Powers Doctrine vis-à-vis the Executive and Legislative Branches. The Tax Court drew no distinction (let alone a meaningful distinction) that would support a conclusion that the offending language in § 7443(f) requires a different result that in *Bowsher*.

Additionally, this case is distinguishable from *Mistretta* and *Morrison*. Here, unlike in each of those cases, the officer in charge of removal exercises a different power than the officer being removed. Unlike *Morrison*, the removal power here is not limited, *cf. Bowsher*, 478 U.S. at 729 ("breadth of the grounds for removal"), instead, it is quite broad in nature. Unlike in *Mistretta*, the President's removal authority over Tax Court judges

involves executive removal power over an officer of the United States from his adjudicatory duties and office. Here, due to its breadth, the President's removal power is significantly greater than a "slight encroachment" on the judicial independence of the Tax Court. Thus, the President's removal authority is unconstitutional and the Tax Court's decision to the contrary was incorrect.

This Court has acknowledged that "the Supreme Court has 'not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch.'" *McMellon v. United States*, 387 F.3d 329, 341 (4th Cir. 2004) (*en banc*) (quoting *Mistretta,* 488 U.S. at 382). This is especially so regarding the Judicial Branch since the Separation of Powers Doctrine protects against "provision[s] of law impermissibly threatens the institutional integrity of the Judicial Branch." *Id.* (quoting *Mistretta,* 488 U.S. at 383). This Court should likewise not hesitate to strike down the offending portion of § 7443(f).

ii. Other Article I judges are not removable by the President.

When analyzing whether removal power of the President over Tax Court judges is permissible under the Constitution, it should be noted that other Article I judges, which exercise judicial power, are not removable by the Executive. For example, judges on the United States Court of Federal Claims, an Article I Court, are not removable by

the President. Instead, Claims Court judges are removed by Article III judges of the Federal Circuit. *See* 28 U.S.C. § 176(a) ("Removal of a judge of the United States Court of Federal Claims during the term for which he is appointed shall be only for incompetency, misconduct, neglect of duty, engaging in the practice of law, or physical or mental disability. Removal shall be by the United States Court of Appeals for the Federal Circuit, but removal may not occur unless a majority of all the judges of such court of appeals concur in the order of removal.").

Similarly, federal magistrate judges, Article I judges who exercise judicial powers such as holding trial, entering final judgments directly reviewable by federal appellate courts, and contempt powers, are not removable by the President. Rather, "[r]emoval shall be by the judges of a district court" and "only for incompetency, misconduct, neglect of duty, or physical or mental disability." 28 U.S.C. § 631(i). The same holds true for federal bankruptcy judges. *See* 28 U.S.C. § 152(e) ("A bankruptcy judge may be removed . . . only for incompetence, misconduct, neglect of duty, or physical or mental disability and only by the judicial council of the circuit in which the judge's official duty station is located.").

Given that: (i) the Tax Court exercises judicial power; (ii) Congress has clearly, systematically, and repeatedly passed legislation which establishes the independence of the Tax Court from the Executive branch; and (iii) other similarly situated Article I

judges with powers which would properly be classified as judicial in nature are not removable by the Executive, but rather removable for-cause by the judiciary, it is evident that the removal provision of § 7443(f) is a nearly century-old vestige that harkens back to a time before the Tax Court was a federal trial court and before its members were federal judges.

Additionally, if this Court were to uphold the *Battat* decision and hold that the Separation of Powers Doctrine does not apply, the ramifications of the holding would ripple out to all Article I judges. Bankruptcy judges, magistrate judges, and Court of Claims judges, all of which are Article I judges like the Tax Court, would necessarily fall within the holding of *Battat*. Accordingly, applying the logic of *Battat* to the other Article I judges, the removal of the non-Tax Court Article I judges by Article III judges would have to implicate the Separation of Powers Doctrine. That is to say either Article I judges can be removed by the President without violating the Separation of Powers doctrine, or Article I judges can be removed by Article III judges without violating the doctrine, but the Separation of Powers Doctrine cannot be home to both conclusions.

3. The Public Rights Doctrine has no impact on a Separation of Powers Analysis.

The Tax Court again created a new *sui generis* legal test for the separation of powers analysis, *viz.*, whether a court adjudicates a "Public Rights" case. *Battat*, 2017

WL 449951, at *12-14. The Public Rights Doctrine jurisprudence that the Tax Court relied on was wholly inapplicable to a separation of powers analysis, instead the Supreme Court caselaw cited in *Battat* stands for the unremarkable proposition that Congress can create adjudicatory bodies outside of Article III without violating Article III's command that only Article III Courts can exercise "the judicial Power of the United States," and that Article III judges have lifetime appointment. Accordingly, Congress could assign public rights cases to be heard before Article I judges,[9] before Article III judges, [10] or before Article IV judges,[11] but the ability of Congress to assign public rights cases to specific courts does not speak to the Constitution's command that the three branches of government be separate. Thus, the Tax Court's decision holding that there is a public rights distinction relevant to a separation of powers analysis was flawed and must be rejected.

Importantly, the Tax Court's public rights analysis has no limiting constitutional principle to only Tax Court judges. Indeed, if there is no constitutional impediment to the President removing a Tax Court judge because he/she is only

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[9] *See N. Pipeline*, 458 U.S. at 73–74; 28 U.S.C. § 1491 (Claims Court jurisdiction for tax refund lawsuits – "Tucker Act");

[10] *See* 26 U.S.C. § 7402 (jurisdiction of district courts); 28 U.S.C. § 1346 (district court jurisdiction, concurrent with Claims Court, for tax refund lawsuits – "Little Tucker Act").

[11] *See* 48 U.S.C. § 1612(a) (providing that the District Court of the Virgin Islands has the jurisdiction of a District Court of the United States).

adjudicating a public rights case, then, by the same logic, there would have to be no constitutional impediment to a Claims Court judge being removed because, by definition, only public rights[12] cases are adjudicated before the Claims Court. And by the same token, if a District Court judge was adjudicating a public rights case, e.g. a tax refund lawsuit, there would there would have to be no constitutional impediment to the President removing a District Court judge. Further, to the extent that there could be some argument made that District Court judges, by virtue of their status under Article III, are different, the logic of *Battat* would break down when there is concurrent Claims Court and District Court jurisdiction under the Little Tucker Act and the Tucker Act,[13] or when the Tax Court, the Claims Court, and the District Courts can adjudicate the same tax dispute.[14] In other words, the public rights distinction necessarily breaks down when applied to common public rights disputes between the American public and their government.

Moreover, the Tax Court's reliance upon what courts at common law could rule on as part of the *Battat* analysis is simply a reintroduction through the back door

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[12] The Tax Court correctly noted that pubic rights cases involve those where at common law the sovereign could not be sued based on sovereign immunity. *Battat*, 2017 WL 449951, at *12-14.

[13] *See* footnotes 13 and 14, *supra.*

[14] *See* 26 U.S.C. § 6228(a) (Tax Court, District Court, and Claims Court jurisdiction to review a final partnership administrative adjustment).

of the argument that the Tax Court does not exercise part of the judicial power of the United States — a position flatly rejected by *Freytag*. This Court should not allow a *sub silento* reintroduction of a legal theory rejected by the Supreme Court.

The problematic nature of the Tax Court's *Battat* decision is brought into sharp relief when one focuses on the following passage:

> In considering the constitutionality of section 7443(f), the question that arises is: "Does providing to the President the authority to remove Tax Court Judges give the President any unconstitutional power to interfere with the Article III judicial power of the United States?" The answer is no; it gives the President no such unconstitutional power.

Battat, 2017 WL 449951, at *13.

In proposing the question, and in providing the answer to said question, the Tax Court created a legal strawman, which it then deconstructed. But the legal strawman is not relevant to answering the question before the Tax Court, *viz.* the constitutionality of the President's removal power of the Tax Court judges (as an Article I Court). Thus, at best the Tax Court's answer to its own question was a non-sequitur, at worst it was an advisory opinion as the question it answered was not presented to it. More importantly it was wrong, as discussed above, because the Tax Court exercises judicial power, *see Freytag, supra,* the Separation of Powers Doctrine applies to any instance of one branch of government improperly intruding into the realm of another branch, *see McMellon*, 387 F.3d at 341. Thus, the public rights

distinction is of no moment and, as the *Battat* decision was predicated upon this faulty legal reasoning, *Battat*'s attendant legal conclusion is necessarily suspect as well.

4. Even if the Tax Court is located in the Executive Branch, because the Tax Court's functions are inherently judicial in nature, the President's intra-branch removal power would still violate the Separation of Powers Doctrine.

Assuming, *arguendo,* that the Tax Court could still be construed as residing in the Executive Branch, the President's intra-branch removal power would still be violative of Separation of Powers Doctrine because the Tax Court exercises judicial power and its judges' functions are inherently judicial in nature. The Separation of Powers Doctrine is just that, a doctrine proscribing the *separation of powers* not necessarily the *separation of branches* of government. In keeping that principle in mind, the Supreme Court has noted that "the Framers did not require—and indeed rejected—the notion that the three Branches must be entirely separate and distinct." *Mistretta*, 488 U.S. at 380 (citing *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977) (rejecting as archaic complete division of authority among the three Branches); *United States v. Nixon*, 418 U.S. 683 (1974) (affirming Madison's flexible approach to separation of powers)). Thus, while in certain instances the inter-branch removal of an official, beyond those rare instances expressly authorizes by the Constitution, is permissible when a cross-branch officer is exercising the same power as the removing official, intra-branch removal is prohibited

when the intra-branch officer is exercising a different power than the removing official. Such is the case here.

And assuming, *arguendo,* that the Tax Court is considered an Executive Branch entity and its judges are considered executive officers, points which Appellants do not concede, a similar result is necessary in this case. The Supreme Court in *Bowsher* made clear that separation of powers violations can occur even when both entities reside in the same branch. *Bowsher*, 478 U.S. at 734.[15] Here, as in *Bowsher*, because the Tax Court exercises judicial power and Tax Court judges' functions are inherently judicial in nature, the removal of Tax Court judges by the President is a violation of the separation of powers and is constitutionally impermissible. *See Bowsher*, 478 U.S. at 730 ("Surely no one would seriously suggest that judicial independence would be strengthened by allowing removal of federal judges only by a joint resolution finding 'inefficiency,' 'neglect of duty,' or 'malfeasance.'"). Thus, the Tax Court decision below finding that § 7443(f) was not unconstitutional was incorrect.

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[15] The taxpayers in *Kuretski* also argued that, even if the Tax Court was in the Executive Branch, *Bowsher* indicates that there can be separation of powers issues with removal power that are intra-branch. *See* reply brief (dated Oct. 10, 2013) of the taxpayers in *Kuretski v. Comm'r,* case no. 13-1090 (D.C. Cir.) at pages 6-7. The D.C. Circuit inexplicably ignored the argument, but this Court should not.

Long before the foundation of this great Republic the "'separation of powers was known to be a defense against tyranny.'" *McMellon*, 387 F.3d at 340 (quoting *Loving*, 517 U.S. at 756 (citing Montesquieu and Blackstone)). Consequently, the Founders protected against such tyranny "by 'the very structure of the Constitution,'" *McMellon*, 387 F.3d at 341 (quoting *Miller v. French*, 530 U.S. 327, 341 (2000)), by building in "'a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'" *McMellon*, 387 F.3d at 341 (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976)).

The *Battat* decision allows the statutory aggrandizement of the Executive at the expense of the federal judiciary. This Court can, and should, strike down the offending portion of § 7443(f) and in doing so ensure that the structural design of our tripartite system of government is protected.

The decision below must be reversed.

II. THE TAX COURT SHOULD HAVE PERMITTED DISCOVERY INTO THE FACTS OF THIS UNUSUAL CASE.

The Tax Court concluded, based on the unsworn representations of counsel for the IRS (i.e., "upon the ground that no statutory notice of determination has been sent to petitioner *** nor has respondent made any determination *** that would confer

jurisdiction on this Court" (R-004))[16], that "the letter on which petitioner relies is not a notice of determination within the meaning of [26 U.S.C.] section 6320 or 6330." R-006. In turn, the Tax Court concluded that it lacked jurisdiction and concomitantly denied Crim's motion for jurisdictional discovery because "discovery would serve no useful purpose." R-009. The failure to permit jurisdictional discovery was an abuse of discretion.

"Although the [petitioner] bears the burden of demonstrating facts that support personal jurisdiction, *courts are to assist* the [petitioner] by allowing jurisdictional discovery unless the [petitioner's] claim is clearly frivolous." *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 456 (3d Cir. 2003) (internal citations omitted, emphasis added). To that end, a trial "court has discretion to allow discovery if it 'could produce [facts] that would affect [its] jurisdictional analysis.'" *Al Maqaleh v. Hagel*, 738 F.3d 312, 325 (D.C. Cir 2013) (alterations in original) (quoting *Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143, 1147 (D.C. Cir. 1994)). Further, "as a general matter, discovery should be freely permitted … [j]urisdictional discovery is justified only if the plaintiff reasonably demonstrates that it can supplement its jurisdictional allegations

[16] IRS Counsel also asserted that: "Respondent has diligently searched his records and contacted I.R.S. personnel" and "[b]ased on said diligent search, and based on a review of respondent's records kept in the ordinary course of business… there is no record, information, or other evidence indicating that a notice of determination was mailed to petitioner with respect to the taxable years 1999 through 2013."

through discovery." *Exponential Biotherapies, Inc. v. Houthoff Buruma N.V.*, 638 F.Supp.2d 1, 11 (D.D.C. 2009) (quoting *Kopff v. Battaglia*, 425 F.Supp.2d 76, 89 (D.D.C. 2006)). Accordingly, "[d]iscovery may be appropriately granted where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary." *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430 fn. 24 (9th Cir.1977).

As a general proposition, it is well-established that an attorney's factual assertions at a do not constitute evidence that a court can rely on. *See United States v. Washington*, 714 F.3d 1358, 1361 (11th Cir. 2013). Thus, Crim should have been permitted discovery into (i) the veracity of the factual averments advanced by IRS counsel, (ii) whether the IRS had, in fact, not "made any determination that would [have] confer[red] jurisdiction on [the Tax] Court," and (iii) the nature, extent, and timing of any purported "diligent search." Accordingly, contrary to the Tax Court's conclusion, discovery would serve a very useful purpose, *viz.* to ascertain whether the IRS had made a "determination" sufficient to allow Crim to invoke the Tax Court's jurisdiction. *See Al Maqaleh, supra.* Thus, instead of assisting Crim by providing him with jurisdictional discovery the Tax Court improperly failed to provide jurisdictional discovery that would be directly relevant to the Tax Court's jurisdiction. *Cf. Goodman*

Holdings, supra. The wholesale failure to provide jurisdictional discovery qualifies as an abuse of discretion.[17]

This is especially so given that the disparity in the restitution order ($17.3 million) imposed by the District Court and the amount of unpaid tax conceded to be owed by the IRS criminal investigation agent ($3.7 million). Indeed, to date, neither Crim, nor the undersigned, has ever been given an explanation as to why there is over a $10 million disparity between the restitution order and the amount the IRS admitted was owed.

Indeed, Crim highlighted why jurisdictional discovery was appropriate when he argued that his case is far from normal and the IRS records may not have been kept in the ordinary course of the IRS's business because Crim's tax liability stems not from his personal income tax return (or from a business that he owned), but from the criminal restitution order. Crim proffered to the Tax Court that the relevant information would be unrelated to his Social Security Number (and related file kept by the IRS), and that the potential relevant information might be in the possession of the Department of Justice (including but not limited to the U.S. Attorney's Office for

[17] The undersigned has conducted a search on Westlaw and was unable to find a single Tax Court case where leave to conduct jurisdictional discovery was granted.

the Eastern District of Pennsylvania) or the Criminal Investigation Division of the IRS.

Thus, Crim presented factual allegations with more than reasonable particularity and has reasonably demonstrated that he can supplement his jurisdictional allegations through discovery. *See Exponential Biotherapies, Inc., supra.* And since "discovery should be freely permitted," *id.*, the Tax Court should have provided Crim with jurisdictional discovery. Indeed, in *Toys "R" Us*, the Third Circuit held that the district court erred in denying the plaintiff's motion for jurisdictional discovery, because the "request for jurisdictional discovery was specific, non-frivolous, and a logical follow-up based on the information known to [plaintiff]." *Toys "R" Us, Inc.* 318 F.3d at 456. The *Toys "R" US* court allowed the reasonable request for jurisdictional discovery. *Id.* The Tax Court should have allowed Crim to conduction jurisdictional discovery, the failure to do so qualifies as an abuse of discretion. *Accord Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1135 (9th Cir. 2003) (allowing the appellant the opportunity to develop a record and make a prima facie showing of jurisdictional facts).

CONCLUSION

Based on the foregoing, the Appellant requests that this Court vacate the decisions below and remand this case with instructions to declare Section 7443(f) unconstitutional, and to permit the Appellant to engage in jurisdictional discovery in order to establish Tax Court jurisdiction.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE RE: WORD COUNT

Pursuant to Fed. R. App. P. 32(a)(7)(C)(i) counsel certifies that this brief is in compliance with the 13,000 type-volume limitation of Rule 32(a)(7)(B)(i). The instant brief is 11,811 words in length. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, Goudy Old Style font in 14 point.

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Joseph A. DiRuzzo, III

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing and the record excepts were uploaded via the Court's electronic filing system which will provide a NEF to counsel of record and that pursuant to 9th Cir. R. 31-1, 7 paper copies of the Initial Brief will be filed pending a directive from the Clerk to do so. I certify that pursuant to 9th Cir. R. 30-1.3, 4 paper copies of the record excepts have been mailed to the Court via U.S.P.S. on the same day as the foregoing was electronically filed. I certify that a paper copy of the foregoing and the record excerpts was mailed via U.S.P.S. on the same day the foregoing was electronically filed to the following counsel for the United States:

Bethany B. Hauser
DOJ - U.S. Department of Justice
Room 4326
950 Pennsylvania Ave., N.W.
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/s/ Joseph A. DiRuzzo, III
Digitally signed by /s/ Joseph A. DiRuzzo, III
Date: 2017.12.15 10:47:14 -05'00'

Joseph A. DiRuzzo, III

ADDENDUM

Full text of 26 U.S.C. § 7443 reproduced in full commencing on the next page.

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 26. Internal Revenue Code (Refs & Annos)
Subtitle F. Procedure and Administration (Refs & Annos)
Chapter 76. Judicial Proceedings
Subchapter C. The Tax Court
Part I. Organization and Jurisdiction (Refs & Annos)

26 U.S.C.A. § 7443, I.R.C. § 7443

§ 7443. Membership

Currentness

(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.

CREDIT(S)

(Aug. 16, 1954, c. 736, 68A Stat. 879; Mar. 2, 1955, c. 9, § 1(h), 69 Stat. 10; Pub.L. 88-426, Title IV, § 403(i), Aug. 14, 1964, 78 Stat. 434; Pub.L. 91-172, Title IX, §§ 952, 953, Dec. 30, 1969, 83 Stat. 730; Pub.L. 96-417, Title VI, § 601(10), Oct. 10, 1980, 94 Stat. 1744; Pub.L. 96-439, § 1(a), (b), Oct. 13, 1980, 94 Stat. 1878.)

EXECUTIVE ORDERS

EXECUTIVE ORDER NO. 12064

Ex. Ord. No. 12064, June 5, 1978, 43 F.R. 24661, formerly set out as a note under this section, which established the United States Tax Court Nominating Commission and provided for its membership, functions, etc., was revoked by Ex. Ord. No. 12305, May 5, 1981, 46 F.R. 25421, set out as a note under section 14 of Appendix 2 to Title 5, Government Organization and Employees.

Notes of Decisions (3)

26 U.S.C.A. § 7443, 26 USCA § 7443
Current through P.L. 115-82