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

REPLY BREIF FOR APPELLANT JOHN M. CRIM

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. THE TAX COURT ERRED IN CONCLUDING THAT SECTION 7443(f) DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE. 1

A. In Our Tripartite System of Government, The Tax Court is Located in Article I. 1

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. 2

II. THE TAX COURT SHOULD HAVE PERMITTED DISCOVERY INTO THE FACTS OF THIS UNUSUAL CASE. 7

CONCLUSION 10

CERTIFICATE OF COMPLIANCE RE: WORD COUNT 11

CERTIFICATE OF SERVICE 11

TABLE OF AUTHORITIES

Cases

Bowsher v.Synar, 478 U.S. 714 (1986) 5, 7

Clem v. Lomell, 566 F.3d 1177 (9th Cir. 2009) 9

Cutter v. Wilkinson, 544 U. S. 709 (2005) 9

Ewing v. Comm'r, 122 T.C. 32 (2004) 8

Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd., 328 F.3d 1122 (9th Cir. 2003) 9

Independence Mining Co. v. Babbitt, 105 F.3d 502 (9th Cir. 1997) 8

Kuretski v. C.I.R., 755 F.3d 929 (D.C. Cir. 2014) 1

Loving v. United States, 517 U.S. 748 (1996) 4

McAllister v. United States, 141 U.S. 174 (1891) 5

Mistretta v. United States, 488 U.S. 361 (1989) 4

Telecommunications Research and Action Center v. FCC, 750 F.2d 70 (D.C. Cir. 1984) 7

United States v. Moussaoui, 382 F.3d 453 (4th Cir. 2004) 4

United States v. Nunez, 223 F.3d 956 (9th Cir. 2000) 9

Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406 (9th Cir.1977) 9

Wiener v. United States, 357 U.S. 349 (1958) 6

Statutes

5 U.S.C. § 706(1) 7

26 U.S.C. § 6330 7

28 U.S.C. § 1651 7

28 U.S.C. § 23421(1) 8

Other Authorities

Brant J. Hellwig, *The Constitutional Nature of the United States Tax Court*, 35 Va. Tax Rev. 269 (2016)..... 1

Constitutional Provisions

U.S. Const. Art. II, § 1, cl. 1..... 6

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.

The Government's answering brief artfully dodges the question as to where the Tax Court is located. Indeed, the Government goes so far as to sight (*see* Gov't Br. at 57) to Brant J. Hellwig, *The Constitutional Nature of the United States Tax Court*, 35 Va. Tax Rev. 269 (2016)) for the proposition 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. As much as the Government may not want to address this question, it must be answered by this Court because the answer drives the separation of powers analysis. Indeed, the D.C. Circuit resolved the constitutionality of Section 7443(f) by holding that "Presidential removal of a Tax Court judge thus would constitute an *intra*—not inter—*branch removal*." *Kuretski v. C.I.R.*, 755 F.3d 929, 932 (D.C. Cir. 2014) (emphasis added).

What the Government's brief does assert is that that "Tax Court does not exercise legislative power within the meaning of Article I." Gov't Br. at 48. But the Government acknowledges that the Appellants "stop short" of asserting that "Tax Court exercises legislative power." Gov't Br. at 48. However, notwithstanding that

the Appellants never advanced that the Tax Court exercises legislative power, the Government then argues against an argument never presented. In essence, the Government constructs a legal strawman to subsequently knock down and divert attention from the issues of this case.

At bottom, the statute and clear congressional direction indicate that the Tax Court is located in the first branch of government. Thus, contrary to the D.C. Circuit, the Presidential removal authorized by Section 7443(f) is an inter-branch removal power.

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.

The Government avers that "the Tax Court does not exercise judicial power within the meaning of Article III." Gov't Br. at 51. True enough, but a *non sequitur* nonetheless as the Appellants never argued as such. Instead, the Appellants argued that the Separation of Powers Doctrine is not limited to Article III judges and that the analysis is the same for Article I judges as it is for Article III judges.

The Government's only response is that the "[t]he 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." Gov't Br. at 55-56. At bottom the Government has no good argument that the test for separation of powers violations

is the same for Article I judges as it is for Article III judges. And for good reason – the tests must be identical.

In addressing the crux of this case, the Government posits that "the President's removal power extends to judges of the Tax Court." Gov't Br. at 56. The Government sets forth two mutually exclusive arguments in support: (a) the D.C. Circuit held that it "follows that the Tax Court exercises its authority as part of the Executive Branch" (Gov't Br. at 56), and (b) "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." (Gov't Br. at 58).

As stated in the Appellants' opening brief and above, the Tax Court is, in all events, located in the first branch of government and *not* as part of the Executive Branch. As to the Government's reading of the statutory amendments to Section 7441, the Government reads too much into a statute (or better said reads too far between the lines) to divine Congress' view on the matter. But even if the Appellee was correct (and he is not), it is not Congress' view on the compatibly of presidential removal power vis-à-vis the Separation of Powers Doctrine that controls. Instead it is the well-established law that "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.* The Government's view of Section 7443(f) renders the Separation of Powers Doctrine a dead letter.

The Government advances 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 statute." Gov't Br. at 58. However, this argument fails to take into account that (a) the language of the statue has already been addressed in *Bowsher* and (b) presidential removal and appointment must be different for federal trial judges in their role as judges, who sit in judgment of executive agency action (i.e. the Treasury's actions conducted by the Commissioner of Internal Revenue).

As to the later, judges must be different as the judiciary must be free of influence from the other branches of government, otherwise the institutional integrity of the Judicial Branch would be threatened. *See Mistretta v. United States*, 488 U.S. 361, 383 (1989) ("In 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.'") (internal citations omitted).

At to the former, the Government has no cogent response why the outcome in this case should be any different from *Bowsher v. Synar*, 478 U.S. 714 (1986), when the language at issue in this case is nearly identical to the language at issue in *Bowsher*. If it was constitutionally impermissible for the first branch to intrude upon the second branch in *Bowsher*, why would the analysis not be exactly the same when intrusion by the President is into Article I (where Congress has squarely placed the Tax Court)? The answer is clear – the analysis is the same.

The Government's reliance on *McAllister*, *Mistretta* and *Wiener* is misplaced. In *McAllister* there was no challenge to the removal power only a challenge for backpay. Thus, *McAllister* did not address any separation of powers issue, instead:

> it is proper to remark *that no question is distinctly raised by the petition as to the right of the appellant to hold the district judgeship for Alaska for the full term* designated in his commission, namely, four years, and until his successor was appointed and qualified. *He sues only for the salary* from the 29th of August, 1885, the day succeeding his suspension from office, to the 6th day of September, 1886, a few days after Dawson took the oath of office.

McAllister v. United States, 141 U.S. 174, 177 (1891) (emphasis added).

In *Mistretta*, the Supreme Court held that the United States Sentencing Commission ("USSC") "is not a court and does not exercise judicial power." *Mistretta*, 488 U.S. at 385 (emphasis added). Thus, because the removal of a judge sitting on the USSC "pose[d] no threat to the balance of power among the Branches," *id.*, it did not violate the Separation of Powers Doctrine.

And in *Wiener,* the Supreme Court addressed the removal or a member of the War Claims Commission (a unique body in our country's history). In *Wiener* the Supreme Court noted that the "President had inherent constitutional power of removal also of officials who have duties of a quasi-judicial character." *Wiener v. United States*, 357 U.S. 349, 352 (1958) (internal citations and quotations omitted). But this reasoning stemmed from the fact that "presidential power was deemed to flow from his constitutional duty of seeing that the laws be faithfully executed." *Id.* (internal citations and quotations omitted); *see also* U.S. Const. Art. II, § 1, cl. 1. Such animating principle is not at play here as Tax Court judges have no role in execution of our nations law, rather the role is in the interpretation of those laws to the facts of the cases before them. In other words, Tax Court judges are not "quasi-judicial," rather they are "fully-judicial" in nature. Thus, *Weiner* sheds no light on the cross-branch removal power this case presents.

Finally, the Government goes so far as to assert "[a]s a practical matter, no President ever has removed a Tax Court judge." Gov't Br. at 37. The fact that a specific power has never been used is of no moment for constitutional purposes. *See Bowsher*, 478 U.S. at 727 (finding that notwithstanding that Congress had never used such power to remove a sitting Comptroller General was irrelevant, instead, mere threat alone was sufficient to make such removal authority "constitutionally impermissible."). This Court should ignore the Government's overture to minimize the constitutional significance of the President's removal power.

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

The Government argues that none of the discovery that the Appellant sought could have had any relevance to the Tax Court's jurisdiction. Gov't Br. at 31. The Government fails to take into account that the Tax Court has jurisdiction — in light of 26 U.S.C. § 6330 and under the Administrative Procedures Act ("APA"), 5 U.S.C. § 706(1) — to "compel agency action unlawfully withheld or unreasonably delayed." Further, the "All Writs Act" (28 U.S.C. § 1651) applies to "all courts established by Act of Congress" (*cf.* 26 U.S.C. § 7441, establishing the U.S. Tax Court); and the D.C. Circuit has held in *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984), that, in view of the APA and the All Writs Act, "it is clear—and no

party disputes this point—that" if a statute (there, 28 U.S.C. § 23421(1)) confers on a court exclusive jurisdiction to review a final agency order, then even before the final order has been issued, the court has "jurisdiction over claims of unreasonable [agency] delay". In *Independence Mining Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997) this Court adopted the *Telecommunications Research and Action Center* guidelines regarding unreasonable agency delay.

Neither has the Tax Court nor this Court has decided whether the reasoning in *Telecommunications Research and Action Center* (and it progeny) applies to the Tax Court and its jurisdiction under 26 U.S.C. § 6330 (or any other statute for that matter). Nor has Tax Court has or this Court decided whether, if the APA does not directly apply, there are case that nonetheless presents one of those instances in which the Tax Court, "in appropriate circumstances, borrow[s] principles of judicial review embodied in the APA." *Ewing v. Comm'r*, 122 T.C. 32, 54 (2004) (Thornton, *J.*, concurring).

At this point, however, this Court need not wade into this thorny jurisdictional thicket but suffice it to say that the Appellant's request for jurisdictional discovery could lead to evidence supporting the Appellant's contention that the Tax Court has jurisdiction over the case below. Thus, contrary to the Tax Court and the Government (*see* Gov't Br. at 31), discovery would serve a useful purpose, i.e., allowing the Appellant

to make his case that 26 U.S.C. § 6330 (combined with either (or both) 5 U.S.C. § 706(1) and 28 U.S.C. § 1651) jurisdiction was present.

In respect to the extant jurisprudence proffered by the Appellant (*see* Br. at 41-45), which leads to the inescapable conclusion that the Tax Court abused its discretion in failing to provide the Appellant with jurisdictional discovery, the Commissioner has no response (*see* Gov't Br. at 29-31 failing to address, *inter alia*, *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406 (9th Cir.1977) and *Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1135 (9th Cir. 2003)).

This Court should find that the Government has waived any argument that *Wells Fargo & Co.*, *supra* and *Harris Rutsky*, *supra*, do not control the outcome of this case. *See Clem v. Lomell*, 566 F.3d 1177, 1182 (9th Cir. 2009) ("where appellees fail to raise an argument in their answering brief, 'they have waived it'") (citing *United States v. Nunez*, 223 F.3d 956, 958-959 (9th Cir. 2000)).

At bottom, the unique facts of this case demonstrate that the Tax Court abused its discretion in failing to provide the Appellant with the opportunity to conduct jurisdictional discovery. Accordingly, this Court should remand the case to allow the Appellant to engage in jurisdictional discovery, which, in turn, would allow him to present his arguments to the Tax Court in the first instance. *Accord Cutter v. Wilkinson*, 544 U. S. 709, 718, n. 7 (2005) (this is "a court of review, not of first view"). Perhaps

the Appellant will be able to make his case, perhaps he will not, but regardless of the outcome of the jurisdictional inquiry the Appellant should be given the opportunity in the first instance to uncover the evidence he needs to support his jurisdictional arguments.

CONCLUSION

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) unconstitutional, and permit the Appellant to engage in jurisdictional discovery in order to establish Tax Court jurisdiction.

Respectfully Submitted,

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Dated: March 9, 2018

CERTIFICATE OF COMPLIANCE RE: WORD COUNT

Pursuant to Fed. R. App. P. 32(a)(7)(C)(ii) counsel certifies that this brief is in compliance with the 6,500 type-volume limitation of Rule 32. The instant brief is 2,931 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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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was 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 Reply Brief will be filed pending a directive from the Clerk to do so. I certify that a paper copy of the foregoing was mailed via U.S.P.S. on the same day the foregoing was electronically filed to the following counsel for the United States:

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