No. 17-71027

In the United States Court of Appeals for the Ninth Circuit

DOUGLAS M. THOMPSON & LISA MAE THOMPSON,
Appellants/Petitioners,
v.
COMMISSIONER OF INTERNAL REVENUE,
Appellee/Respondent.

ON APPEAL FROM
THE UNITED STATES TAX COURT, No. 6613-13
Hon. Robert A. Wherry, Jr., Presiding

OPENING BRIEF FOR APPELLANTS DOUGLAS & LISA MAE THOMPSON WITH RULE 28 ADDENDUM

Joseph A. DiRuzzo, III
JOSEPH A. DIRUZZO, III, P.A.
633 SE 3rd Ave., Suite 301
Ft. Lauderdale, FL 33301
954.615.1676 (Office)
954.764.7272 (Fax)
jd@diruzzolaw.com

Counsel for the Appellants

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 26.1

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

Appellants Douglas M. Thompson and Lisa Mae Thompson are individuals, noncorporate Parties, and neither they nor their counsel is aware of any interest in the outcome of this case to be disclosed.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT REGARDING ORAL ARGUMENT

Because of the complexity and constitutional significance of the issues involved, Appellants respectfully request oral argument, which they believe 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 Appellants filed a Motion to Disqualify & Motion to declare 26 U.S.C. § 7443(f) Unconstitutional (the "Motion"). R-038 (at docket no. 20).

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-005; citing *Battat v. Comm'r*, 148 T.C. No. 2, 2017 WL 449951 (2017) (*reprinted in* R-016).

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

Appellants come to this Court requesting that the decision below be vacated so that the Separation of Powers Doctrine is faithfully honored and to ensure that the structural design of our government provides the guarantee of liberty that the Founders intended.

STATEMENT OF SUBJECT MATTER & APPELLATE JURISDICTION

The Tax Court had jurisdiction under 26 U.S.C. § 6214(a). This Court has jurisdiction pursuant to 26 U.S.C. § 7482(a)(1).[3]

Under 26 U.S.C. § 7482, the Courts of Appeal "shall have jurisdiction to review the decisions of the Tax Court… in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury…." 26 U.S.C. § 7482(a). Thus, applying the same framework used to analyze appellate jurisdiction of appeals taken from District Courts is appropriate.

Generally, the Courts of Appeal may only review final trial court orders, i.e. final judgments. 28 U.S.C. § 1291(a). For purposes of § 1291, a final judgment is typically regarded as "a decision by the district court that ends the litigation on the

[3] Venue is proper in this Court under 26 U.S.C. § 7482(b)(1)(A) because the Appellants/taxpayers were (at the time of the filing of their Tax Court petitions) residents of California.

merits and leaves nothing for the court to do but execute the judgment." *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521 (1988). Here, Appellants concede that a final judgment under § 1291(a) has not been entered. If no appeal were taken, this case would still need to be tried; neither side has obtained a judgment.

However, there are several exceptions which vest appellate jurisdiction in the Courts of Appeal even when the at-issue order does not meet the traditional definition of "final" under § 1291(a). Several of those exceptions apply in this case. Thus, despite the Appellants' concession that the Tax Court's order was not final for purposes of § 1291(a), both statutory and caselaw exceptions apply to permit this Court's review of the order and opinion denying the Motion.

I. APPELLATE JURISDICTION EXISTS UNDER THE COLLATERAL ORDER AND *GILLESPIE* DOCTRINES.

Even if this Court determines that it does not have appellate jurisdiction under § 1292(a)(1), "the [Supreme] Court has fashioned" two exceptions "to the final judgment rule: the collateral order doctrine" and "the exception for intermediate resolution of issues fundamental to the merits of the case." *Atl. Fed. Sav. & Loan Ass'n of Ft. Lauderdale v. Blythe Eastman Paine Webber, Inc.*, 890 F.2d 371, 376 (11th Cir. 1989). Each exception applies in this case to confer appellate jurisdiction on this Court, and each will be addressed in turn.

A. Collateral Order Doctrine.

The Supreme Court has fashioned the Collateral Order Doctrine in a discrete line of cases enunciating a common-sense exception to the 28 U.S.C. § 1291 requirement for a "final decision." The Collateral Order Doctrine is meant to encompass, and thus make subject to interlocutory review, "certain decisions…[which] are final in effect although they do not dispose of the litigation." *Davis v. East Baton Rouge Parish Sch. Bd.*, 78 F.3d 920, 925 (5th. Cir. 1996). "The collateral order doctrine is best understood…as a practical construction" of § 1291's final judgment rule. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994). Specifically, under the Collateral Order Doctrine, interlocutory appeal is allowed if the trial court decision is: (i) conclusive, (ii) resolves an important question completely separate from the merits, and (iii) would be effectively unreviewable on appeal from final judgment in the underlying action. *Id.* These factors are commonly referred to as the *Cohen* factors, *see Cohen v. Beneficial Industrial Loan Corp.* 337 U.S. 541 (1949). Here all three factors are present and thus the Collateral Order Doctrine is satisfied.

First, the Tax Court's order denying the Motion is conclusive. In this context, "conclusive" means that the at-issue order will not be subject to later review by the trial court. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978). Mere power to revisit the order is not sufficient; the trial court must be likely to revisit the order.

Henry v. Lake Charles American Press, LLC, 566 F.3d 164, 174 (5th Cir. 2009). That no further consideration of the at-issue order is contemplated by the trial court is sufficient to establish the conclusive factor. *Id.*

There is no indication that the Tax Court is going to revisit its decision to deny the Motion. The decision was issued by the Tax Court in a thorough and extensive opinion, after having been pending for years. Further, the Tax Court denied a motion filed by the Appellants to certify the issue for interlocutory appeal. Additionally, the Tax Court has denied a number of similar motions in other cases based on the rationale adopted in the order denying the Motion in this case. Given these facts, it cannot be reasonably doubted that the Tax Court will not address this issue again on its own volition, and that consequently the conclusiveness factor of the Collateral Order Doctrine is satisfied here.

Second, the Tax Court's order resolves an important question completely separate from the underlying merits of the Appellants' petition to the Tax Court. This appeal concerns the constitutionality of the President's ability to remove judges of the Tax Court under § 7443(f), and thus the constitutionality of the Tax Court's ability to exercise judicial power, *not* the overall merits of the Appellants' tax claims. Consequently, the issue in this appeal is separate from the merits of underlying case

(i.e. whether the Appellants are liable for a deficiency in tax under the Internal Revenue Code).

Moreover, the issue in this appeal *is incredibly important*. Generally, the importance of an issue is measured in relation to the interests underlying the final judgment rule. Put differently, "an order is immediately appealable when the interests in permitting immediate appeals are sufficiently important to outweigh the interests of finality in denying immediate appeals." *Henry,* 566 F.3d at 179. The interests intended to be furthered by § 1291's final judgment rule are "judicial efficiency…and the sensible policy 'of avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise." *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368, 374 (1981).

Among the category of interests that have been determined over the years to be more compelling than the interests underlying the final judgment rule, thus permitting an interlocutory appeal, are "*compelling public ends…rooted in the separation of powers*." *Nixon v. Fitzgerald,* 457 U.S. 731, 749 (1982) (emphasis added). The importance of separation of powers issues like those present here cannot be understated – separation of powers issues go to the core of our country's constitutional structure and are exceedingly important. *See Edmond v. United States*, 520 U.S. 651,

664 (1997) ("The power to remove officers, we have recognized is a powerful tool for control."). And that 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.").

Furthermore, "serious questions of unsettled law" are generally viewed as important. The Collateral Order Doctrine is particularly relevant, and the benefits of an immediate appeal outweigh the potential detriments of immediate appeal, where "a decision will settle a point once and for all" as opposed to opening "the way for a flood of appeals concerning the propriety of the district court's ruling on the facts of a particular suit." *Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l, Inc.*, 455, F.2d 770, 773 (2d Cir. 1972).

These factors cut in favor of permitting interlocutory review of the Tax Court's order and opinion denying the Motion. Appellants' Motion involves a question of significant importance because it goes to the very heart of the Tax Court's viability as it is currently constituted. Currently, the Tax Court represents the only pre-payment judicial forum available to taxpayers. Other courts are only open to review IRS determinations in refund cases, i.e. after the taxpayer has paid an assessment with

which he or she does not agree. Taxpayers, in great numbers, rely on this pre-payment forum; in 2013 alone, over 30,000 deficiency cases were filed in the Tax Court.[4] Further, collection due process and innocent spouse determinations can only be litigated in the Tax Court. There is no other avenue for judicial review of these issues. Given the Tax Court's unique and important role in the federal tax system, clarity and certainty regarding the validity of its current governance structure is essential.

Moreover, the issues presented by the Appellants' Motion are unsettled. The rationale underlying the Tax Court's denial of the Motion is in direct conflict with the D.C. Circuit Court's opinion in *Kuretski*, which held that the Tax Court is part of the Executive Branch, and consequently never addressed the constitutional implications of inter-branch removal.[6]

However, the Tax Court's opinion expressly found that the Tax Court is independent of the Executive Branch and held that inter-branch removal was constitutional in these circumstances because the Tax Court does not exercise Article III judicial power.[7] This distinction is relevant because, as the Appellants argued in

---

[4] https://www.ustaxcourt.gov/book/Dubroff_Hellwig.pdf at p. 909 (last visited May 2, 2017).

[6] "The Court of Appeals in *Kuretski* had available at least two alternative routes for deciding the taxpayer's contentions. First, it could have decided (as it did) that the Tax Court is within the executive branch, thus mooting the separation of powers issue." *Battat*, 2017 WL 449951 at * 16.

[7] Specifically, the Tax Court concluded:

the Motion, if the Tax Court were part of the Executive Branch the President's intra-branch removal power over Executive Branch employees exercising judicial functions (i.e. Tax Court Judges) would still be unconstitutional or, at the very least, create an intolerable appearance of bias by the Tax Court in favor of the IRS.[5] Thus, the law in the D.C. Circuit is different than the law of the Tax Court and the question of whether the Tax Court is part of the Executive Branch remains unsettled.

Additionally, exercising appellate jurisdiction over the Tax Court's opinion and order denying the Appellants' Motion would not be contrary to the Congressional policy of avoiding piecemeal litigation and it would not open the floodgates to numerous similar appeals based on different sets of facts. Rather, the Tax Court's

---

> In contrast to the approach taken by the Court of Appeals in *Kuretski*, we hold...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...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.

Battat, 2017 WL 449951 at * 16 (internal citations omitted).

[5] In its order denying the Appellants' Motion, the Tax Court echoed the Appellants' concerns. *See Battat*, 2017 WL 449951 at * 11 ("If the Tax Court were in the executive branch, the relevant "other executive actor" would be the IRS. Surely any taxpayer would find it repugnant if the Tax Court, which by congressional design is the Federal court which decides the most taxpayer disputes with the IRS, has only some nebulous "measure of independence" from the IRS.").

order addresses a purely legal question, it applies across the board. This Court's decision would have a similarly wide-ranging effect, and would not be subject to being repeatedly questioned based on factual distinctions. In sum, the Tax Court's order resolves an exceeding important question completely separate from the merits underlying the merits of the Appellants' petition to the Tax Court, and thus the second element of the Collateral Order Doctrine is satisfied.

Third, and finally, absent immediate appellate jurisdiction the Tax Court's order would be effectively unreviewable. An order is effectively unreviewable "where the order at issue involves *an asserted right the legal and practical value of which would be destroyed if not vindicated before trial.*" *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989) (emphasis added); *see also Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 107 (2009) (when a class of claims cannot be adequately vindicated by other means, immediate review of the claim is appropriate under the Collateral Order Doctrine). Indeed, courts have "have permitted interlocutory appeals under the reasoning of *Cohen*" when "the particular questions before them were too important and too independent of the cause itself to require delay until final disposition of the case in the district court." *Miller v. Simmons*, 814 F.2d 962, 966 (4th Cir. 1987).

To that end, this Court has recognized that appeals under the collateral order doctrine involve raise "some particular value of a high order," *SolarCity Corp. v. Salt River Project Agric. Improvement & Power Dist.*, 859 F.3d 720, 724 (9th Cir. June 12, 2017) (citing *Will v. Hallock,* 546 U.S. 345, 351-53 (2006)), such as "*honoring the separation of powers*, preserving the efficiency of government and the initiative of its officials, [or] respecting a State's dignitary interests." *Will,* 546 U.S. at 352 (2006) (emphasis added). *See also Englert v. MacDonell*, 551 F.3d 1099, 1105 (9th Cir. 2009) (citing *Will* for separation of powers as meeting the collateral order test); *DC Comics v. Pac. Pictures Corp.*, 706 F.3d 1009, 1016 (9th Cir. 2013) ("constitutional rights deserve particular solicitude within the framework of the collateral order doctrine.").

Being subject to an unconstitutional structural design cannot be vindicated after trial as the entire process is constitutionally suspect. Indeed, the Founders recognized as much because

> Montesquieu's view that the maintenance of independence, as between the legislative, the executive and the judicial branches, was a security for the people had [the founders'] full approval.... Accordingly the Constitution was so framed as to vest in the Congress all legislative powers therein granted, to vest in the President the executive power, and to vest in one Supreme Court and such inferior courts as Congress might establish the judicial power. From this division on principle, *the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended*, and the Constitution should be expounded to blend them no more than it affirmatively requires.

Myers v. United States, 272 U.S. 52, 116 (1926) (emphasis added). Thus, there is a "strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers." *Freytag*, 501 U.S. at 879.

And for the same reasons that the Supreme Court granted cert. in *Freytag* – "to resolve the important questions the litigation raises about the Constitution's structural separation of powers," *id.* at 873 – this Court should conclude that the practical value of the Appellants' rights to a constitutionally compliant adjudicatory body would be destroyed if not vindicated immediately. Undoubtedly, if there is a strong interest in the maintenance of the separation of powers by the judiciary there is also a strong interest in the American public in maintaining the separation of powers as it ensures everyone the liberty the Constitution was intended to provide (and in particular the American public who is involved in litigation against the Executive Branch – the very branch that is aggrandizing power by virtue of § 7443(f)'s removal provision). *Accord Freytag*, 501 U.S. at 888 ("[t]he structural interests protected by the Appointments Clause are not those of any one branch of Government *but of the entire Republic*.") (emphasis added). Thus, the issues presented in this appeal are not effectively reviewable.

Accordingly, because this case involves the Separation of Powers Doctrine, which is of particularly high value, all of the *Cohen* factors have been satisfied and this

Court has jurisdiction to review the Tax Court's order under the collateral order doctrine, regardless of whether the order is sufficiently "final" under § 1291(a).

B. "Twilight Zone Doctrine" a/k/a *Gillespie* Doctrine

The second key exception to the final order rule, *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 153-54, (1964), "provides that even an order of marginal finality should be accorded immediate review if the question presented is fundamental to further conduct of the case." *Atl. Fed. Sav.*, 890 F.2d at 376. Indeed, because it "is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the 'twilight zone' of finality. Because of this difficulty this Court has held that the requirement of finality is to be given a 'practical rather than a technical construction." *Gillespie*, 379 U.S. at 152.

Determining whether Tax Court is operating in a manner that is constitutionally compliant is fundamental to the further conduct of the case below (and numerous others like it) because, in the event this Court or another Court of Appeals determines that the current structure is unconstitutional, this case below will be litigated in a forum incapable of issuing a legally enforceable order or judgment. In effect, the parties will be forced to go through an elaborate yet futile exercise so that a purportedly "final" order can be issued by the Tax Court, only for the order to be

vacated and for the process to begin all over again before a constitutionally compliant court. Practical concerns demand resolution of this issue now, before any additional steps are taken in the litigation. To hold otherwise would be to needlessly relent to theoretical concerns in the face overwhelmingly persuasive, practical reasons to exercise current appellate jurisdiction.

Consequently, this Court has appellate jurisdiction to review the Tax Court's order denying the Appellants' Motion to Disqualify & Motion to declare 26 U.S.C. § 7443(f) Unconstitutional.

II. JURISDICTION EXISTS UNDER THE ALL WRITS ACT.

In the event that this Court determines that it lacks jurisdiction under 28 U.S.C. § 1291, the Appellant requests that the Court treat the appeal as a petition for a writ of mandamus. *See Metabolic Research, Inc. v. Ferrell*, 693 F.3d 795, 803 (9th Cir. 2012) ("in truly extraordinary cases, a writ of mandamus is available").

This Court has held that that mandamus is an especially appropriate vehicle for review where the court is confronted with an issue of first impression. *Medhekar v. United States District Court*, 99 F.3d 325, 327 (9th Cir. 1996). As discussed herein the constitutionality of 26 U.S.C. § 7443(f) is a matter of first impression that militates in favor of exercising jurisdiction under the All Writs Act. As a result, this Court has jurisdiction to review the Tax Court's decision.

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?

STATEMENT OF RELATED CASES & PROCEEDINGS

Pursuant to 9th Cir. R. 28-2.6, Appellants inform the Court that the undersigned is litigating the same issue in *Crim v. Comm'r*, case no. 17-72701 (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.

On January 5, 2015, the Appellants filed a Motion to Disqualify & Motion to declare 26 U.S.C. § 7443(f) Unconstitutional (the "Motion").[6] 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.

II. RULING PRESENTED FOR REVIEW.

On February 2, 2017, the Tax Court, entered an omnibus opinion holding, *inter alia,* that Section 7443(f) did not violate the Constitution. R-001. The February 2nd omnibus opinion incorporated by reference another case raising the very same issue, *see Battat, supra*, which also declined to provide the same requested relief as the case below.[7] In the *Battat* decision the Tax Court reasoned that while it exercises

---

[6] The Tax Court's electronic filing system does not have an option to label a motion to declare a statute unconstitutional or for disqualification, hence the undersigned selected "recusal of judge" (which Appellants submit in no way controls the outcome of this litigation as labels cannot control the constitutional inquiry involved).

[7] The undersigned is also counsel of record for the taxpayer in *Battat.*

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 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.

The Appellants timely appealed. R-033.

REVIEWABILITY & STANDARD OF REVIEW

The issues raised in this appeal were raised by the Appellants below. *See* R-038 (at docket no. 20).

This Court reviews *de novo* the legal questions that were before the Tax Court. *Salus Mundi Found. v. C.I.R.*, 776 F.3d 1010, 1017 (9th Cir. 2014).

SUMMARY OF THE ARGUMENT

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 I and 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.

ARGUMENT

I. 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.[8] However the D.C. Circuit 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*

[8] 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.

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.

A. Section 7441.

In 1969 Congress amended[9] § 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

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

1969, Congress removed the Tax Court from it the Executive Branch and squarely placed it in Article I.

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

Contrary to the clear statutory language,[10] 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. 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*

[10] 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).

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.[11]

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 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 Court has stated, in Article I.

---

[11] 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).

C. 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.

***

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.

II. 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.

A. 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.

B. 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.

1. 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.

2. 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.

ii. 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.[12]

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 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

[12] *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).

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.

***

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.

The Fourth Circuit 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.

C. 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,[13] before Article III judges, [14] or before Article IV judges,[15] 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 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

---

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

[14] *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").

[15] *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).

definition, only public rights[16] 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,[17] or when the Tax Court, the Claims Court, and the District Courts can adjudicate the same tax dispute.[18] 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 of the argument that the Tax Court does not exercise part of the judicial power of the

---

[16] 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.

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

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

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.

D. 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.[19] 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.

[19] 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.

CONCLUSION

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.

Respectfully Submitted,

/s/ Joseph A. DiRuzzo, III
Digitally signed by /s/ Joseph A. DiRuzzo, III
Date: 2017.11.28 12:54:02 -05'00'

Joseph A. DiRuzzo, III
JOSEPH A. DIRUZZO, III, P.A.
633 SE 3rd Ave., Suite 301
Ft. Lauderdale, FL 33301
954.615.1676 (Office)
954.764.7272 (Fax)
jd@diruzzolaw.com

Counsel for the Appellants

Dated: Nov. 28, 2017

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 12,155 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.

/s/ Joseph A. DiRuzzo, III Digitally signed by /s/ Joseph A. DiRuzzo, III
Date: 2017.11.28 12:53:20 -05'00'

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.
Washington, DC 20530

/s/ Joseph A. DiRuzzo, III Digitally signed by /s/ Joseph A. DiRuzzo, III
Date: 2017.11.28 12:53:34 -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

End of Document