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

REPLY BRIEF FOR APPELLANTS DOUGLAS & LISA MAE THOMPSON

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

Constitutional Provisions

STATEMENT OF SUBJECT MATTER & APPELLATE JURISDICTION

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

A. Collateral Order Doctrine.

The Government's brief focuses of the third prong of the collateral order test, i.e., unreviewability on appeal. *See* Gov't Br. at 24-27. However, "the correct consideration in determining whether a judgment is effectively unreviewable is whether delaying review until the entry of final judgment would imperil a substantial public interest *or* some particular value of a high order." *DC Comics v. Pac. Pictures Corp.*, 706 F.3d 1009, 1014 (9th Cir. 2013) (internal citations and quotations omitted, emphasis added). The Appellants meet this Court's disjunctive test.

Separation of powers cases qualify as a value of high order. *Englert v. MacDonell*, 551 F.3d 1099, 1105 (9th Cir. 2009); *see also Royalty Network, Inc. v. Harris,* 756 F.3d 1351, 1356 (11th Cir. 2014) (cases that implicate significant constitutional guarantees qualify as being of exceptionally high order allowing interlocutory appeal, and citing *DC Comics*, 706 F.3d at1015-16 (same)). Such is the case because the "avoidance of a trial that would imperil a substantial public interest would suffice" to qualify for the collateral order exception. *Englert*, 551 F.3d at 1105 (internal citations and quotations omitted).

The Government argues that separation of powers claims qualify for collateral order treatment only when such involves immunity from suit. Gov't Br. at 27. While immunity from suit is a basis for collateral order treatment, the Government makes the improper logical leap to argue that *only* immunity issues that implicate the separation of powers qualify for collateral order treatment. In other words, the Government attempts to limit separation of powers claims to a sub-set of immunity claims. This Court should reject such a reading of the extant jurisprudence. Indeed, the Supreme Court has said that:

> some particular value of a high order was marshaled in support of the interest in avoiding trial: *honoring the separation of powers*, preserving the efficiency of government and the initiative of its officials, respecting a State's dignitary interests, and mitigating the government's advantage over the individual. That is, it is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether an order is "effectively" unreviewable if review is to be left until later.

Will v. Hallock, 546 U.S. 345, 352–53 (2006) (emphasis added). As this language demonstrates, the Supreme Court views "honoring the separation of powers" as qualifying for collateral order treatment (the Supreme Court could have said "honoring immunity claims," or provided some other limiting language, but has not).

The Government makes the argument that because the D.C. Circuit addressed Section 7443(f) in the context of appeal of a final decision such is *ipso facto* proof that collateral order jurisdiction cannot lie. However, the Supreme Court has stated that

courts are to examine "the entire category to which a claim belongs." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994). *See also id.* ("this Court has expressly rejected efforts to reduce the finality requirement of § 1291 to a case-by-case appealability determination") (internal citations, quotations, and brackets omitted). Try at it may, the Government cannot escape the fact that separation of powers claims are a category of claims that the Supreme Court has indicated, *see Will v. Hallock*, *supra*, that qualify for collateral order treatment.

Indeed, the Eleventh Circuit has stated that "Appellant[s] [are] of course correct that the independence of the judiciary from external pressures is a highly valued element of our constitutional system," *United States v. Hastings*, 681 F.2d 706, 710 (11th Cir. 1982) (citing *United States v. Will*, 449 U.S. 200, 217-18 (1980)), thus concluding that separation of powers cases fall within the Collateral Order Doctrine, *see id.* Such is the case here as the Appellants advanced the argument that § 7443(f) interferes with the independence of the judiciary, to wit: the Tax Court.

In respect to the Government's reliance on orders from sister Circuits, this Court should reject the Government's reliance thereon as such orders are not binding precedent, lacking any precedential value. *See* 11th Cir. Local Rule 36-1 IOP at ¶ 6 ("[a]lthough unpublished opinions may be cited as persuasive authority, they are not considered binding precedent. The court will not give the unpublished opinion of

another circuit more weight than the decision is to be given in that circuit under its own rules."); 4th Cir. I.O.P. 36.3 ("[a] summary opinion identifies the decision appealed from, sets forth the Court's decision and the reason or reasons therefor, and resolves any outstanding motions in the case. It does not discuss the facts or elaborate on the Court's reasoning."); 8th Cir. Local Rule 32.1A ("Unpublished opinions are decisions a court designates for unpublished status. They are not precedent."). And, in any event, this Circuit's precedential caselaw supports the Appellants' position that this Court has appellate jurisdiction.

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

Although this Court has observed that the "*Gillespie* door [is closed] all but a crack," *Solis v. Jasmine Hall Care Homes, Inc.*, 610 F.3d 541, 544 (9th Cir. 2010), the Third Circuit has succinctly stated (albeit in another context) that "rarely if ever does not mean never." *In re U.S.*, 273 F.3d 380, 385 (3d Cir. 2001) (quotation and brackets omitted). This is one of the rare cases that fits into the crack of *Gillespie*'s door. The reason being that a separation of powers attack on a statute (and a taxation statute no

less), is exceeding rare and, contrary to the Government's assertions, is of "national significance."[1]

This Court has described the *Solis* factors as being: "(1) if the decision appealed was a marginally final order, (2) if it disposed of an unsettled issue of national significance, (3) if review of the decision implemented the same policy Congress sought to promote in § 1292(b); (4) if the parties have alerted the reviewing court to the jurisdictional issue before the parties and the court waste time analyzing merits; and (5) the exercise of the practical finality doctrine does not extend *Gillespie* beyond the unique facts of that case." *C.I.R. v. JT USA, LP*, 630 F.3d 1167, 1171 (9th Cir. 2011) (internal quotations omitted). Each of the five factors of the *Solis* factors have been met.

The Government draws this Court's focus on the fourth factor, *viz.* "the finality issue was not presented to the appellate court until argument on the merits." Appellant cannot dispute that the Government moved to dismiss, however, this Court did differ ruling on any jurisdiction defects until the parties filed their merits briefs. In such an instance, such as this, the salutary principles forming the legal basis of the

[1] The Appellants do not believe that one could credibly argue that the striking down of the language addressing the President's ability to remove sitting Tax Court (a court of nation-wide jurisdiction) judges could be anything but of "national significance." *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 477 n. 30 (1978).

fourth factor, i.e., "before the parties and the court waste time analyzing merits," *Solis*, 610 F.3d at 545, are not present as the parties have briefed the issues on the merits. As the Appellants see it, the Government advances a rule of law that when a timely motion to dismiss is file it will always preclude *Gillespie* review. This Court has never so stated, and this panel should not be first to do so.

At bottom the constitutional attack on the President's removal power of Tax Court judges in this case is "exceedingly rare," *JT USA, LP*, 630 F.3d at 1171, bordering on being *sui generis*, that poses no threat to rendering Section 1291's finality requirement useless. Consequently, appellate jurisdiction exists allowing this Court to review the decision below on the merits.

II. JURISDICTION EXISTS UNDER THE ALL WRITS ACT.

The Government argues that the writ should not issue. Gov't Br. at 33. However, the Government conflates that entitlement to the writ with this Court's jurisdiction to issue the writ. There can be no dispute, this Court has the jurisdiction to issue the writ (and, ultimately, the writ should issue).

This Court has recognized that "[w]here there really is very strong reason for interlocutory correction of a district court error, even though the case falls within no exception from the final judgment rule, we can use mandamus." *Solis*, 610 F.3d at 545.

Strong reasons exists in this case because the "[f]ramers of our Constitution viewed the principle of separation of powers as the central guarantee of a just government," *Freytag v. Comm'r*, 501 U.S. 868, 870 (1991). And reduced to its constitutional minima "[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." *Will*, 449 U.S. at 217-218. *See also Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988) (there must be "public confidence in the integrity of the judicial process"). Accordingly, mandamus jurisdiction is present in this case.

ARGUMENT

I. 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 60) 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 52. But the Government acknowledges that the Appellants "stop short" of asserting that "Tax Court exercises legislative power." Gov't Br. at 52. 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.

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.

The Government avers that "the Tax Court does not exercise judicial power within the meaning of Article III." Gov't Br. at 54. 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 59. 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 59. 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 59), 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 61).

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 62. 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 40. 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.

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) 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,

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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 3,846 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
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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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