No. _____

In the Supreme Court of the United States

MICHAEL CORNWELL, HILARY IKER

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

On Petition for a Writ of Certiorari

to the United States Court of Appeals

for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether IRS Appeals Officers holding hearings and issuing determinations in excess of powers granted Tax Court Special Trial Judges in Collection Due Process hearings are "Officers of the United States' who have to be appointed under the appointments clause of the Constitution. (Art. II, sec 2, cl. 2).

2. When the standard of review is abuse of discretion, whether the scope of review allowing extra record evidence in lien/levy hearings under the same federal statutes, 26 U.S.C. §§ 6320, 6330, among the Tax Courts and circuits should be uniform so that extra administrative record is permitted in the Tax Court and some circuits but not the Eighth. First, and Ninth, which expressly restrict evidence to the administrative record.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioners state that they have no parent companies or wholly owned subsidiaries.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

SECONDARY AUTHORITIES

U.S. CONSTITUTION

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, A-2) is unreported. The opinion of the Tax Court (App., *infra*, A-4) is reported at T.C. Memo 2007-294.

JURISDICTION

The court of appeals judgment was entered on May 26, 2009. A timely petition for rehearing was denied on August 27, 2009. (App., *infra*, A-1) Associate Justice Anthony M. Kennedy extended the time to December 10, 2009 to file this Petition. (Application 09A463). The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Appointments Clause of the Constitution provides in relevant part: [The President] shall nominate, and by and with the Advice and Consent of the Senate shall appoint Ambassadors, other public Minsters and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by Law vest the appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments. U.S. CONST. Art. II, sect. 2, cl. 2.

The relevant provisions of the IRS Restructuring and Reform Act of 1998, 26 U.S.C. §§ 6320, 6330, are reproduced at App., *infra*, A-13, A-16.

STATEMENT

When Congress passed the IRS Restructuring and Reform Act of 1998, it had two unintended consequences:

A. The Appointments Clause

First, the Act created IRS Appeals Officers and gave them new, broad powers that changed their position from employee to Officer of the United States requiring appointment under the Constitution at Article II, section 2, clause 2. These powers exceeded those of Special Trial Judges. Even "inferior officers" require appointment by the "head of an agency" and the Commissioner is not the Treasury Secretary. There is no question Appeals Officers meet this Court's test as an "inferior officer" under this Court's *Buckley* decision. *Buckley v. Valeo*, 424 U.S. 1, 126, 96 S.Ct. 612 (1976). They meet every essential prong of this Court's *Freytag* test. *Freytag v. Commissioner*, 501 U.S. 868, 111 S.Ct. 2631 (1991). So concerned was the Supreme Court with appointments clause violations that its *Freytag* decision allowed the issue concerning Special Trial Judges to be raised for the first time in a certiorari brief. Many of the Appeals Officers were elevated from collection officers.

The Solicitor General need not look far for its research in response. The Department of Justice recently published a Memorandum Opinion for the General Counsels of the Executive Branch entitled "Officers of the United States for Purposes of the Appointments Clause" (hereinafter DOJ Opinion). 2007 WL 1405459. Appeals Officers meet the requirement for appointment under the DOJ analysis. Generally, administrative law judges were the solution as with Social Security. However, no appointment mechanism was provided for the IRS. The Commissioner recently judicially admitted that no Appeals CDP personnel have ever been appointed under the procedures allowed by the Appointments Clause. (*Larry E. Tucker v CIR*, Tax Court Docket No.

3165-06L). (Appendix, *infra*, A-22. Though the general rule on admissions is they can't be used in a different case, this is an admission by the Commissioner as to his routine practice nationwide, not one specific case. Many revenue officers suddenly became elevated to judges for their agency. The statute prescribed impartiality as, not appeal to a judge or third party, but an elevated man from the same agency who had not seen the case before. This is akin to the legality of a speeding ticket being appealed to the desk sergeant of the highway patrol, not the traffic court. If the 2007 figure is representative, the Appeals Office closed 34,648 cases. Projected backward over 10 years from the date the statute became effective, over 300,000 cases are potentially voidable.

B. Nonuniform Application of Same Federal Statute Among the Tax Court and the Circuits.

Second, the Act allowed Appeals Officers' final decisions to be challenged in court for the first time. This results in the functional equivalent of a circuit split among the lone national Tax Court and every circuit that expressly overrules it. The Eighth Circuit held that the Tax Court's review in an abuse of discretion case is limited to the administrative record. The reasoning was that an Appeals Officer could not abuse his discretion on evidence never proffered to consider. *Robinette v. CIR*, 439 F.3d 455 (8th Cir. 2006). The First Circuit followed the Eighth a few months later, noting every U.S. District court to consider the issue limited to the administrative record. *Murphy v. CIR*, 469 F.3d 27 (1st Cir. 2006). The Ninth Circuit chose not to reach the record rule in this case, though it was the central issue. Yet one week later, another Ninth Circuit panel published the controlling precedent that Tax Court review was limited to the administrative record in the Ninth Circuit. *Keller v. CIR*, 568 F.3d 710 (9th Cir. June 3, 2009).

The Commissioner is the Tax Court's permanent customer. The Commissioner's previously fluctuating position that administrative record rule should not

control in the Ninth Circuit, has changed to a universal policy that judicial review should be limited to the administrative record in abuse of discretion cases. The Commissioner also argues that judicial review should be limited to abuse of discretion in innocent spouse cases, though that standard of review is *de novo*. Record review assumes the record is sacrosanct. Here, the Commissioner judicially admitted that his Appeals Officer chose not to consider evidence and omit it from a reviewing court.

The Tax Court's *Golsen* Rule allows the lone national Tax Court to rule differently in one circuit than another on the same set of facts. *Golsen v. Commissioner*, 54 T.C. 742, 756 (1970) affd. 445 F.2d 985 (10th Cir. 1971). Under *Golsen*, the Tax Court would not follow its own precedents only if expressly overruled by the Circuit it visited that week. If a circuit overruled a Tax Court precedent, the Tax Court does not follow the overruling circuit law in other circuits. This means that the same set of facts would get one ruling in the Eighth Circuit which overruled it, but a different ruling in the Ninth Circuit which has not. And yet a different ruling in the Ninth Circuit when, a week later, another Ninth Circuit panel adopts a controlling precedent that the Eighth Circuit was right and the rule is different now.

The Tax Court's *Porter* re-decision illustrates the conflict within itself:

> We concur in so much of the majority opinion as holds the appropriate standard of review to be de novo. We do so notwithstanding our dissent in the Court's prior report in this case, *Porter v. Commissioner*, 130 T.C. 115, 146-147 (2008), holding that the appropriate scope of review is de novo. That holding is now binding on us, and for that reason alone we concur that "it would be incongruous to hold that review is limited to determining whether an appeals officer 'abused his discretion,' but also to

> conclude that the appeals officer committed such an'abuse' by failing to weigh information that was never even presented to him." *Robinette v. Commissioner*, 439 F.3d 455, 460 (8th Cir. 2006) (addressing the scope and standard of review appropriate to judicial review of an Appeals officer's decision under section 6330), revg. 123 T.C. 85 (2004).

Porter v. Commissioner, 132 T.C. No. 11 (April 23, 2009).

Here, in open court, the Tax Court requested and received a straightforward judicial admission from Petitioner Cornwell about the effect of the faxes concerning changed economic circumstances. For the first time, the Tax Court stated its review was not limited to the administrative record:

> "Now as far as the scope of the consideration of the Court, the Court has not adopted Robinette or Murphy as the law in this Circuit. It seems contrary to the law in this Circuit to the extent it exists..." [Reporter's Transcript, p. 8:25-9:4] [ER 144]

In adopting the *Robinette* record rule, the Ninth Circuit reaffirmed in practice its precedent that "the tax decisions of other circuits should be followed unless they are demonstrably erroneous or there appear cogent reasons for rejecting them." *Beecher v. Comm'r*, 481 F.3d 717, 720 (9th Cir. 2007) citing *Popov v. Comm'r*, 246 F.3d 1190, 1195 (9th Cir.2001) . The *Popov* court held: "Uniformity of decision among the circuits is vitally important on issues concerning the administration of tax laws. Thus the tax decisions of other circuits should be followed unless they are demonstrably erroneous or there appear cogent reasons for rejecting them." *Unger v. Comm'r*, 936 F.2d 1316, 1320 (D.C.Cir.1991) (quoting *Keasler v. United States,*

766 F.2d 1227, 1233 (8th Cir.1985)).

Good as this call for uniformity among the circuits is, the Tax Court reasoning remains the *Robinette* decision was wrong and it will not follow it until expressly overruled by a circuit.

If there is one federal statute that affects everyone in the country it is taxation. But the Taxpayer in Missouri gets one set of procedure, and the Taxpayer in New Hampshire gets the same break, but everywhere else the same statute is applied a different way. That is the Golsen solution: to avoid Supreme Court clarification, it adopts a rule sanitizing a circuit split.

Here, there was no Tax Court precedent to bruise. The IRS Restructuring and Reform Act of 1998 created new rights to appeal that did not exist before. The Tax Court continued to apply its "redetermination" precedent, a *de novo* review, in cases where review was for abuse of discretion and the Commissioner switched positions until he decided one.

The need for a national solution is all the more necessary because Congress revised its statute to give the Tax Court exclusive jurisdiction over OIC appeals. Unlike a U.S. District Court, the Tax Court will not look to other District Courts or even the Circuits for guidance, unless the Circuit expressly overruled them. Only this Court can provide that uniform guidance for the Tax Court.

C. Background

Once the IRS has notified a taxpayer of its intent to file a notice of lien or to impose a levy, the taxpayer has the right to a CDP hearing before the IRS Office of Appeals. In 1998, Congress established the CDP hearing process to temper "any harshness caused by allowing the IRS to levy on property without any provision for advance hearing." *Olsen v. United States,* 414 F.3d 144, 150 (1st Cir.2005). During the hearing, a taxpayer may raise "any relevant issue relating to the unpaid tax or the proposed levy, including ... offers of collection alternatives, which may

include an offer-in-compromise." 26 U.S.C. § 6330(c)(2)(A).[1]

To proceed with a levy after a CDP hearing, the IRS must verify that it has met all the requirements to move forward with a levy, shall take into consideration the issues and evidence presented by taxpayer, reject the taxpayer's defenses and proposed collection alternatives, and determine that the "proposed collection action balances the need for efficient collection of taxes with the legitimate concern of the person that any collection be no more intrusive than necessary." *Id.* § 6330(c)(3).

This section 6330 appeal could have been filed in either the Tax Court or the U.S. District Court.[2] Under section 6330, if the underlying tax liability is contested, the standard of review by the Tax Court is *de novo*. *Davis v. Commissioner*, 115 T.C. 35, 39 (2000). Where the tax liability is not at issue, the Tax Court reviews for abuse of discretion. *Goza v. Commissioner*, 114 T.C. 176 (2000). In either case, the Tax Court's *scope* of review is limited to the administrative record in the First, Eighth, and now Ninth Circuits. As the Tax Court is a traveling court, in other circuits its review of evidence is *de novo* in that it accepts evidence outside the administrative record. However, every U.S. District Court to consider a section 6330 appeal has limited scope of review to the administrative record. *Olsen v. United States,* 414 F.3d 144, 154 n. 9 (1st Cir.2005).

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[1] Section 6320(c) looks to § 6330 for issues regarding hearings, review of decisions, and suspensions. Therefore, Appellants discuss the procedural requirements as outlined in § 6330 in discussing both the liens and the levy.

[2] Before a 2006 amendment, a section 6330 lien/levy appeal could be obtained in either U.S. District Court or the Tax Court. 26 U.S.C. § 6330(d)(1) was amended to give the Tax Court exclusive jurisdiction. This amendment became effective August 17, 2006, after expiration of the appeal period here.

This case could have resolved on a remand motion in Tax Court. Section 6330 requires the government officer to consider all evidence submitted and provide an accurate record to a reviewing court. The judicial admissions in the Commissioner's Answer are:

1. The Commissioner admits that respondent's settlement officer did not consider faxes dated July 5, 2006 and July 11, 2006 in making the determination set forth in the Notice of Determination, but denies that the Commissioner erred in failing to do so. [Answer to Amended Petition, p. 2., ¶5(a).] [ER 102]

2. The Commissioner admitted on April 12, 2007 that Appellants' faxes dated July 5, 2006 and July 11, 2006, were not made part of the administrative record. [Answer to Amended Petition, p. 5, ¶ 7(n).] [ER 105]

3. The Commissioner judicially admits that he does not contest the faxes of July 5, 2006 and July 11, 2006 were actually sent on those dates and does not contest the accuracy of the statements made in said faxes.

Compare to Petitioners' First Amended Petition. (App., *infra*, A-24).

At the May 14, 2007 trial call calendar, the Tax Court denied the Commissioner's summary judgment motion which turned on the failure to consider the faxes and include them in the administrative record. The Tax Court also denied Appellants' remand motion seeking remand on the basis the Appeals Officer chose not to consider a key issue and include it in the record. The Commissioner argued that the *Robinette* record review should control this case.

In open court, the Tax Court requested and received a straightforward judicial admission from Petitioner Cornwell about the effect of the faxes concerning changed economic circumstances.

For the first time, the Tax Court stated its review was not limited to the administrative record:

> "Now as far as the scope of the consideration of the Court, the Court has

not adopted Robinette or Murphy as the law in this Circuit. It seems contrary to the law in this Circuit to the extent it exists. . ." [Reporter's Transcript, p. 8:25-9:4] [ER 144]

The parties submitted the case on the record. [ER 145:11-13]

The Tax Court's Memorandum Opinion affirmed the IRS Appeals determination on the basis extra record evidence was not provided.

D. The Court of Appeals Decision

The Commissioner judicially admitted he did not consider evidence of changed circumstances contrary to a mandatory statutory directive. The Ninth Circuit held this error was not prejudicial. The Ninth Circuit declined to reach the administrative record rule argument under 26 U.S.C. §6330 because the tax court did not consider evidence outside the administrative record in this case. A week later another Ninth Circuit panel made it controlling law of the circuit.

REASONS FOR GRANTING THE PETITION

Tax law affects everyone. Review of this case would allow the Court to resolve an important, far-reaching Constitutional problem and fashion an appropriate remedy. The Commissioner recently judicially admitted that no Appeals CDP personnel have ever been appointed under the procedures allowed by the Appointments Clause.(*Larry E. Tucker v CIR*, Tax Court Docket No. 3165-06L) Appendix, *infra*, A-22). IRS Appeals Officers meet this Court's *Buckley* test as at least an inferior officer of the United States. These Appeals Officers meet every essential prong of this Court's *Freytag* test. So concerned was the Supreme Court with appointments clause violations that its *Freytag* decision allowed the issue concerning Special Trial Judges to be raised for the first time in a certiorari brief. Moreover, Appeals Officers meet the criteria for appointment under the

DOJ Opinion. If the published 2007 figure is representative, the Appeals Office closed 34,648 cases. Projected backward over 10 years from the date the statute became effective, over 300,000 cases are potentially voidable.

This Court should address this issue now, so as to prevent another 34,648 cases a year to accumulate.

Review of this case would also allow this Court to resolve the functional equivalent of a circuit split among the Eighth, First, and Ninth Circuits on one hand, and the lone Tax Court and remaining circuits on the other, concerning the admission of extra record evidence. Whether this Court adopts the administrative record rule, the Tax Court's *de novo* scope of review, or some other approach, it would result in uniformity such that the same set of facts based on the same federal statute would not yield different outcomes depending on geography.

ARGUMENTS

I. The Appointments Clause is Violated in CDP Hearings

A. Background

In the IRS Restructuring and Reform Act of 1998, Congress created the "Collection Due Process" (hereinafter, "CDP") provisions of the Internal Revenue Code at sections 6320 and 6330. These provisions allow taxpayers to request hearings at the IRS Appeals Office level either shortly before or shortly after the IRS takes either one or two incredibly intrusive and financially catastrophic collections actions: levy or filing a notice of federal tax lien.

The hearing employees were being given such powers by law that they also had to be appointed under the Appointments Clause. Congress passed no law delegating appointment power to anyone with respect to the Appeals Office CDP hearing personnel, and the President did not submit the names of any CDP

hearing personnel to the Congress for their appointment with the advice and consent of the Senate.

The issue petitioners raise is whether these Appeals Office employees holding and issuing notices of determination in the new CDP hearings are "Officers of the United States" who have to be appointed under the Appointments Clause. Petitioners argue that they do have to be appointed under the procedures of the Clause. Because they have not been, any notices of determination that they have issued in the past 10 years have been issued *ultra vires* and are, potentially, voidable. In the instant case, the proper remedy is to hold the Notice of Determination issued void and not to give them any deference.

To date, IRS Appeals employees are treated very differently from usual administrative law judges and administrative tribunal members under the Appointments Clause. In most areas of the law outside taxes, individuals who hold administrative hearings are appointed. Social Security disability benefits determinations are made by administrative law judges, appointed, pursuant to 5 U.S.C. §3105,85 by the Secretary of Health and Human Services under a statutory delegation complying with the Appointments Clause. The administrative law judges make binding decisions under 5 U.S.C. §557(b), subject to appellate review, first, by the Appeals Council, then, if desired, in the district courts. By way of dicta, Justice Scalia noted in his concurrence in *Freytag*: "Today, the Federal Government has a corps of administrative law judges numbering more than 1,000, whose principal statutory function is the conduct of adjudication under the Administrative Procedure Act (APA), see 5 U. S. C. §§554, 3105. They are all executive officers." *Freytag*, 501 U.S. at 910. Three other Justices joined Justice Scalia in his concurrence. The majority in Freytag that cited, for the proposition that Tax Court Special Trial Judges are "Officers", the Tax Court's opinion on the same issue in *First Western Government Securities, Inc. v. Commissioner*. *Id.*, 501 U.S. at 881 In that opinion, the Tax Court itself noted: "Congress permits

administrative agencies to appoint their own administrative law judges who perform duties similar to those of special trial judges. 5 U.S.C. §3105 (1982)."

Professor Carlton Smith states this argument has not been made in any court before it was raised in his Tax Court case, *Larry Tucker v. Commissioner.* Smith, Carlton, "Does the Failure to Appoint Collection Due Process Hearing Officers Violate the Constitution's Appointments Clause," Benjamin N. Cardozo School of Law, October 2008 Working, Paper No. 245. Nor has he found reference to such an argument in any law review or tax publication. Thus, it is an issue of first impression both in the courts and in the public forum.

The Appointments Clause of the Constitution at Article II, section 2, clause 2, reads:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

In *Freytag, supra,* the Supreme Court stated:

> The "manipulation of official appointments" had long been one of the American revolutionary generation's greatest grievances against executive power, see G. Wood, The Creation of The American Republic 1776-1787, p. 79 (1969) (Wood), because "the power of appointment to offices" was deemed "the most insidious and powerful weapon of

> eighteenth century despotism." Id., at 143.... The Framers understood... that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people. Thus, the Clause bespeaks a principle of limitation by dividing the power to appoint the principal federal officers -- ambassadors, ministers, heads of departments, and judges -- between the Executive and Legislative Branches. See *Buckley*, 424 U.S. at 129-131. Even with respect to "inferior Officers," the Clause allows Congress only limited authority to devolve appointment power on the President, his heads of departments, and the courts of law. *Freytag*, 501 U.S. at 883.

The clause, however, only applies to "Officers of the United States", not independent contractors, "lesser functionaries", or mere employees of the government.

Prior to the 1998 Act, Appeals Officers, Settlement Officers, and Appeals Team Managers were mere employees. They were not mentioned in the United States Code or any law of the United States, and they had no statutory duties expressly given to them to fulfill. Thus, their jobs were not "established by Law", within the meaning of the Appointments Clause.

However, the 1998 Act for the first time named "appeals officers", gave them record-gathering and adjudicative powers, and allowed them to issue final determinations in the following areas as part of newly-created CDP hearings: (1) the applicability of "appropriate spousal defenses" (i.e., whether section 6015 relieved a spouse of joint and several liability for taxes on a joint income tax return), (2) "challenges to the appropriateness of collection actions" (i.e., whether a levy should go forward or whether a notice of federal tax lien should be removed), (3) "offers of collection alternatives" (e.g., posting of a bond, substitution of

other assets, installment agreements, or offers in compromise), and (4) in certain circumstances, "challenges to the existence or amount of the underlying tax liability for any tax period" – all without limitation as to the amount in controversy.

Congress instructed the "appeals officer" in how to conduct the CDP hearing by requiring that "[t]he appeals officer shall at the hearing obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met." Congress also required that "[t]he determination by an appeals officer . . . take into consideration . . . whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary." Congress guaranteed that the CDP hearing would be conducted by an impartial Appeals "officer or employee who has had no prior involvement with respect to the unpaid tax."

Outside the CDP area, the 1998 Act added a new section 7122(d) (later redesignated (e) in 2006) that required that taxpayers have a right to appeal any rejection of a proposed installment agreement or offer in compromise to an Appeals Officer. The 1998 Act also required that an Appeals Officer "is regularly available within each state," and that to "ensure an independent appeals function within the Internal Revenue Service" there be a "prohibition . . . of ex parte communications between appeals officers and other Internal Revenue Service employees to the extent that such communications appear to compromise the independence of the appeals officers."

All of these 1998 Act provisions make it clear that an "Appeals Officer" is a position now "established by Law" and that Appeals Officers are now "Officers of the United States" for purposes of the Appointments Clause.

Assuming that Settlement Officers are authorized by Congress to act as the "appeals officer" described in the CDP provisions, then Settlement Officers, too, are "Officers of the United States" and have to be properly

appointed.

Assuming that neither Appeals Officers nor Settlement Officers actually enter the binding determinations after CDP hearings, but those determinations are properly made by Appeals Team Managers purporting to act under the statutory grant of authority to "appeals officers", then Appeals Team Managers are also "Officers of the United States" and have to be properly appointed.

On March 17, 2003, the Chief of Appeals issued Appeals Delegation Order No. 8-a, which (a) delegated to Appeals Officers and Settlement Officers the authority "to conduct hearings and make determinations" under sections 6320 and 6330, and (b) delegated to Appeals Team Managers "the authority to review and approve" such determinations. An Appeals Team Manager is a supervisory Appeals officer who is responsible for managing and reviewing Appeals officers within the jurisdiction of a particular Appeals Office. An [Appeals Team Manager's] duties include, *inter alia*, reviewing work for quality and professional standards, approving recommendations by Appeals officers who lack authority to take the recommended action themselves, and supervising the general work performance of Appeals officers.

The Appeals Officer rendering a decision after a CDP hearing is a person exercising sufficient power under the laws of the United States to be required to be appointed under the Appointments Clause. Among Appeals Officers, Settlement Officers, and Appeals Team Managers, at least one is an officer who must be appointed. Appeals Team Managers and those Appeals Officers and Settlement Officers that they supervise are all now "Officers of the United States" who have to be appointed.

The Commissioner has admitted that, "[t]o date, no Appeals Officer, Settlement Officer, or Appeals Team Manager has been appointed to his or her job by the President of the United States with the advice and consent of the Senate," and that, "[n]o statute provides for the appointment of Appeals Officers, Settlement Officers, or Appeals Team Managers by the President

alone, the 'Heads of Department', or the 'Courts of Law', as those terms are used in the Appointments Clause of the Constitution."

On April 16, 2007, the Department of Justice Office of Legal Counsel issued a comprehensive, 132-page Memorandum Opinion for the General Counsels of the Executive Branch, entitled "Officers of the United States for Purposes of the Appointments Clause" (hereinafter, "DOJ Opinion") 2007 WL 1405459. The DOJ Opinion analyzes U.S. Supreme Court Appointment Clause opinions and other governmental rulings, and distills the essential characteristics of an "Officer" for purposes of the Appointments Clause. The DOJ Opinion finds that the 1976 Supreme Court opinion in *Buckley v. Valeo*, sets forth the current requirements for deciding whether a person is an officer or mere employee for purposes of the Clause. The DOJ Opinion concludes that

> any position having the two essential characteristics of a federal "office" is subject to the Appointments Clause. That is, a position, however labeled, is in fact a federal office if (1) it is invested by legal authority with a portion of the sovereign powers of the federal Government, and (2) it is "continuing." A person who would hold such a position must be properly made an "Officer of the United States" by being appointed pursuant to the procedures specified in the Appointments Clause.

B. Court Opinions on the "Officer" Versus "Employee" Issue

Buckley Opinion

The principal Supreme Court opinions providing guidance to decide the issue presented are the Court's 1976 opinion in *Buckley v. Valeo, supra*, and its 1991 opinion in *Freytag v. Commissioner, supra.*

Buckley v. Valeo involved the Federal Election

Campaign Act of 1971. This Court stated:

> The Appointments Clause could, of course, be read as merely dealing with etiquette or protocol in describing "Officers of the United States," but the drafters had a less frivolous purpose in mind. . . .
>
> We think the term "Officers of the United States" as used in Article II . . . is a term intended to have substantive meaning. We think its fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an "Officer of the United States," and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of that Article." *Buckley*, 424 U.S. at 125, 96 S.Ct. at 685.

The Court held that FEC members were "Officers of the United States", in part, because of their administrative functions, including "rulemaking, advisory opinions, and determinations of eligibility for funds and even for federal elective office itself. . . . [E]ach of these functions . . . represents the performance of a significant governmental duty exercised pursuant to a public law. . . . These administrative functions may therefore be exercised only by persons who are 'Officers of the United States.'"

Of particular relevance were the FEC's duties to render advisory opinions and determine eligibility for funds and office. These duties are highly analogous to the taxpayer-specific collection and underlying tax liability rulings issued by IRS Appeals personnel after CDP hearings.

Freytag Decision

While not identical to Tax Court Special Trial Judges in all respects, Appeals Officers, Settlement

Officers, and/or Appeals Team Managers holding CDP hearings are so similar to Special Trial Judges in all ways that mattered to this Court in its Freytag Appointments Clause analysis that any differences are not of Constitutional significance. By holding CDP hearings and issuing CDP notices of determination, the Appeals personnel exercise significant authority pursuant to the laws of the United States for purposes of the Appointments Clause. Thus, Appeals Officer, Settlement Officers and/or Appeals Team Managers are "Officers of the United States" within the meaning of the Appointments Clause and have to be appointed, currently, by the President with the advice and consent of the Senate.

In *Freytag v. Commissioner, supra*, the Supreme Court faced an Appointments Clause challenge with respect to Tax Court Special Trial Judges holding hearings and issuing proposed findings of fact and opinion in complex tax shelter cases assigned to them by the Tax Court's Chief Judge.

All nine Justices agreed with one thing: Tax Court Special Trial Judges were "Officers of the United States" for purposes of the Appointments Clause. Because what the Court said about this argument is so central to petitioners' argument, the text of the Supreme Court's discussion of this issue is quoted in full:

> We turn to another preliminary issue in petitioners' Appointments Clause challenge. Petitioners argue that a special trial judge is an "inferior Officer" of the United States. If we disagree, and conclude that a special trial judge is only an employee, petitioners' challenge fails, for such "lesser functionaries" need not be selected in compliance with the strict requirements of Article II. Buckley v. Valeo, 424 U.S. 1, 126, n. 162, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976).
>
> The Commissioner, in contrast to petitioners, argues that a special trial

judge assigned under §7443A(b)(4) acts only as an aide to the Tax Court judge responsible for deciding the case. The special trial judge, as the Commissioner characterizes his work, does no more than assist the Tax Court judge in taking the evidence and preparing the proposed findings and opinion. Thus, the Commissioner concludes, special trial judges acting pursuant to §7443A(b)(4) are employees rather than "Officers of the United States."

"Any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of [Article II]." Buckley, 424 U.S. at 126.The two courts that have addressed the issue have held that special trial judges are "inferior Officers." The Tax Court so concluded in First Western Govt. Securities, Inc. v. Commissioner, 94 T.C. 549, 557-559 (1990), and the Court of Appeals for the Second Circuit in Samuels, Kramer & Co. v. Commissioner, 930 F.2d 975, 985 (1991), agreed. Both courts considered the degree of authority exercised by the special trial judges to be so "significant" that it was inconsistent with the classifications of "lesser functionaries" or employees. Cf. Go-Bart Importing Co. v. United States, 282 U.S. 344, 352-353, 75 L. Ed. 374, 51 S. Ct. 153 (1931) (United States commissioners are inferior officers). We agree with the Tax Court and the Second Circuit that a special trial judge is an "inferior Officer" whose appointment must conform to the Appointments Clause.

The Commissioner reasons that special trial judges may be deemed

employees in subsection (b)(4) cases because they lack authority to enter a final decision. But this argument ignores the significance of the duties and discretion that special trial judges possess. The office of special trial judge is "established by Law," Art. II, § 2, cl. 2, and the duties, salary, and means of appointment for that office are specified by statute. See Burnap v. United States, 252 U.S. 512, 516-517, 64 L. Ed. 692, 40 S. Ct. 374 (1920); United States v. Germaine, 99 U.S. 508, 511-512, 25 L. Ed. 482 (1879). These characteristics distinguish special trial judges from special masters, who are hired by Article III courts on a temporary, episodic basis, whose positions are not established by law, and whose duties and functions are not delineated in a statute. Furthermore, special trial judges perform more than ministerial tasks. They take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders. In the course of carrying out these important functions, the special trial judges exercise significant discretion.

Even if the duties of special trial judges under subsection (b)(4) were not as significant as we and the two courts have found them to be, our conclusion would be unchanged. Under §§7443A(b)(1), (2), and (3), and (c)), the Chief Judge may assign special trial judges to render the decisions of the Tax Court in declaratory judgment proceedings and limited-amount tax cases. The Commissioner concedes that in cases governed by subsections (b)(1), (2), and (3), special trial judges act as inferior officers who exercise independent

> authority. But the Commissioner urges that petitioners may not rely on the extensive power wielded by the special trial judges in declaratory judgment proceedings and limited-amount tax cases because petitioners lack standing to assert the rights of taxpayers whose cases are assigned to special trial judges under subsections (b)(1), (2), and (3).
>
> This standing argument seems to us to be beside the point. Special trial judges are not inferior officers for purposes of some of their duties under §7443A, but mere employees with respect to other responsibilities. The fact that an inferior officer on occasion performs duties that may be performed by an employee not subject to the Appointments Clause does not transform his status under the Constitution. If a special trial judge is an inferior officer for purposes of subsections (b)(1), (2), and (3), he is an inferior officer within the meaning of the Appointments Clause and he must be properly appointed. *Freytag*, 501 U.S. at 880-882, 111 S.Ct. at 2640-2641.

In *Freytag* the Supreme Court cited nine factors for determining whether a Tax Court Special Trial Judge is an "Officer of the United States" under the Appointments Clause. Under these tests, an IRS Appeals Officer meets all but nonessential criteria.

Position "established by Law": Both the positions of Tax Court Special Trial Judge and Appeals Officers are mentioned in the Code and given duties to perform. The DOJ Opinion, after analyzing much authority (including *Freytag*) states: "a position, however labeled, is in fact a federal office if (1) it is invested by legal authority with a portion of the sovereign powers of the federal Government, and (2) it is 'continuing'."

Statutory duties: Tax Court Special Trial Judges and Appeals personnel holding CDP hearings are both

given substantially similar duties that can only be exercised by an Officer. Although Special Trial Judges were limited to cases ($10,000 and below) in the types of taxes as to which the Tax Court had deficiency jurisdiction, IRS Appeals Officers have much more power, in that they can make rulings without limit to (1) the amount in dispute (potentially, billions of dollars) or (2) the type of tax --e.g., they can rule on underlying liability for employment taxes that the Tax Court did not have any jurisdiction to hear when *Freytag* was decided.

Discretion: *Freytag* points to discretion as a factor indicative of "Officer" status under the Appointments Clause. According to the Supreme Court, Tax Court Special Trial Judges have discretion. By providing the Appeals hearing person in the CDP proceeding with the obligation to "take into consideration" both the issues that can be raised in such a hearing (including "offers of collection alternatives") and "whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary", Congress has clearly given the Appeals personnel considerable discretion. Further, except as to underlying liability determinations and spousal liability determinations under section 6015, Tax Court review of a notice of determination issued by such an Appeals person is done under an "abuse of discretion" standard of review limited to issues raised at the Appeals hearing. This further proves that Appeals personnel in CDP proceedings have "discretion". Below the Ninth Circuit and Sixth Circuit noted this broad discretion and held that they would give it deference unless it was patently unfair or wrong. *Living Care Alternatives of Utica, Inc v. U.S.*.411 F.3d 621 (6th Cir. 2005). Even after a court decision, the Appeals Office retains jurisdiction to reconsider its prior decision due to changed circumstances. 26 U.S.C.6330(d)(2).

Ability to enter final decision: Tax Court Special Trial Judges had the ability to enter the decision of the Tax Court in declaratory judgment and certain

small-dollar deficiency proceedings. Notices of determination issued by Appeals personnel after CDP hearings are final and binding on the IRS and taxpayers, but can be appealed by taxpayers to the Tax Court.67 Although Section 6330(d))(2) rehearings are possible, below the Commissioner stated its procedure was only to provide such a hearing if a new offer was filed. The Commissioner stated petitioners' options were either appeal to the Ninth Circuit or a new offer. Appeal can only be taken from a final judgment.

Salary: The Internal Revenue Code provides that Special Trial Judges are paid 90% of the salary of a regular, Presidentially-appointed Tax Court judge. There is no provision in any statue specifically stating how much is paid to Appeals Officers, Settlement Officers, or Appeals Team Managers. However, the Appeals personnel are compensated Civil Service employees. As the DOJ Opinion points out, "an emolument is also a common characteristic of an office, . . .but it too is not essential."

Means of appointment: The Internal Revenue Code sets out the means of appointment of a Special Trial Judge: He or she is appointed by the Chief Judge of the Tax Court. By contrast, no law specifically states how an Appeals Officer, Settlement Officer, or Appeals Team Manager is hired or appointed. But that does not mean that the latter personnel need not be appointed pursuant to the Appointments Clause. It merely means that, if those persons are "Officers" within the meaning of the Clause, they must be appointed by the President with the advice and consent of the Senate. As to the issue of whether the lack of a statutory provision for "appointment" means that a government employee is not an "Officer" under the Appointments Clause, the DOJ Opinion states:

It is true that an individual not properly appointed under the Appointments Clause cannot technically be an officer of the United States . . . . But such a person may nevertheless be required to be appointed as prescribed by the Clause in order constitutionally to exercise his authority. A contrary conclusion would render the Appointments Clause a matter of etiquette

or protocol, rather than one of the "significant structural safeguards of the constitutional scheme[.]" . . . . Under such a (tautological) reading, the Clause would require a certain means of appointment only for persons appointed by that means.

Continuity of position: Neither Tax Court Special Trial Judges nor Appeals personnel conducting CDP proceedings are temporary government workers.

Powers to take testimony, conduct trials, and rule on admissibility of evidence: Under the rules of the Tax Court, any judge, including a Special Trial Judge, can conduct a trial at which he or she takes testimony and rules on admissibility of evidence. At a CDP hearing, the holder of the hearing can accept testimony and decide what weight to give to any evidence presented. The Federal Rules of Evidence do not apply, as this is an informal administrative proceeding.

Power to enforce compliance with discovery orders: A Tax Court Special Trial Judge has the power to enforce compliance with discovery orders. By contrast, a taxpayer does not have the right to do discovery of the IRS in the course of a CDP hearing at Appeals. This is not an essential element. In *Buckley v. Valeo*, the Supreme Court held that the FEC's power to issue advisory opinions on submitted proposed actions was a power that could only be held by an "Officer", yet there is no discovery in an advisory opinion ruling, either.

II. This Court Should Advise a Uniform Rule for the Tax Court Introduction of Evidence Where the Standard is Abuse of Discretion.

A. This Case Squarely Demonstrates The Conflict -- Even Within the Same Circuit

The Tax Court works off a double standard. It requires the *de novo* admission of evidence never presented to an Appeals Officer to determine whether he abused his discretion the year before. The Eighth Circuit prohibited the Tax Court from this approach,

limiting its review to the administrative record. *Robinette v CIR*, 439 F.3d 455 (8th Cir. 2006). The First Circuit adopted the Eighth Circuit's record review limitation. *Murphy v. CIR*, 469 F.3d 27, 31 (1st Cir. 2006). Although the Ninth Circuit, declined to reach the record rule here, one week later another Ninth Circuit panel did so, adopting the Robinette rule as the law in the Ninth Circuit. *Keller v. CIR*, 568 F.3d 710 (9th Cir. June 3, 2009)

Yet the Tax Court maintains it is not an Article III court and its history allows it to conduct *de novo* trials of evidence.

Inconsistent scope of review arises because under the "Golsen Rule," the Tax Court is bound to apply the law of the circuit to which the case is appealable. *Golsen v. Commissioner*, 54 T.C. 742, 756 (1970) affd. 445 F.2d 985 (10th Cir. 1971).

The Tax Court recently distinguished *Robinette*'s record-only review in Section 6330 (lien/levy) cases from statutory language authorizing *de novo* review in Section 6015 (innocent spouse) cases. See, *Porter v. CIR*, 130 T.C. 10 at *3, 2008 WL 2065189 (May 15, 2008). Section 6015 provides that the Tax Court "determine" relief, suggesting it conduct a trial *de novo*. The Tax Court contrasts this to Section 6330(d) where Congress "chose not to use the word 'determine' or some derivation thereof." The Tax Court stated no inference should be drawn that by distinguishing *Robinette,* it is changing its own position concerning Section 6330 lien/levy cases, i.e. it is not limited to the administrative record. *Porter v. CIR, supra,* at fn. 6. Yet the Tax Court's position in *Robinette* was overruled by the Eighth Circuit, and the First Circuit adopted its reasoning in *Murphy*. If Congress wished the section 6015 "determine" language to appear in section 6330, it could have included it. The Tax Court's ruling in *Porter v. CIR* further illustrates the confusing scenario confronted by Tax Court litigants. The Tax Court estimates 70 percent of such litigants are pro se. If one relies on the First, Eighth, and now Ninth Circuit holdings, but is not in those circuits, he may improperly present his

case to the Tax Court because the procedure fluctuates even within the same circuit.

The Tax Court further maintained in *Ewing II*, the instant case, and in newly decided cases that an unpublished Ninth Circuit "memdispo" affirms its continued practice of allowing at trial documents, records, and testimony never presented at the administrative hearing. See *Ewing v. CIR*, 122 T.C. No. 32 at fn 3, WL 158177 (2004) ("*Ewing II*"); *Oropeza v CIR*, T.C. Memo 2008-94 at *2, 2008 WL 1722003 (April 14, 2008). In a three-quarter page footnote of its *Ewing II* decision, the Tax Court cited two unpublished Ninth Circuit opinions affirming introduction of evidence at trial that was not part of the administration record. *Holliday v. Commissioner*, 57 Fed. Appx 774 (9th Cir. 2003) affg. T.C. Memo 2002-67; *Lindsey v. Commissioner*, 56 Fed. Appx. 802 (9th Cir. 2003) affg. T.C. Memo 2002-

The Ninth Circuit's *Keller* decision overruled the Tax Court's reasoning.

Robinette, Murphy, and Keller create a problem for litigants outside the Eighth, Firth, and Ninth Circuits, because they do not know whether they should present extra record evidence at trial. In *Robinette*, the Tax Court allowed extra record evidence, but the Eighth Circuit overruled the Tax Court, limiting review to the administrative record.

This dilemma poses problems. In a leading opinion, the Tax Court held that where the standard of review is abuse of discretion, "it would be anomalous and improper for us to conclude that respondent's Appeals Office abused its discretion under section 6330(c)(3) in failing to grant relief, or in failing to consider arguments, issues, or other matter not raised by taxpayers or not otherwise brought to the attention of respondent's Appeals Office. *McCoy Enters., Inc. v. Commissioner,* 58 F.3d 557, 563 (10th Cir.1995) ("The Tax Court * * * cannot find an abuse of discretion where there is no evidence that the Commissioner exercised any discretion at all"). *Magana v. CIR*, 118 T.C. No. 30, 118 T.C. 488, 493 (2002).

Magana's same reasoning, by extension, should

apply to the scope of review. To paraphrase *Magana*, it would be anomalous for the Tax Court to find an Appeals Officer abused his discretion based on documents, records and testimony presented at trial which were never presented to the Appeals Officer. Section 6330 already requires that the Appeals Office adequately consider issues raised by a taxpayer at a CDP hearing, and the Commissioner's regulation further requires the taxpayer be allowed a reasonable opportunity to present evidence to support that issue. 26 CFR 301.6330-1(f)(2).

The Tax Court is reviewing for an abuse of discretion. Its scope of review should be limited to supporting evidence that was provided to the Appeals Officer. If the Tax Court were to find abuse of discretion by an Appeals Officer based on new documents, records, and testimony never presented to him, it would be akin to faulting a person for not seeing into the future a year from now and seeing it 100 percent accurately.

The irony of the Tax Court's *de novo* scope of review is it effectively rewards taxpayers who fail to provide evidence to the Appeals Officer by giving them a second bite at the apple when they bypassed their first. The majority of the Tax Court case annotations for section 6330 involve cases where a taxpayer chose not to provide financial information or other supporting evidence requested by the Appeals Officer. *See, e.g., Murphy v. Commissioner*, 469 F.3d 27 (1st Cir 2006) [failure to provide financial and health information to Appeals Officer]; *Etkin v. CIR*, T.C. Memo 2005-245 at *3, 2005 WL 2709505 [failure to provide updated financial information to Appeals Officer].

Here, the reverse is true. The Commissioner admits in his Answer to Amended Petition that Appellants timely responded to all information requests; but denies for lack of knowledge as to the truth of petitioners' allegations that the information was hand delivered. [Answer to Amended Petition, p. 5, ¶ 5(p).] [ER 105] Admissions in a party's answer are judicial admissions and the party is conclusively bound

by them. A judicial admission has the effect of withdrawing the admitted fact from issue and wholly dispensing with the need for proof of the fact. *American Title Insurance Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988). Indeed, a key issue here is that evidence showing a change in income was faxed to the Appeals Office the same day it was issued, but that evidence was not considered. [ER 309-310].

Allowing evidence to be presented for the first time to the Tax Court would eliminate the Appeals' officer's role and permit the evidence to be reviewed without any prior consideration by any level of the Commissioner's organization. The Tax Court's consideration of such evidence without any prior review by the Commissioner would frustrate the administrative review process created by section 6330. The Tax Court described this exact scenario in a decision requiring presentation of all issues -- not evidence -- to the Appeals Office. "We hold today that we do not have authority to consider section 6330(c)(2) issues that were not raised before the Appeals Office." *Giamelli v. CIR*, 129 T.C. No. 14, 129 T.C. 107, 115 (2007) [holding Estate may not raise underlying tax liability on appeal when underlying tax liability was not properly raised during the collection review hearing before Commissioner's Appeals Office.]

This Tax Court position is akin to the math concept of infinite regression, where it can get closer and closer to a position, but never arrive.

As the *Robinette* court pointed out, there can be unusual circumstances where the completeness of the administrative record is called into question. When that circumstance arises, the reviewing court's role is not to conduct a *de novo* review of the evidence, but correct the record and remand it to the agency to reconsider the omitted material. *Robinette*, *supra*, at 461, citing *Camp v. Pitts,* 411 U.S. 138 at 143, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973).

The Supreme Court's resolution of the Tax Court's *de novo* acceptance of evidence procedures versus restriction to the record in three Circuits will result in a uniform application of tax laws.

III. The Decision Below is Incorrect

Petitioners have been caught in the crossfire of a raging tax debate that involves the Commissioner stating the *Robinette* record controls, the Tax Court holding it doesn't, and the Ninth Circuit changing views within a week. The Ninth Circuit held that the IRS Appeals Officer's error to not consider new evidence was not prejudicial. In so doing the Court gave additional license to nonappointed judges to not comply with a controlling statute and submit a truncated record to a reviewing court. However, this Court's precedent is that a government actor has no authority to disregard a controlling statute. This Court held that a government actor has no discretion "when a federal statute, regulation, or policy specifically prescribes a course of action. In this event, the [government actor] has no rightful option but to adhere to the directive." *Berkowitz v. U.S.*, 486 U.S. 531, 536 108 S.Ct. 1954, 1959 (1988). The IRS must follow statutory and regulatory criteria in exercising its discretion, and [courts] may review the IRS's decision for an abuse of discretion. *Speltz v. Commissioner*, 454 F.3d 782 (8th Cir. 2006). This Court also held that except in rare circumstances, remand to the agency is appropriate where the record before the agency does not support the agency action or if the agency has not considered all relevant factors. *Florida Power & Light Co. v. Lorion, etc., et al. United States Nuclear Regulatory Commission*, 470 U.S. 729, 744, 105 S.Ct. 1598, 1607 (1985). The Commissioner agreed below.

The Ninth Circuit declined to reach the record rule, a central issue below, though it was urged by the Commissioner, agreed by petitioners and became the circuit's controlling law a week later. *Keller*, *supra*. The Ninth Circuit's holding is contrary to judicial admissions at the May 14, 2007 Tax Court trial when the Tax Court *sua sponte* requested extra record evidence:

> Tax Court: Have you had overtime recently?

> Mr. Cornwell: I've had some, Your Honor, but it's not to the same degree. [Reporter's Transcript, p;. 8:11-13] [ER 144]

A statement of fact made during oral argument or trial is a judicial admission. *U.S. (Commissioner of IRS) v. Bentson*, 947 F.2d 1353, 1356 (9th Cir. 1991).

IV. AMICUS BRIEFS

Several professors around the country specializing in tax law agree that the appointments clause violation should be addressed by this Court. At least one will file an amicus brief to fully inform this Court. Petitioners respectfully request hat these learned amici be allowed to address this Court should review be granted.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: December 9, 2009

Respectfully submitted,

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FILED Aug 27, 2009

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL CORNWELL; et al.,	No. 08-71458
Petitioners - Appellants,	Tax Ct. No. 15013-06L
v.	ORDER
COMMISSIONER OF INTERNAL REVENUE,	
Respondent - Appellee	

Before: PREGERSON, CANBY and BERZON, Circuit Judges

Cornwell and Iker's petition for panel rehearing is denied.

No further filings shall be accepted in this closed case.