NO. 12-49

IN THE
Supreme Court of the United States

LARRY E. TUCKER,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNTIED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF CENTER FOR THE FAIR ADMINISTRATION OF TAXES AS *AMICUS CURIAE* IN SUPPORT OF GRANTING PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether IRS Appeals Officers who issue adjudications in administrative appeals relating to the collection of taxes (Collection Due Process appeals) are subject to the Appointments Clause of the U.S. Constitution.

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INTEREST OF *AMICUS*

This *amicus* brief is being filed with the written consent of both parties.

Amicus Center for the Fair Administration of Taxes ("CFAT") is a section 501(c)(3) non-profit organization seeking to promote fairness in the administration of the tax laws to taxpayers as a whole. Currently, the primary means utilized to achieve this goal is through the filing of briefs as *amicus curiae* in tax-related cases throughout the United States. CFAT works jointly with the Chapman University School of Law Appellate Tax Clinic, offering law students the opportunity to assist in the preparation of the *amicus curiae* briefs filed by CFAT. A. Lavar Taylor, the Director for CFAT and Adjunct Professor of Law at Chapman Law School, has over 31 years of experience in the handling of civil and criminal tax controversies, both in government and in private practice.[1]

Mr. Taylor has handled many hundreds of IRS Collection Due Process appeals at the administrative level and has also handled many of these types of appeals at the judicial level in District Court, the Tax Court and the Courts of Appeal.

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[1] No person other than the named amicus or their counsel authored this brief or provided financial support for this brief.

In this case, Larry E. Tucker contends that the individuals working in the IRS Office of Appeals who issue adjudications in administrative IRS Collection Due Process appeals are "inferior officers" who must be appointed pursuant to the Appointments Clause of the U.S. Constitution. This issue is of significant importance in the administration of the tax laws, for reasons explained below.

SUMMARY OF ARGUMENT

This Court should grant certiorari in this case to address the Appointments Clause issue raised by Petitioner for the following reasons.

First, the D.C. Circuit committed a serious error in refusing to conclude that IRS Appeals Officers who adjudicate administrative appeals dealing with the collection of taxes, known as Collection Due Process ("CDP") hearings, are subject to the Appointments Clause. The Court of Appeals completely mischaracterized the nature of power and role of the IRS Office of Appeals employees who adjudicate CDP hearings when it concluded that these employees in the IRS Office of Appeals lack sufficient "discretion" to be subject to the Appointments Clause.

Second, the issue raised by Petitioner has significant administrative importance for the IRS and taxpayers. This issue also affects other government agencies and thus has significant importance for the government as a whole.

Third, it is unlikely that a split in the Circuit Courts of Appeal will ever develop. This is because the IRS can effectively prevent a Circuit split by channeling judicial appeals in CDP cases to the D.C. Circuit through the venue provision of 26 U.S.C. § 7482. In addition, this Court previously granted certiorari on a similar Appointments Clause issue without a circuit split in *Freytag v. Commissioner*, 501 U.S. 868 (1991), which involved the status under the Appointments Clause of the Tax Court's Special Trial Judges.

ARGUMENT

I. This Court should grant review because the D.C. Circuit committed a serious error in refusing to conclude that Appeals Officers or Settlement Officers of the IRS Office of Appeals must be appointed in accordance with the Appointments Clause of the U.S. Constitution.

A. The Law Prior to the Enactment of the IRS Collection Due Process Provisions

The law creating Collection Due Process (CDP) appeals, which took effect in 1999, was quite revolutionary from the standpoint of tax administration. Prior to this law taking effect, IRS employees handling collection of taxes could pursue collection action at will by levying on any or all of a taxpayer's assets once the tax was assessed and certain basic notices were provided to the taxpayer, such as a notice and demand for payment under 26

U.S.C § 6303(a) and notice of intent to levy under 26 U.S.C. § 6331. These IRS employees could also file notices of federal tax lien at any time after the notice and demand for payment was sent.

There was no statutory procedure for challenging these levy and lien actions within the IRS itself. If the taxpayer believed that the IRS had violated statutory procedures in pursuing collection action, the taxpayer's sole remedy, other than begging the IRS to stop taking collection action and to reverse the effect of prior collection action, was to file a lawsuit in court challenging the IRS's collection action. *See, e.g.*, *Cool Fuel, Inc. v. Connett*, 685 F.2d 309 (9th Cir. 1982) (Effort by taxpayer to enjoin IRS collection action where IRS failed to send notice of deficiency to taxpayer's "last known address" as required by law), *Goodwin v. United States*, 935 F.2d 1061 (9th Cir. 1991) (action brought to challenge procedural validity of IRS sale of taxpayer's property). Because of the Anti-Injunction Act, 26 U.S.C. §7421 and the onerous requirements for obtaining injunctive relief to prevent IRS collection action, taxpayers were generally unsuccessful in enjoining IRS collection action, even where it was clear that the IRS had violated the law in making the assessment that was the subject of the collection action. *Cool Fuel v. Connett, supra* (taxpayer denied injunction against IRS collection action where IRS failed to send notice of deficiency to taxpayer's last known address because the taxpayer had an adequate remedy to challenge the tax liability via a refund suit).

Where IRS collection action produced hardship but the IRS had followed all required procedures, taxpayers who believed they were being treated unfairly had no judicial remedy at all. This is because the IRS lien and levy procedures were held to be consistent with the Due Process Clause of the Constitution many years ago by this Court. *Phillips v. Commissioner*, 283 U.S. 589, 595 (1931). Aggrieved taxpayers did have the ability to beg the IRS to stop taking collection action and to undo the effect of the prior collection action which produced hardship. Since the begging was generally directed at the very employees who had taken the collection action in the first place, the begging generally fell on deaf ears. It was the apparent inability of the IRS to exercise its considerable discretion in pursuing collection action in a consistently fair manner which led Congress to create the provisions governing CDP appeals. S. Rep. 105-174, 105th Cong., 2d Sess. 67 (Apr. 22, 1998).

B. The IRS Collection Due Process Provisions and the Large Amount of Discretion Afforded the Employees of the IRS Office of Appeals Who Decide CDP Appeals

The provisions in the Internal Revenue Code which govern CDP appeals make clear that those employees in the IRS Office of Appeals who adjudicate CDP appeals have a wide amount of discretion in deciding how to resolve those appeals. A taxpayer pursuing a CDP appeal may raise in that appeal "any relevant issue relating to the unpaid tax

or the proposed levy," including innocent spouse defenses, the appropriateness of collection actions, and collection alternatives. 26 U.S.C. § 6330(c)(2)(A). The employee in the IRS Office of Appeals who adjudicates the CDP appeal is legally required to take into account all issues raised by the taxpayer in adjudicating the administrative appeal and is also required to determine "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." 26 U.S.C. § 6330(c)(3).

While the number of collection alternatives is finite (e.g., a) full pay over short period of time, b) installment agreement over longer period of time, c) compromise for less than the amount due, or d) place account in suspense temporarily without taking any collection action), the number of different fact patterns which the Office of Appeals will consider in CDP appeals is almost infinite. Each taxpayer will have their own unique circumstances, and each separate set of circumstances will require the Office of Appeals to exercise its discretion in a different way while deciding how to adjudicate each CDP appeal.

Consider the following hypotheticals, all of which are loosely based on actual cases handled by the undersigned counsel. Suppose the IRS has assessed $500,000.00 in unpaid income taxes, none of which are disputed by the taxpayer. The taxpayer owns two parcels of real property. Parcel #1 is an office building which is leased to a single tenant by

the taxpayer. The value of the property exceeds all encumbrances (other than the IRS liens) by over $1 million. Thus, a seizure and sale of this property by IRS will fully pay the IRS liability.

Parcel #2 is a warehouse where the taxpayer conducts his business operations through his wholly owned corporation, which employs 100 employees. The value of the warehouse exceeds all encumbrances (other than the IRS liens) by only $200,000.00. Thus, a seizure and sale of the warehouse by IRS will not fully pay the IRS liability. Use of the warehouse is critical to the taxpayer's business operations (importing and selling wholesale specialized equipment manufactured overseas). If the IRS seizes and sells Parcel #2 (the warehouse), it will cause the taxpayer's business operations, which provide the taxpayer with a steady salary, to cease. If the IRS seizes and sells Parcel #1 (the office building), it will not disrupt the taxpayer's business operations.

The collection officer dislikes the taxpayer because of rude comments made by the taxpayer to the revenue officer. The revenue officer therefore wants to seize and sell the taxpayer's warehouse as part of the IRS's efforts to collect the taxes, even though a) seizure and sale of the warehouse will have serious adverse collateral consequences to the taxpayer without fully paying the amount owed to IRS and b) seizure and sale of the office building will full pay the amount owed without disrupting the taxpayer's business.

The revenue officer then issues a notice of intent to levy as a precursor to seizing and selling the warehouse, and the taxpayer files a timely request for a hearing with the Office of Appeals. In the CDP appeal, the Office of Appeals will have to decide whether the IRS collection officer should be allowed to seize and sell Parcel #2.

A second hypothetical is as follows. The taxpayer is a 50 year old woman who is unemployed and, due to physical ailments, is also unemployable. She receives a small amount of disability income which is insufficient to pay her monthly living expenses. Her only asset of any significance is a promissory note secured by a deed of trust in the amount of $200,000. She receives monthly payments under the note which, combined with her disability income, are just enough to pay her monthly living expenses. She owes the IRS $250,000 and does not qualify for innocent spouse relief.

The IRS collection officer wants to levy on the payments due the taxpayer under the note, which would leave the taxpayer insufficient income to pay her basic living expenses. The officer issues a notice of intent to levy, and the taxpayer timely pursues a CDP appeal. In that appeal, the Office of Appeals will have to decide whether the IRS is allowed to levy on the payments owed the taxpayer under the note.

A third hypothetical is as follows. The taxpayer is a mid-size company that encountered severe cash flow problems because its primary customer filed a chapter 7 bankruptcy owing the

taxpayer a large amount of money. As a result, the taxpayer is unable to pay $1 million in income taxes which are owed for year 1. There is no current net income after expenses, and all company assets are needed to generate revenue for the company. The IRS collection officer is proposing to levy on the company's receivables (which will probably cause the company to go out of business), but the company advises the collection officer that, in about 6 months, the company anticipates filing a tax return for the current tax year, year 2, which will show a large net operating loss. The company says that the net operating loss will be carried back to the year for which taxes are owed and will be large enough to completely eliminate the tax liability which the collection officer is trying to collect. But it is possible that the IRS will audit the tax return for year 2 and may not allow the loss carryback to year 1 until the IRS is satisfied that the loss is being properly claimed. The IRS audit process of the year 2 return could take a year or more, but no one knows for sure if there will be an IRS audit or what the outcome of the audit will be. If the IRS collection officer issues a notice of intent to levy and a timely CDP hearing request is made, the Office of Appeals will have to decide whether to allow the IRS to pursue collection action against the receivables.

A fourth hypothetical is as follows. Taxpayer is a 91 year widow in good health. Her house, which was encumbered by a loan far in excess of the home's value, has been foreclosed on, and she has $500,000 of cancellation of debt income, which will result in an income tax liability of $150,000. The taxpayer's only

income is Social Security income. The taxpayer's only remaining asset is an Individual Retirement Account which contains $250,000. Withdrawals from the IRA account will be taxable. Based on presently known data (including life expectancy using mortality tables), the taxpayer estimates that she will need almost all of the money in the IRA account (after paying taxes on the amounts withdrawn) to pay her living expenses that cannot be paid with her Social Security income. This estimate does not include any unanticipated large medical expenses. If the IRS collection officer issues a notice of intent to levy and a timely CDP hearing request is made, the Office of Appeals will have to decide whether to allow the IRS to pursue collection action against the funds in the IRA account.

In each of these hypotheticals, the amount of discretion possessed by the Office of Appeals to resolve the CDP appeals is unfettered and considerable. There are no legal issues involved. Rather, the Office of Appeals must adjudicate collection issues that will have a profound effect on the lives of the taxpayers.

This decisions made by the Office of Appeals in these types of cases are judicial in nature, which strongly supports a conclusion that the employees who adjudicate these types of appeals are subject to the Appointments Clause. *Freytag v. Commissioner*, 501 U.S. 868, 881-82 (1991). By statute the Office of Appeals employees who adjudicate CDP appeals must be "impartial officers." 26 U.S.C. § 6330(b)(3). These same Office of Appeals employees are also

generally prohibited from having "ex parte" communications with the collection officers who proposed (or took) the collection action which is the subject of the CDP appeal. Rev. Proc. 2012-18, 2012-10 I.R.B. 455. These same employees issue written rulings when deciding CDP appeals. And it is undisputed by the Commissioner that the rulings of these same Office of Appeals employees are binding on the IRS collection persons who took or proposed taking collection action against the taxpayer.

The rulings of these same Office of Appeals employees are subject to judicial review by the Tax Court and the Courts of Appeal, but under a deferential "abuse of discretion" standard of review. *See*, *Dalton v. Commissioner*, 682 F.3d 149 (1st Cir. 2012), *Fargo v. Commissioner*, 447 F.3d 706, 709 (9th Cir. 2006), *Robinette v. Commissioner*, 439 F.3d 455, 458-59 (8th Cir. 2006). The degree of discretion afforded the Office of Appeals employees who adjudicate CDP appeals is illustrated by the case of *Fargo v. Commissioner*, 447 F.3d 706 (9th Cir. 2006). In that case, the taxpayer argued that the IRS erred in refusing to accept their offer to compromise the liability for less than the amount owed, claiming that a ruling which upholds the IRS's refusal to compromise would preclude all similarly situated taxpayers from compromising their own tax liabilities. The Ninth Circuit rejected that argument, stating as follows: "The fact that the Commissioner chose to reject Taxpayers' offer-in-compromise here does not mean that he will reject all similar offers in compromise in the future; indeed, that is the very definition of discretion." *Fargo*, 447 F.3d 706 at n.5.

The broad scope of discretion afforded the Office of Appeals employees who adjudicate CDP appeals is further illustrated by the fact that these employees retain jurisdiction to issue supplemental rulings in so-called "retained jurisdiction hearings" after the case in which the initial CDP appeal was adjudicated has been returned to the collection officer responsible for handling the collection of the liability. 26 U.S.C. § 6330(d)(2). In these retained jurisdiction hearings, the Office of Appeals must consider any issues raised regarding the collection actions taken or proposed with respect to the initial ruling and (after administrative remedies have been exhausted) any change in the taxpayer's circumstances which affects the initial ruling. *Id*. The IRS takes the position that rulings made in retained jurisdiction hearings cannot be reviewed by a court. Treas. Reg. § 301.6330-1, Q&A H2 (as amended in 2002). While CFAT believes that this regulation is invalid because it is inconsistent with the statutory language of section 6330(d)(2), the degree of discretion held by the Office of Appeals is even greater if there is no court review of rulings by the Office of Appeals in Retained Jurisdiction Hearings.

The IRS Office of Appeals employees who adjudicate CDP appeals are also required to obtain verification "that the requirements of any applicable law or administrative procedure have been met." 26 U.S.C. § 6330(c)(1). This "verification" requirement must be undertaken by the Office of Appeals even if the taxpayer does not claim that there was a failure by the IRS to follow proper procedures. *Tucker v.*

Commissioner, 135 T.C. 114, 138 (2010). And if a taxpayer claims that the IRS has failed to follow proper procedures, the Office of Appeals must address those claims in adjudicating the CDP appeal. 26 U.S.C. § 6330(c)(3).

Thus, if a notice of deficiency was issued to the taxpayer prior to the assessment of the liability and the taxpayer believes that the notice of deficiency was not sent to the taxpayer's "last known address," the Office of Appeals employee who adjudicates the CDP appeal must determine whether the assessment is legally proper. Taxpayers can raise any relevant procedural violation in a CDP appeal. Thus, as long as taxpayers timely invoke their right to a CDP appeal, taxpayers now do not need to file suits such as *Cool Fuel v. Connett*, *supra*, in order to challenge a procedural violation by the IRS. The Office of Appeals is legally required to consider all claimed procedural violations (in addition to verifying that proper procedures have been followed) when it adjudicates CDP appeals.

The IRS Office of Appeals employees who adjudicate CDP appeals are also required to determine the merits of the tax liability which is the subject of (proposed) collection action if the taxpayer challenges the amount of the tax liability in the CDP appeal and the taxpayer "did not receive a notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability." 26 U.S.C. § 6330(c)(2)(B). Failure by the Office of Appeals to consider the merits of the liability where the taxpayer has the ability to challenge the merits

of the tax liability under this provision is legal error. *Tucker*, 135 T.C. at 144.

It is the experience of the undersigned counsel that the Office of Appeals employees who adjudicate CDP appeals rarely seek legal advice from IRS attorneys. In those cases which involve primarily questions of what collection alternatives will be permitted, which is the vast majority of CDP appeals cases, there is no need for legal advice. While IRS attorneys are required by law to sign off on doubt as to collectability compromises of tax liabilities of $50,000 or more, 26 U.S.C. § 7122(b), the review of IRS attorneys is only for legal sufficiency. IRS attorneys do not second guess the "business judgment" of Office of Appeals employees who decide to accept a taxpayer's offer in compromise for less than the actual amount owed. Internal Revenue Manual ("IRM") §§ 8.23.4.2.2 (Oct. 25, 2011) and 33.3.2.2 (Aug. 11, 2004).

Those cases where the Office of Appeals seeks legal advice tend to be those involving very unusual situations, e.g., the IRS collection officer wants to seize and sell a building located on contaminated soil and the taxpayer claims that, if the IRS seizes the building, the IRS will be liable for a portion of the cleanup costs under CERCLA. But even where the Office of Appeals has sought legal advice from IRS attorneys, the Office of Appeals is not required to follow that legal advice. *See* Rev. Proc. 2012-18, 2012-10 I.R.B. 455. Thus, the legal advice provided to the Office of Appeals employee who adjudicates a CDP appeal is akin to a memo from a law clerk,

providing the law clerk's views on a point of law, to a judge, who has to decide how to resolve the case.

C. The D.C. Circuit's Opinion and Why it is Wrong

In this case, the D.C. Court of Appeals, in deciding whether IRS Office of Appeals employees who adjudicate CDP appeals are "inferior officers" who must be appointed under the Appointments Clause or instead are mere employees not covered by this Clause, stated that: "the main criteria for drawing the line between inferior Officers and employees not covered by the clause are (1) the significance of the matters resolved by the officials, (2) the discretion they exercise in reaching their decisions, and (3) the finality of those decisions." *Tucker v. Commissioner*, 676 F.3d 1129, 1133 (D.C. Cir. 2012).

The Court then concluded that matters handled by the IRS Office of Appeals employees who adjudicate CDP appeal are "significant" for purposes of the Appointments Clause and that the decisions by these employees made in adjudicating CDP appeals are "final" for purposes of the Appointments Clause. But the Court of Appeals concluded, erroneously, that these employees did not have sufficient "discretion" to be subject to the Appointments Clause.

The Court of Appeals, in erroneously concluding that these employees lacked sufficient discretion to be subject to the Appointments Clause, focused on the following six supposed limitations on

the authority of IRS Office of Appeals employees who adjudicate CDP appeals: (1) the employees are instructed to request legal advice from IRS lawyers on "novel or significant issues", (2) the employees are advised to seek "Technical Advice" from IRS National Office lawyers on complex issues or issues where there appeared lack of IRS uniformity, (3) the employees are required to follow taxpayer-favorable legal advice given under (2) or (3) above, (4) the employees are advised to follow Office of Appeals settlement guidelines, (5) in proposing a resolution of the matter by offer in compromise, the employees are subject to IRS quality review, and all offers in compromise of $50,000 or more must be reviewed by IRS attorneys, and (6) that any "closing agreement" under 26 U.S.C. § 7121 can only be done if the Treasury Secretary did not revoke his delegations to Office of Appeals employees to enter into such agreements. *Tucker*, 676 F.3d at 1134.

The reasoning of the Court of Appeals on this point is faulty. In the four hypotheticals outlined above, none of these supposed "limitations" apply. In the vast majority of all IRS CDP appeals, there are no legal issues requiring advice of counsel or advice of the IRS National office, nor is there any need for a closing agreement. And in those cases resolved via offer in compromise, counsel reviews the case only for legal sufficiency of the compromise, not to second guess the "business judgment" of the Appeals employee who has decided to accept the taxpayer's offer in compromise.

The fact is that it is rare for IRS Appeals employees who adjudicate CDP appeals to seek legal advice. It is even rarer for them to enter into closing agreements. Even where they do seek legal advice, the employees are generally not required to follow that legal advice. Rev. Proc. 2012-18, *supra*.

The fact that these employees look to internally published IRS guidelines, such as the Internal Revenue Manual, to assist them in exercising their discretion and adjudicating CDP appeals does not support the Court of Appeals' conclusion. Tax Court Judges and Special Trial Judges look to written "guidelines" in deciding cases, such as statutes and case law. Yet they are subject to the Appointments Clause. The internal "guidelines" relied upon by the IRS Appeals employees who adjudicate CDP appeals are far more precatory than a statute or binding case law and allow for the exercise of considerable discretion. Even the relevant statute requires these employees to balance "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." 26 U.S.C. § 6330(c)(3)(C).

As can be seen from the four hypotheticals outlined above, the IRS Appeals employees who adjudicate CDP appeals have considerable discretion on how to resolve these appeals, and the manner in which this discretion is exercised has significant and far ranging effects on the taxpayers involved in these appeals. Accordingly, the Court of Appeals committed serious error in concluding that these

employees lack sufficient discretion to be subject to the Appointments Clause.

II. The Appointments Clause Issue is Administratively Important

The Appointments Clause issue presented in this case is of considerable administrative importance. As noted in the Petition for Certiorari at page 15, over 50,000 CDP appeals were closed by the IRS Office of Appeals in fiscal year 2011. The actual number of CDP appeals pending at any given time is likely somewhere near 50,000. Thus, this issue affects a significant number of administrative cases pending within the IRS, far more than the number of cases handled by the Tax Court's Special Trial Judges, whose status under the Appointments Clause was addressed by this Court in *Freytag v. Commissioner*, 501 U.S. 868 (1991).

Requiring the appointment of all IRS Appeals employees who adjudicate CDP appeals is important to the administration of the tax laws because it will afford an additional degree of independence for those employees who adjudicate CDP appeals. Currently, those employees work for and are evaluated by the Office of Appeals. IRS employees, including employees of the Office of Appeals, are evaluated in part by how quickly they can "move" their cases. A premium is placed on closing cases quickly. See generally, IRS National Taxpayer Advocate 2010 Annual Report to Congress, at 28-48, available at http://www.irs.gov/pub/irs-utl/2010arcmsp3_irsmeasures.pdf. Needless to say, the Commissioner's emphasis on closing cases does

not inspire confidence in the decision making process used by the Commissioner. Few persons other than the National Taxpayer Advocate want to discuss this problem publicly. The Commissioner, who must live within the budget allocated by Congress, does not want to advertise to the world that there is systemic pressure within the IRS to "close" cases quickly to deal with budgetary concerns. Practitioners do not discuss this pressure publicly out of fear that their cases will receive less favorable treatment from the Commissioner after they have spoken out. Employees and former employees of the Commissioner do not discuss this pressure publicly for obvious reasons.

Of course, each employee of the Commissioner reacts to this type of pressure in his/her own way. Some will ignore this pressure and handle the case in a manner (s)he thinks it needs to be handled. But not all of the Commissioner's employees ignore pressure to "move" their caseload. Requiring the appointment of IRS Office of Appeals employees who adjudicate CDP appeals will afford a greater measure of independence to these individuals.

Finally, the Appointments Clause issue has significance for other government agencies. For example, in the case of *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board,* 2012 U.S. App. LEXIS 13757 (D.C. Cir. Jul. 6, 2012), the D.C. Circuit held that Copyright Royalty Board judges setting copyright rates were principal officers for purposes of the Appointments Clause, even though these judges are required to obtain and follow the

opinion of the Registrar of Copyrights for a "novel material question of substantive law", and even though the Registrar of Copyrights is also allowed to review their final rulings for legal error. 17 U.S.C. § 802(f)(1). There is obvious tension between the holding in that case and the holding in the present case, notwithstanding the brief efforts by the panel in *Intercollegiate Broadcasting Systems, Inc., supra,* to distinguish the two cases. Thus, the Appointments Clause issue is of general importance throughout the government.

III. The Court Should Grant Certiorari Because It Is Unlikely That a Split in the Circuit Court of Appeals Will Occur, Due to the Venue Provisions Governing Appeals from the Decisions of Tax Court

This Court should grant the petition for certiorari, notwithstanding the absence of a split in the Circuit Courts of Appeal. First, the Commissioner can prevent a split in the Circuit Courts of Appeal from ever developing by channeling appeals in CDP cases which raise the Appointments Clause issue to the D.C. Circuit through the venue provision of 26 U.S.C. § 7482.

Section 7482 governs venue on appeal from the Tax Court to the Circuit Courts of Appeal. Venue for appeals of cases where a taxpayer other than a corporation is seeking redetermination of their tax liability lies in the Court of Appeals in which the taxpayer has its legal residence. Venue for appeals of cases where a corporate taxpayer is seeking redetermination of its tax liability lies in the Court

of Appeals in which the corporation has its principal place of business or in which the corporate return was filed if there is no principal place of business in any Circuit. In CDP cases, the taxpayers are generally not seeking redetermination of their tax liability, so these venue provisions typically are inapplicable.

There are also venue rules for certain specialized actions brought under sections 7476, 7428, 6226, 6228(a), 6247, 6252 and 6234 of Title 26. None of these sections involve CDP cases.

Finally, there is a "default" venue provision, which provides that, if none of the above-described venue provisions apply, venue on appeal of a Tax Court decision lies in Circuit Court of Appeals for the District of Columbia. Because appeals from the Tax Court's decision in CDP cases do not fall within any of the specific rule specified above, it would appear that venue on appeal of all CDP cases in which the taxpayer is not seeking a redetermination of their tax liability lies in the D.C. Circuit Court of Appeals.

Strangely, neither taxpayers nor the Commissioner have in the past invoked this venue rule. Rather, both taxpayers and the Commissioner have pursued appeals in CDP cases to the Court of Appeals in which the taxpayer had his/her/its legal residence. *See, e.g.*, *Fargo v. Commissioner*, *supra* (appeal to the 9th Circuit), *Robinette v. Commissioner, supra*, (appeal to the 8th Circuit). Why the "default" venue provisions described above

have not been invoked by any of the parties on appeals from the Tax Court in CDP cases is unclear.

But now that the Commissioner has a favorable ruling from the D.C. Circuit on the Appointments Clause issue, the Commissioner can invoke the "default" venue provisions discussed above to direct all appeals in CDP cases in which a taxpayer raises the Appointment Clause issues to the D. C. Circuit, thereby preventing a split in the Circuits from ever developing on this issue. Accordingly, it is appropriate for this Court to grant certiorari on this issue now. A split in the Circuit Court of Appeals is unlikely to ever develop.

In addition, this Court previously granted certiorari in the case of *Freytag v. Commissioner*, *supra*, which involved the status of the Tax Court's Special Trial Judges under the Appointments Clause. As noted by the Petitioner in his Petition, the power and discretion exercised by the IRS Appeals employees who adjudicate CDP appeals are at least as broad as the power of the Tax Court's Special Trial Judges. Accordingly, this Court should grant writ of certiorari filed in this case.

CONCLUSION

For the reasons set forth above, this Court should grant the petition for writ of certiorari in this case.

Respectfully submitted,

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