No. 07-308

In the
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

CLINTWOOD ELKHORN
MINING COMPANY, et al.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

BRIEF AMICUS CURIAE OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a taxpayer's suit under the Tucker Act, 28 U.S.C. § 1491(a), seeking damages and interest for a violation of the Constitution's specific limitation on the power of Congress to impose a tax or duty on exports, is foreclosed by the Internal Revenue Code's tax refund scheme.

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INTEREST OF AMICUS CURIAE

Amicus, Nation Federation of Independent Business Legal Foundation[1] is the legal voice of small business in America. As the legal arm of NFIB, the Legal Foundation represents the interests of small business in the nation's courts. The Legal Foundation participates in precedent setting cases that will have a critical impact on small businesses nationwide, such as the case before the Court in this action.

The National Federation of Independent Business is an organization of more than 350,000 members in all 50 states. The members of NFIB are the small businesses that make up the backbone of the American economy. Small businesses account for more than 99% of all employers in the country and provide more than one-half of all jobs in our economy. More importantly, two-thirds of new job growth comes from small business. According to the United States Small Business Administration, small business accounts for more than half of the private nonfarm gross domestic product in America. United States Small Business Administration website,

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

FAQs: Frequently Asked Questions, a*vailable at* http://app1.sba.gov/faqs/faqIndexAll.cfm?areaid=24 (last visited Feb. 17, 2008). In addition to providing goods and services in every sector of the economy (including exporting goods to other countries), NFIB members bear a significant portion of the overall national tax burden.

In pursuit of its goal to support small business in America, NFIB and the NFIB Legal Foundation have participated as amicus curiae in several cases before this Court including *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162 (2007), *Rapanos v. United States*, 547 U.S. 715 (2006), *Ballard v. Comm'r of Internal Revenue*, 544 U.S. 40 (2005), *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202 (1997), *Pierce v. Underwood*, 487 U.S. 552 (1988), and *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978).

This case is of special interest to small businesses that are often on the front lines of new taxing schemes. Small-business owners most often identify tax-related regulations as the most burdensome type of regulations with which they must comply. William J. Dennis, Jr., *Coping with Regulation*, NFIB National Small Business Poll, Vol. 1, Issue 5, 2001, at 4, *available at* http://www.411sbfacts.com/sbpoll.php?POLLID=0038&KT_back=1 (last visited Feb. 17, 2008). Because a complex and often unfair tax code and burdensome taxes are among the top concerns of small-business owners, NFIB is committed to securing tax relief and equity for its members.

These issues are at the forefront of this case where the government is urging a requirement that

taxpayers file constitutional challenges to Congressional enactments with an administrative agency that has no authority to rule on the challenge, and then wait six months for the agency to decide it has no authority to strike down an act of Congress before a legal action may be filed. The resources of small business are better spent growing the economy and creating new jobs.

SUMMARY OF ARGUMENT

The United States has already conceded that the tax at issue here violated the Export Clause of the Constitution. U.S. Const. art. I, § 9, cl. 5. The dispute now centers on the remedy for those injured by the unconstitutional enactment. More precisely, the question is whether Congress intended that challenges to constitutionality of federal laws be referred to an executive agency for resolution.

It may be that not every provision of the Constitution is "self-executing," and certainly few violations call for a damages remedy as a matter of constitutional text. Where the scope of the violation is expressed in the Constitution in concrete financial terms, however, this Court has ruled that the provision of the Constitution is self-executing. That is the case with the Export Clause. The clause is a specific limit on the power of Congress and is expressed in concrete financial terms. Thus, the Export Clause supports a cause of action for damages.

The United States urges that this action for damages for constitutional violations must be referred to an administrative agency. Yet, the statute on which the United States relies will not

support such a construction. There is no evidence that Congress intended that constitutional challenges to its authority be presented to the Secretary of the Treasury for resolution. It is certain that the Secretary has no authority to strike a Congressional enactment, and there is no evidence that Congress attempted to grant the Secretary such a judicial power.

With no other more specific Congressional enactment directly applicable, those who were damaged by the unconstitutional enactment are free to file their damage claims in the Claims Court under the Tucker Act. That act constitutes a waiver of sovereign immunity and provides the appropriate limitations period for filing damages actions based on the unconstitutional exaction.

ARGUMENT

I

THE EXPORT CLAUSE IS SELF-EXECUTING

A. The Export Clause Imposes a Clear Limit on the Power of the Federal Government

This Court has noted that the limitation imposed by the Export Clause is clear and direct. *United States v. Int'l Bus. Machines Corp.*, 517 U.S. 843, 846 (1996). The clause is the result of a compromise struck between northern and southern states at the constitutional convention. Without this clear limit imposed on the scope of federal government power, the constitution may not have been possible. *See* The Avalon Project at Yale Law School website, *The Debates in the Federal Convention of 1787: Reported by James Madison:*

August 16, 1787, *available at* http://www.yale.edu/lawweb/avalon/debates/816.htm (last visited Feb. 17, 2008); *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 367-69 (1998); *Int'l Bus. Machines Corp.*, 517 U.S. at 859-60; *Fairbank v. United States*, 181 U.S. 283, 290 (1901). Although the United States has attempted to characterize this as a "narrow purpose" deserving of a narrow construction, *Fairbank*, 181 U.S. at 292, this Court has rejected such an approach. *Id.*

> As in *Fairbank*, we think the text of the constitutional provision provides a better decisional guide than that offered by the Government. The Government's policy argument–that the Framers intended the Export Clause to narrowly alleviate the fear of northern repression through taxation of southern exports by prohibiting only discriminatory taxes–cannot be squared with the broad language of the Clause. The better reading, that adopted by our earlier cases, is that the Framers sought to alleviate their concerns by completely denying to Congress the power to tax exports at all.

Int'l Bus. Machines Corp., 517 U.S. at 860-61. However narrow one might characterize the debate over this provision, "the remedial provision that ultimately became the Export Clause does not [have a narrow focus], and there is substantial evidence from the Debates that proponents of the Clause fully intended the breadth of scope that is evident in the language." *Id.* at 860.

The tax at issue in this case breaches this limitation on the power of Congress. The Coal Excise Tax (26 U.S.C. § 4121) imposed a tax on all coal–*including* coal that was exported to other countries. *Ranger Fuel Corp. v. United States*, 33 F. Supp. 2d 466, 468 (E.D. Va. 1998). While prior statutes levying similar excise taxes included a specific provision exempting products slated for export, this statute contained no such exemption. *Id.* In *Ranger Fuel*, the federal district court ruled the tax unconstitutional as a violation of the Export Clause. *Id.* at 469. The Internal Revenue Service acquiesced to the ruling. *See Venture Coal Sales Co. v. United States*, 370 F.3d 1102, 1103 n.1 (Fed. Cir. 2004).

It is conceded, therefore, that Congress had no power under the Constitution to impose this tax on coal slated for export. As explained below, this violation of the Export Clause supports a cause of action for damages.

B. Expressed in Concrete Financial Terms, the Export Clause Is Self-Executing

For the most part, the limitations on federal power under the Constitution are not expressed in financial terms. There is thus no intent expressed in the text of the Constitution that would support a claim for damages. A few provisions of the Constitution, however, do define the limit of federal power in financial terms. The text of the Constitution itself defines the nature of the injury in concrete financial terms and no further congressional action is required to define a damages remedy. A clear example of this is the Takings Clause of the Fifth Amendment.

The Fifth Amendment provides: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The Takings Clause imposes a clear limitation on the reach of government power, prohibiting the uncompensated confiscation of private property. *See San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 654 (1981). In this context, "just compensation" is not stated as a "remedy" for the seizure of property. Instead, it is the necessary precondition for a lawful taking under the Constitution. *See Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893).

Yet the "just compensation" language of the Fifth Amendment also serves to define the nature of the violation in concrete financial terms. When property is taken without payment or with less than adequate compensation, the Fifth Amendment dictates the measure of damages–just compensation. Under the Fifth Amendment, payment of just compensation is the necessary precondition for a constitutional taking. Thus, payment of just compensation is the minimum remedy called for in the Constitution for an uncompensated taking. *Id.* No action of Congress is necessary to define the scope of the damages to be awarded. *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 304 (1923).

This self-contained definition of the injury is what establishes the self-executing nature of the Takings Clause. As this Court has noted:

> But we need not have recourse to this natural equity, nor is it necessary to look through the constitution to the affirmations lying behind it in the

> Declaration of Independence, for in this fifth amendment there is stated the exact limitation on the power of the government to take private property for public uses.

Monongahela Navigation Co., 148 U.S. at 325. The constitutional command for "just" compensation also convinced this Court that the damages remedy must include the payment of interest from the date of the taking. *Seaboard Air Line Ry. Co.*, 261 U.S. at 304.

This Court has not treated this as a matter in dispute. Instead, it is a simple and noncontroversial application of the limitation of government power imposed by the Constitution. "Having taken the lands of the defendants in error, it was the duty of the government to make just compensation as of the time when the owners were deprived of their property." *United States v. Rogers*, 255 U.S. 163, 169 (1921). The Court's decision in *Jacobs v. United States*, 290 U.S. 13 (1933), provides a clear statement of the principle:

> The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. *Statutory recognition*

> *was not necessary*. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the amendment. The suits were thus founded upon the Constitution of the United States.

Id. at 16 (emphasis added). This recognition that the Takings Clause of the Fifth Amendment supported a free-standing damages remedy was repeated in *United States v. Clarke*, 445 U.S. 253, 257 (1980) (citation omitted) ("A landowner is entitled to bring such an action as a result of 'the self-executing character of the constitutional provision with respect to compensation.'") and *San Diego Gas & Elec. Co.*, 450 U.S. at 654.

These same principles were at work in *Hatter v. United States*, 953 F.2d 626 (Fed. Cir. 1992) in a claim regarding judicial pay. The court in *Hatter* considered a claim that the Social Security Amendments of 1983 violated Article III, section 1 of the Constitution providing that judges' compensation "shall not be diminished during their continuance in office." *Id.* at 628. The challenged enactment extended social security coverage (and tax assessments) to federal judges, effectively reducing the compensation that the judges received. *Id.* at 627. As in this case, the judges brought their action under the Tucker Act seeking damages for violation of their rights under this provision of the constitution. *Id.* at 627-28. The United States sought dismissal of the case since the judges did not submit an administrative claim for refund under 26 U.S.C. § 7422.

The court of appeals rejected the argument that the judges were required to file administrative claims for tax refunds. The court noted that Article III, section 1 "of the Constitution, fairly interpreted, mandates the payment of money in the event of a prohibited compensation diminution. . . . This language presupposes damages as the remedy for a governmental act violating the compensation clause." *Hatter*, 953 F.2d at 628.

As was the case with the Takings Clause, the court noted that this provision of the Constitution was stated in concrete financial terms–no further definition of the remedy is required by Congress. "[T]he Constitution itself provides a remedy–compensation. In sum, by forbidding any diminution of judicial compensation, the Constitution itself requires repayment of prohibited reductions in compensation to Article III judicial officers." *Id.* at 628. The court concluded that both the purpose and text of Article III, section 1 "embraces a self-executing compensatory remedy." *Id.* at 629.

The same is true for the Export Clause. The very precision of this limitation on the scope of Congressional power defines the minimum necessary damages remedy–return of the "tax or duty" that was levied on the export. Requiring further legislative or executive action would frustrate the purpose of the Export Clause. *See id.* at 628-29. As with the Takings Clause and the Judicial Compensation Clause, the Constitution itself defines the remedy. Because the remedy is defined in the Constitution (just compensation for a taking, restoration of salary for a diminution of judicial compensation; or return of a tax or duty levied on exports), the provision of

the Constitution is "self-executing" and supports an action for those damages without any further action of Congress.

II

THE TAX REFUND ADMINISTRATIVE PROCEDURE IN SECTION 7422 WAS NOT INTENDED FOR CONSTITUTIONAL CHALLENGES TO CONGRESSIONAL ENACTMENTS

The brief for the United States notes that Congress has set out a "detailed and finely reticulated refund scheme, *including the mandatory administrative claims process*" for challenges to the application of the Tax Code. Brief for the United States at 8 (emphasis added). This is undoubtedly an accurate assessment of the administrative remedy provided for under 26 U.S.C. § 7422. However, the United States misses the import of having such a "finely reticulated" procedure. Whenever a detailed procedure is present in the statute, that very detail provides the Court with its best clue as to legislative intent. *See Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 127 S. Ct 1994, 1996 (2007).

In the case of Section 7422, Congress required an administrative claim for refund to first be filed with the Secretary of the Treasury. Under this scheme, no judicial action for remedy may be filed until the Secretary has had at least six months on which to act on the administrative petition. 26 U.S.C. § 6532. This detailed procedure is obviously applicable to allegations that the Secretary has erred–either as a matter of fact or statutory interpretation–in the application of the Tax Code to

an individual taxpayer. *See Mikulski v. Centerior Energy Corp.*, 501 F.3d 555, 564 (6th Cir. 2007). Courts have consistently held that the intent behind this procedure is for claims to be resolved short of litigation. *See IA 80 Group, Inc. & Subsidiaries v. United States*, 347 F.3d 1067, 1074 (8th Cir. 2003); *Mallette Bros. Constr. Co., Inc. v. United States*, 695 F.2d 145, 155 (5th Cir. 1983); *Union Pac. R.R. Co. v. United States*, 389 F.2d 437, 442 (Ct. Cl. 1968). The United States argues in this case, however, that this procedure was also intended for challenges to the constitutionality of a Congressional enactment.

The brief of the United States offers no evidence of a legislative intent that constitutional challenges were to be referred to the Secretary of the Treasury. Adjudicating the constitutionality of an Act of Congress is, of course, a judicial function. Congress could not assign that power to the executive. *See United States v. Booker*, 543 U.S. 220, 243 (2005).

Given that it is unlikely that Congress intended to grant the Secretary of the Treasury the power to rule on the constitutionality of an Act of Congress, the application of Section 7422 to this proceeding becomes even more problematic. As noted, the statute requires the initial claim to be filed with the Secretary. 26 U.S.C. § 7422. No judicial action may be filed until six months have elapsed after this filing. 26 U.S.C. § 6532. There is no purpose served to presenting an administrative petition for refund based on a constitutional challenge to the statute. Nor can there be any legitimate purpose behind a six-month moratorium on judicial review of that constitutional challenge.

The United States notes that Congress is free to impose whatever administrative procedures it desires as a condition to the waiver of sovereign immunity. Brief of the United States at 28. However, there is no evidence to suggest that Congress intended to impose pointless procedural hurdles to claims such as that before the Court in this action. The procedural "hoops" to filing a constitutional challenge advocated by the United States in this case would only serve to make a challenge more costly and to ensure that it would take longer to resolve. Before this Court embarks on an analysis to determine if Congress has the authority to impose barriers to constitutional claims, the Court should first determine if Congress actually intended to require such apparently pointless hurdles to a constitutional claim.

The finely wrought and detailed administrative procedure for challenging an action of the Internal Revenue Service simply has no place in the resolution of constitutional challenges to congressional enactments.

III

THE TUCKER ACT'S WAIVER OF SOVEREIGN IMMUNITY AND SIX-YEAR STATUTE OF LIMITATIONS APPLY TO CLAIMS FOR DAMAGES FOR VIOLATION OF THE EXPORT CLAUSE

The Tucker Act recognizes jurisdiction in the Claims Court to hear damages claims against the United States based on the Constitution. 28 U.S.C. § 1491. The Act does not establish a cause of action, *United States v. Mitchell*, 445 U.S. 535, 538 (1980),

but does operate as a waiver of sovereign immunity, *United States v. Mitchell*, 463 U.S. 206, 215 (1983).

In *Hatter*, the Federal Circuit held that the Tucker Act provided jurisdiction for the Claims Court to hear a claim for damages based on a self-executing provision of the Constitution. *Hatter*, 953 F.2d at 627-28. According to that decision, for a claimant to invoke the court's jurisdiction under the Tucker Act, it must demonstrate "an independent source of federal law" for the claim and must further demonstrate that the particular federal law "provide[s] a damages remedy for violations." *Id.* at 628. This was satisfied in *Hatter* by the reference to Article III, section 1–the Judicial Compensation Clause.

The court in *Hatter* reasoned that the Compensation Clause provided its own remedy. "By forbidding any diminution of judicial compensation, the Constitution itself requires repayment of prohibited reductions in compensation to Article III judicial officers." *Id.* Thus, the court ruled that the judicial officers in *Hatter* could bring their claim in the Claims Court pursuant to the Tucker Act.

This same reasoning applies in this case. As demonstrated above, the Export Clause also provides its own remedy. Because it is a clearly stated limitation on the power of Congress framed in financial terms, the clause is "self-executing." It thus fulfills the requirement for a claim "founded . . . upon the Constitution." 28 U.S.C. § 1491. The provision of the Constitution, fairly interpreted, establishes "a damages remedy for violations." *See Hatter*, 953 F.2d at 628. This action was, therefore, properly before the Claims Court.

The United States expresses concern, however, that this will lead to the filing of *every* constitutional challenge to a tax under the Tucker Act. Brief for the United States at 28. This parade of horribles, however, will not result from the analysis urged by Respondent. The First Amendment claims feared by the United States are based on a textual command that "Congress shall make no law". U.S. Const. amend. I. That text does not demonstrate any intent that there is a damages remedy for a breach of the limit on Congressional power. By contrast, the Export Clause forbids the imposition of a "tax or duty" on exports. Because of the nature of the limit on the power of Congress, the measure is defined in financial terms. The obvious remedy for the imposition of a tax forbidden by the Constitution is monetary damages. Such a remedy makes the citizen whole and fulfills the purpose of the Constitution. Because the Export Clause is self-executing and contemplates an award of damages (return of the unconstitutional tax collection), the Tucker Act supplies the necessary jurisdiction for the Claims Court to hear this case.

CONCLUSION

The judgment of the Court of Appeals for the Federal Circuit should be affirmed.

DATED: February, 2008.

Respectfully submitted,

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