No. 22-5797

In the Supreme Court of the United States

THOMAS A. FORREST AND JAMIE W. FORREST,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Supreme Court erred in their interpretation of the Internal Revenue Code in *United States v. Brockamp*, 519 U.S. 347 (1997) by disallowing equitable tolling in all circumstances because they may not have been aware of the tension between two United States Codes (26 U.S.C. §6511(a) and 10 U.S.C. §1174(h)(1)) resulting in an adverse financial impact on a large group of taxpayers.

2. Whether the *Brockamp* decision will be overturned to allow equitable tolling for taxpayers caught between two United States Codes because of *Brockamp's* precedent on lower court rulings.

3. Whether United States military retirees can obtain a fair outcome to recover taxes paid on funds that were later returned to the federal government.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

Lovett v. United States, No. 95-5158, U. S. Court of Appeals for the Federal Circuit. Judgment entered April 9, 1996.

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The opinion of the U.S. Court of Appeals for the Federal Circuit appears at Appendix A to the petition and is unpublished.

The opinion of the U.S. Court of Federal Claims appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals for the Federal Circuit decided our case was July 8, 2022.

No petition for rehearing was timely filed in our case.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Appendix C reproduces the text of 10 U.S.C. §1174(h)(1) and 26 U.S.C. §6511(a).

STATEMENT OF THE CASE

The petitioners are Captain Thomas A. Forrest, United States Navy, Retired, and his wife Jamie W. Forrest. Captain Forrest served over 29 years in the U.S. Navy; the initial 11 years on active duty, the next 9 years as a drilling Navy Reservist, and the remaining 9 years on active duty. After Captain Forrest returned to active duty and completed 20 years of active service he was permitted to receive all benefits, including pay, immediately upon retirement.

The petitioners, neither of whom have a Juris Doctorate, recognize that filing a writ *pro se* may put the petition at risk. However, in *Wadlington v. United States*, 68 Fed. Cl. 147 (2005) "We accord a plaintiff proceeding *pro se* latitude in drafting

pleadings. *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972)." Additionally, "It is important to recognize that, as a *pro se* litigant, plaintiff is entitled to certain leniencies which are afforded to parties proceeding in that capacity. This is particularly true when ruling on a motion to dismiss, as '[i]t is settled law that the allegations of ... a [*pro se*] complaint, however inartfully pleaded[,] are held to less stringent standards than formal pleadings drafted by lawyers[.]' *Hughes v. Rowe*, 449 U.S. 5, 9, 101 S.Ct. 173, 66 L.Ed.2d 163 (1980) (internal quotations omitted); *Troutman v. United States*, 51 Fed.Cl. 527, 531 (2002)." *Minehan v. United States*, 75 Fed. Cl. 253 (2007).

Separated U.S. military service members who received taxable separation pay and later qualified for retirement pay, by law must return the gross separation pay. Those retirees, who paid income taxes when they received the separation pay and later filed a claim for refund of the taxes of the gross pay, cannot qualify for a refund because the period of limitations has expired, and the U.S. Supreme Court has held that equitable tolling cannot be applied to the overpayment statute of limitations. An upfront assumption is that retirees who received separation pay subsequently filed all tax returns in a manner compliant with the terms of the Internal Revenue Code (IRC).

A limited number of U.S. military officers and enlisted personnel are involuntarily separated each year for various reasons not related to discipline. Upon discharge, 10 U.S.C. §1174 "Separation pay upon involuntary discharge or release from active duty" is calculated and provided to those service members. Each pay calculation is

independent of each other. The separation pay is provided to the veteran in a lump sum, less required statutory withholding for advanced payment of applicable taxes including a one-time federal tax (e.g. 28% withholding rate in 1997 for the petitioners.) Thus, a 28% withholding rate on a lump sum payment of $50,000 would have $14,000 of federal income tax withheld. The veteran would then file an Internal Revenue Service (IRS) Form 1040 the following year declaring all income earned in the previous year, including the separation pay, and calculate the tax liability based on the total income earned.

To retain the separation pay after being discharged, the veteran has two options: 1) mandatory enrollment in the Ready Reserve (i.e. their name is placed on a list in case of an emergency recall), 2) affiliate with the Active (i.e. drilling) Reserves and continue to earn eligible years of service towards retirement, or 3) any combination of the two for a minimum of three years. If the veteran elects to continue serving in the Active Reserves or returns to active duty until becoming retirement eligible (obtaining either a Reserve or Active duty retirement), they will eventually receive retirement pay and other benefits.

Years later, after retiring, a veteran who received separation pay under 10 U.S.C. §1174(a)-(f) will have their separation pay recouped per 10 U.S.C. §1174(h)(1) and (h)(2)[1] . Specifically, §1174(h)(1) states:

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[1] 10 U.S.C. §1174(h)(2) expounds on §1174(h)(1) regarding disability compensation from the Department of Veterans Affairs. Because the Dept. of Veterans Affairs disability compensation does not directly affect the federal income tax withheld, further discussion of §1174(h)(2) is not required.

> A member who has received separation pay under this section...and who later qualifies for retired or retainer pay under this title or title 14 shall have deducted from each payment of such retired or retainer pay an amount, in such schedule of monthly installments as the Secretary of Defense shall specify, taking into account the financial ability of the member to pay and avoiding the imposition of undue financial hardship on the member and member's dependents, until the total amount deducted is equal to the total amount of separation pay...so paid.

10 U.S.C. §1174(h) is the source for the Department of Defense (DoD) Financial Management Regulation, Volume 7B, Chapter 4, Sections 040502 and 0410, which details/addresses the Secretary of Defense's specific policies regarding recoupment of separation pay, including establishing a recoupment rate not to exceed 40% of retirement pay, and stating the Defense Finance and Accounting Service (DFAS) shall provide written notification to members (who are subject to recoupment) 90 days in advance of the initial collection from their retired pay.

Unfortunately, because the percentage of service members who are involuntarily separated is extremely small when compared to the total number of service members who transition from active duty, and there is no way to verify in advance the career intentions of the veterans involuntarily separated, the potential impact of 10 U.S.C. §1174(h) is not addressed during the transition process, thus making the DFAS recoupment a surprise to those veterans who receive the notification several years later.

The consequence of 10 U.S.C. §1174(h)(1) is that veterans (who had the one-time tax withholding on their separation pay) will have their gross separation pay

recouped after retirement resulting in paying back the DoD an amount that exceeds the net separation pay received.

As a result of the gross separation pay being recouped, the separation pay initially received (which is reported by DFAS to the IRS on Form W-2 as "wages, tips, other compensation") in essence never existed. However, the one-time tax withheld still remains with the IRS.

Similar to the steps taken by the petitioners, veterans could then contact the IRS regarding how to obtain a refund for the applicable tax withheld. They may be advised by IRS officials to file a 1040X requesting a refund for the tax year that the separation pay was earned. In due course, the veteran will be advised by the IRS that a claim for a refund is not allowed if they "filed it more than three years after the tax return due date." However, the IRS provides a process which advises the veteran that they "may pursue the matter further by filing suit in either the United States District Court or the United States Court of Federal Claims."

Equitable tolling pleadings filed with a U.S. District Court or the U.S. Court of Federal Claims has historically resulted in dismissal by the courts on the grounds that the taxpayer failed to file a timely claim for refund and the courts lack subject matter jurisdiction over the complaint. Specifically, the pleading would be dismissed because the periods of limitation for filing a claim for refund are set forth in 26 U.S.C. §6511(a) which states:

> Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be

> filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid.

This introduces a conflict or tension between 10 U.S.C. §1174 and 26 U.S.C. §6511 for taxpayers who are retired military service members and received involuntary separation pay. Primarily, the veteran will be informed of the recoupment by DFAS after the three-year statute of limitations for filing a claim for refund will expire.

Appeals filed to the respective U.S. Court of Appeals by taxpayers contesting the District Court or the Court of Federal Claims dismissal ruling have also historically resulted in affirming the dismissal by the courts for lack of subject matter jurisdiction.

The petitioners received such an affirmation from the Court of Appeals for the Federal Circuit regarding their claim.

Case Law Background

There are two notable cases that the Court has ruled on which are frequently referenced as precedent in other cases: *United States v. Dalm*, 494 U.S. 596 (1990) and *United States v. Brockamp*, 519 U.S. 347 (1997) regarding equitable recoupment and equitable tolling, respectively.

There have been numerous claims filed requesting equitable tolling for tax refunds in various U.S. District Courts or the U.S. Court of Federal Claims. All cases were dismissed because the courts lacked subject matter jurisdiction, not because of the merits of the claims.

Similarly, appeals filed in the District Courts' respective U.S. Courts of Appeals or in the U.S. Court of Appeals for the Federal Circuit resulted in holdings that affirmed the dismissal strictly by the lower courts' lack of subject matter jurisdiction, not the merits of the claims (with one exception, *Brockamp v. United States*, 67 F.3d 260 (9th Cir. 1995) which ruled in favor of the plaintiff-appellant, but was reversed by the Supreme Court (*United States v. Brockamp*, 519 U.S. 347 (1997)). According to the Court, "All other Circuits that have considered the matter, however, have taken the opposite view. They have held that §6511 does not authorize equitable tolling." *Brockamp*, 519 U.S. at 349.

Notable Courts of Appeals examples include:

- First Circuit (*Oropallo v. United States*, 994 F.2d 25 (1st Cir. 1993)*),
- Fourth Circuit (*Miller v. United States*, 949 F.2d 708 (4th Cir. 1991), and *Webb v. United States*, 66 F.3d 691 (4th Cir. 1995)*)
- Seventh Circuit (*Swietlik v. United States*, 779 F.2d 1306 (7th Cir. 1985))
- Ninth Circuit (*Brockamp v. United States*, 67 F.3d 260 (9th Cir. 1995))
- Eleventh Circuit (*Vintilla v. United States*, 931 F.2d 1444 (11th Cir. 1991)*)
- Federal Circuit (*Lovett v. United States*, 81 F.3d 143 (Fed. Cir. 1996)*, and *Wadlington v. United States*, 176 Fed. Appx. 105 (Fed. Cir. 2006))

* Cases referenced in *Brockamp*, 519 U.S. at 349.

The Court granted certiorari to resolve the conflict between the Ninth Circuit and the other Circuits.

What is undeniable is that the eight aforementioned cited cases, in addition to *Irwin v. Department of Veterans Affairs*, 498 U.S. (1990) and other equitable tolling

cases (not referenced) all discuss the three-year time limitation prescribed by §6511(a) that could have been mitigated by each plaintiff, but not one of the cases state that the reason for an untimely filing was a result of a subsequent action by another U.S. Government agency or tension with another U.S.C. that required the plaintiffs to abide by another law in addition to §6511(a), particularly if the non-Title 26 U.S.C. made it impossible for the plaintiffs to know in advance the cause of action was impending -- i.e. injury/damages would not be suffered until long after the three-year time limitation has expired.

Factual Background

The following timeline and actions taken by the petitioners were undisputed by the Court of Federal Claims.

The petitioner (Captain Forrest) separated from active duty service in the Navy in February 28, 1997. Upon discharge, he received $45,877.00 in gross separation pay, which was taxed at a rate of 28% resulting in a withholding of $12,845.57.

The petitioners timely filed their 1997 tax returns in April 1998. DFAS issued a Form W2-C to the petitioners for the 1997 tax year, reporting an increase in compensation in the amount of $45,877 arising from his receipt of separation pay. DFAS also reported withholding $12,845.57 in federal income tax from the gross amount of separation pay.

According to *Dalm*, "...unless a claim for refund of a tax has been filed within the time limits imposed by §6511(a), a suit for refund, regardless of whether the tax is alleged to have been 'erroneously,' 'illegally,' or 'wrongfully collected,' §§1346(a)(1),

7422(a), may not be maintained in any court. See *United States v. Kales*, 314 U.S. 186, 193 (1941)." *Dalm*, 494 U.S. at 602. Likewise, "Section 6511(a) applies to claims for refund of a tax 'overpayment.' The commonsense interpretation is that a tax is overpaid when a taxpayer pays more than is owed, for whatever reason or no reason at all. Even in *Bull* [*Bull v. United States*, 295 U. S. 247, 260-261, 263 (1935)]...we described the inconsistent tax as being an 'overpayment.'...The word encompasses 'erroneously,' 'illegally,' or 'wrongfully' collected taxes, as those terms are used in 28 U.S.C. §1346(a)(1) (1982 ed.) and §7422(a)." *Id.* at 609, Footnote 6.

Contrary to §§1346(a)(1) and 7422(a), the federal tax obligation for the petitioners separation pay collected by the IRS in 1997 was neither "erroneous," "illegal" nor "wrongfully collected" -- the one-time tax withheld on the separation pay was correctly assessed by DFAS and collected by the IRS in accordance with the IRC, especially since the petitioner's (Captain Forrest) future status in the U.S. Navy was still unknown at that time.

On March 1, 1997, the petitioner (Captain Forrest) affiliated with the U.S. Navy Reserve component as a drilling reservist, and in 2012 was approved to receive an active duty retirement upon completion of 20 years active service.

On April 30, 2015, the petitioner (Captain Forrest) retired from active duty with the U.S. Navy and immediately began receiving retirement pay. By correspondence dated January 6, 2016, DFAS notified the petitioner of its intent to recoup separation payment "received as a result of your previous separation from active duty" from his monthly retirement payments.

When the gross separation pay was recouped by DFAS from 2016-2017, the correctly assessed tax obligation on the petitioners' separation pay was retained by the IRS.

On May 20, 2016, the petitioners filed a Form 1040X with the IRS seeking to amend their 1997 tax return to exclude from their reported gross income the separation payment of $45,877 resulting in the refund of the $12,845 tax obligation. On January 31, 2017, the IRS denied the petitioners' claim.

Court of Federal Claims Proceedings

On January 18, 2019, the petitioners filed a tax refund action against the U.S. Government in the U.S. Court of Federal Claims (No. 19-110T).

On March 24, 2020, the court issued a Memorandum Opinion stating that the facts are undisputed and granted the United States' motion to dismiss that included the following:

"Among other requirements, the Internal Revenue Code requires that claims for tax refunds must first be filed with the Secretary of the Treasury." and "Indeed, under [26 U.S.C.] §7422(a):

> "No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof." Pg. 3 and 4

Regarding §7422(a), the petitioners filed the 1040X on May 16, 2016 per the instructions provided by the IRS Department Manager, Stephanie Rapp, in a letter to the petitioners dated May 6, 2016. Still, it is not §7422 that is in conflict/tension with §1174, rather it is §6511.

The opinion also states, "Had the Forrests desired to recover taxes paid in 1997 on Mr. Forrest's separation pay, they should have done so contemporaneously, i.e., within three years of filing their 1997 return." Pg. 5

In reference to 26 U.S.C. §§1311–1314, the opinion states:

> "These provisions, in specified circumstances, 'permit a taxpayer who has been required to pay inconsistent taxes to seek a refund of a tax the recovery of which is otherwise barred by [I.R.C.] ... 6511(a).'" *Stephens v. United States*, 884 F.3d 1151, 1155 (Fed. Cir. 2018) (quoting *Dalm*, 494 U.S. at 610). The *Stephens* court explained the purpose and limits of §§1311–1314:
>
> > "In general, mitigation allows a taxpayer or the IRS to 'correct errors otherwise barred by the statute of limitations' when all requirements in the mitigation provisions are met. The primary purpose of the mitigation provisions is to prevent the inconsistent treatment of items that result in a windfall to either the taxpayer or the Service. However, Congress did not intend by [the mitigation provisions] to provide relief for inequities in all situations in which just claims are precluded by statutes of limitations.
>
> "884 F.3d at 1158 (citations and internal quotations omitted); see also *Allred v. United States*, 689 Fed. Appx. 392, 397 (6th Cir. 2017) (Noting that though mitigation provisions are meant to allay effects of 'unfair results' which may result in connection with tax refunds, 'Congress did not intend by [the provisions] to provide relief in all situations in which just claims are precluded by statutes of limitations.') (quoting *Olin Mathieson Chemical Corp. v. United States*, 265 F.2d 293, 296 (7th Cir. 1959)). This may well be one of the situations in which a just claim is nevertheless barred." Pg. 6

The opinion finally states, "Thus, while the Court is sympathetic to the Forrests' situation, the United States' motion to dismiss must be granted." and "Because the Forrests' claim for a tax refund arising from tax year 1997 is time-barred, this Court lacks subject matter jurisdiction to hear the Forrests' claim. Therefore, the Court hereby GRANTS the United States' motion to dismiss pursuant to RCFC 12(b)(1)." Pg. 7 and 8

Court of Appeals for the Federal Circuit Proceedings

On or about May 8, 2020, the petitioners filed a Notice of Appeal in the U.S. Court of Federal Claims. The petitioners received a Notice of Docketing from the U.S. Court of Appeals for the Federal Circuit (No. 20-1923) dated June 24, 2020.

On July 8, 2022, the Court of Appeals affirmed that the Court of Federal Claims properly dismissed the case which included the following by a panel of judges:

"The Court of Federal Claims granted the motion and dismissed the action for lack of subject-matter jurisdiction, pursuant to 26 U.S.C. §§6511(a) and 7422(a). App'x 8. The Forrests appeal the Court of Federal Claims' dismissal. We have jurisdiction pursuant to 28 U.S.C. §1295(a)(3)." Pg. 3

The court's discussion included the following:

> "Because their request fell well outside the time limits set forth in 26 U.S.C. §6511(a), the Court of Federal Claims correctly dismissed this action for lack of subject-matter jurisdiction, pursuant to 26 U.S.C. §7422(a).
>
> "The arguments raised by the Forrests on appeal do not change this conclusion. The focus of their appeal is that 26 U.S.C. §6511(a) and 10 U.S.C. §1174(h)(1), in combination, result in an unfair result for veterans like Mr. Forrest who dutifully paid taxes on a separation payment only to learn years later that they must pay back the gross separation payment before receiving retirement pay. Like the Court of Federal Claims, we are

> sympathetic to the Forrests' situation; however, we adhere to Supreme Court precedent that the time limits of §6511(a) are jurisdictional and not subject to tolling for equitable reasons.
>
> "We lastly note that, insofar as the Forrests purport to challenge §1174(h)(1)'s requirement to recoup the gross amount of Mr. Forrest's separation pay, that requirement is not at issue in this appeal. Rather, the sole issue presented is whether there exists any exception to the limitations requirements of §6511(a) for someone in the Forrests' situation, which there is not." Pg. 4

Regarding the comment about challenging §1174(h)(1)'s requirement, the petitioners addressed the tension between §§1174 and 6511, but only challenged the latter U.S.C. in their legal claims.

Finally, "We hold that the Forrests failed to establish the timely filing of a tax refund claim for the 1997 tax year, which is a prerequisite for bringing their tax refund action. 26 U.S.C. §§6511(a), 7422(a). The Court of Federal Claims properly dismissed this action." Pg. 4 – 5

REASONS FOR GRANTING THE WRIT

The petitioners pleading is distinguishable from all other cases involving equitable tolling and is also a case of first impression. Unfortunately, as a result of previous Court rulings, all lower courts' opinions are constrained by subject matter jurisdiction and only the Supreme Court can resolve the issue.

According to Rules of the Supreme Court of the United States (effective July 1, 2019), Rule 10. Considerations Governing Review on Certiorari, paragraph (c), "...[the] United States Court of Appeals [for the Federal Circuit] has decided an important question of federal law that has not been, but should be, settled by this

Court..." That is, no case has been brought to the Court that involved veterans caught between two conflicting codes.

All the petitioners seek is for the Court to review a previous opinion and determine whether a select group of taxpayers have been negatively financially impacted by that ruling because of circumstances beyond their control; overturn the ruling if warranted; and grant relief to the veterans affected.

As a military retiree that received involuntary separation pay 18 years before receiving retirement pay, the petitioner (Captain Forrest) is bound by the law according to 10 U.S.C. §1174(h)(1), and 26 U.S.C. §6511(a) results in the petitioners' federal income tax on that separation pay being withheld by the U.S. government. The fact remains that the petitioners must lawfully abide by both U.S.C. sections because of a (excusing the inartful term) "conflict" between codes.

In advance of the potential argument to create exceptions to 10 U.S.C. §1174(h) to resolve the conflict, there is no need as it is written to prevent military retirees from "double-dipping" by receiving both separation pay and retirement pay, nor did the petitioners challenge the §1174(h)(1) requirements as stated by the Court of Appeals.

The failure of the petitioners to file a timely claim was not avoidable nor because of indifference on their part, but rather the petitioners were unable to disregard the recoupment requirement of the gross separation pay (in accordance with 10 USC §1174(h)(1)), and only became aware of the recoupment after the three-year limitation had expired when they received a letter notification from DFAS 18 years after the subject income taxes were paid in full.

As a result, it was impossible for the petitioners to file for a tax refund within the three-year time limitation as stated in §6511(a) and under no circumstances would they be able to mitigate the requirement.

The Memorandum Opinion in response to the petitioners' case filed at the U.S. Court of Federal Claims (No. 19-110T) included the following comment:

"Had the Forrests desired to recover taxes paid in 1997 on Mr. Forrest's separation pay, they should have done so contemporaneously, i.e. within three years of filing their 1997 return." Pg. 5

The statement has no basis as the likelihood of the 1997 separation pay taxes getting refunded by the IRS in the three years between 1998 and 2001 is virtually non-existent because the justification for the petitioners' request would have been based on intent of pursuing retirement from the military service, which was still undetermined.

More importantly, a veteran who is unaware of §1174(h)(1) would not need to submit a refund request within three years as they would not yet have achieved retirement eligibility that triggers the gross pay recoupment which the veteran would be mitigating (with the request.)

In *Swietlik*, "...the majority concludes that the estate's trustee should have filed a conditional claim tolling the statute of limitations. But only judges seem to be blessed with perfect hindsight and today's ruling places trustees in a dilemma." *Swietlik*, 779 F.2d at 1312 (Cudahy, R., dissenting), and "The majority's result

veteran actually commences receiving retirement payments) and gross pay recoupment begins.

Again, for the sake of argument, presuming the IRS is willing to approve all requests by veterans who file for a tax refund within the three-year limitation, many situations could occur in the interim which may prevent the service member from reaching retirement eligibility, including: 1) the service member voluntarily elects to depart the military prior to retirement eligibility, 2) death or injury which prevents the veteran from attaining retirement eligibility, or 3) because the length of military service is based on selection for promotion by an impartial review board or other means, there is no guarantee of the member's retention in the service to the minimum threshold of 20 active years for retirement. The consequence of just those three examples is that the IRS would have issued refunds that were not justified or earned.

Accordingly, because of the burden to track veterans (who filed for and received a refund within the three-year limitation) to ensure they eventually obtain retirement eligibility up to 24 years after their separation, the IRS is extremely unlikely to issue a refund based on "future intent" so that the veteran may meet the time limitations in §6511(a). This validates the rationalization why it is inconceivable for the applicable veterans to, as suggested, file for and receive a refund of their federal tax obligation for income that, in essence, they ultimately will have never received after their gross pay is recouped per §1174(h).

As a result, there is no scenario which will allow a veteran bound by §1174(h) to meet the three-year requirement. Certiorari is warranted.

352, has, in fact, adversely affected thousands of retired veterans and is not factually supported. That is, it is neither occasional nor individualized.

Specifically, because of the lack of conformity with other statutory provisions (e.g. 10 U.S.C. §1174(h)) the absence of equitable tolling in 26 U.S.C. §6511(a) has unavoidably penalized thousands of veterans during a nine year period for over $291M (estimated).[2] It is not unreasonable to estimate, through extrapolation, that approximately 60,000 veterans have been adversely affected by the competing aforementioned United States Codes since the Internal Revenue Code of 1986 ratification and could be owed over $1B in tax refunds that were withheld by the IRS.[3]

The U.S.C. tension also has the potential to affect roughly 50,000 future military retirees. The Department of Defense's military retirement system implemented wide-ranging changes on January 1, 2018, referred to as the Blended Retirement System (BRS). All military personnel who join after that date must abide by the new retirement system, but all personnel who joined beforehand may continue to serve under the old system. Ignoring the potential impact of the tension between the two codes on those veterans who will retire under the BRS, and because mandatory

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[2] According to the Defense Finance and Accounting Service (DFAS) Retired and Annuitant Pay section, 16,270 retired military service members representing all four DoD military branches (Army, Navy, Air Force and Marines) had recoupments of gross separation pay from August 2010 to September 2019 for a total over $1.04B. The 1997 withholding tax rate for separation pay was 28%. Assuming an identical tax rate for all gross separation payments recouped from 2010-2019, tax overpayments withheld by the IRS that are owed to those service members total approximately $291M (i.e. 1.04B x 28% = 291M).

[3] Extrapolating 16,270 veterans over a 9 year period to 33 years (1987-2019, inclusive) would equal ~60,000 veterans (33/9 = 3.667; 3.667 x 16,270 = 59,663 veterans)
Extrapolating $291M in recouped tax payments over 9 years to 33 years (1987-2019, inclusive) would equal $1.067B. (33/9 = 3.667; 3.667 x $291M = $1.067B).

And while over 110,000 veterans may be considered a small percentage of the U.S. population, they are negatively affected by the tension of two different laws that will not impact other U.S. taxpayers. It is not unwarranted to ascertain that the Supreme Court was not aware of the U.S.C. tension and did not recognize the negative implications of that tension on retired veterans when the Court wrote the *Brockamp* Opinion. It is not "occasional unfairness in individual cases."

This Court is the only body that can fix the ruling that constrains the lower courts from issuing opinions other than dismissing for lack of subject matter jurisdiction.

B. Assumptions and inferences are used to describe the effort required by the IRS to adjudicate late claims if equitable tolling is allowed for §6511.

The Court discusses the magnitude of requiring the Government to do their job, namely, "The IRS processes more than 200 million tax returns each year. It issues more than 90 million refunds. See Dept. of Treasury, Internal Revenue Service, 1995 Data Book 8-9. To read an 'equitable tolling' exception into §6511 could create serious administrative problems by forcing the IRS to respond to, and perhaps litigate, large numbers of late claims, accompanied by requests for 'equitable tolling' which, upon close inspection, might turn out to lack sufficient equitable justification. See H. R. Conf. Rep. No. 356, 69th Cong., 1st Sess., 41 (1926)" *Brockamp*, 519 U.S. at 352.

The viewpoint that equitable tolling "...'could' create serious administrative problems by forcing the IRS to respond to, and 'perhaps' litigate, large numbers of late claims..." when taxpayers fail to meet the deadline because of an insufficient equitable reason(s)/justification is understandable.

The Court also over relies on the statistic "200 million tax returns" and "90 million refunds" which is independent of the number of taxpayers who annually may reasonably request an "equitable tolling" exception to §6511(a) -- i.e. 200 million households are not going to request a refund after the three-year limitation each year.

The Court also addresses stale demands, stating, "[The] larger Congressional objective: providing the Government with strong statutory 'protection against stale demands.'" *Brockamp*, 519 U.S. at 353.

Examining *Irwin v. Department of Veterans Affairs*, 498 U.S. (1990), the Court states, "...our previous cases dealing with the effect of time limits in suits against the Government have not been entirely consistent, even though the cases may be distinguished on their facts. In *United States v. Locke*, 471 U.S. 84, 94, n. 10 (1985), we stated that we were leaving open the general question whether principles of equitable tolling, waiver, and estoppel apply against the Government when it involves a statutory filing deadline." *Irwin*, 498 U.S. at 94. The tension between 10 U.S.C. §1174 and 26 U.S.C. §6511 that affects veterans is distinguishable from all other known equitable tolling claims against the Government.

The Court also states, "We therefore hold that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." and "...it is evident that no more favorable tolling doctrine may be employed against the Government than is employed in suits between private litigants." *Id.* at 96.

C. *Irwin's* negatively phrased question in *Brockamp* is answered.

In *Brockamp*'s discussion of *Irwin*, "...given *Irwin*'s language, there must be a 'presumption' that limitations periods in tax refund suits against the Government can be equitably tolled. And...that 'presumption,' while 'rebuttable,' has not been rebutted." *Brockamp*, 519 U.S. at 350. One issue identified with *Irwin* is deduced in *Webb v. United States*, "The Supreme Court did not consider how the *Irwin* rule should apply in a context like tax refund suits, where all suits are brought against the government and none against private defendants." *Webb v. United States*, 66 F.3d 691 (4th Cir. 1995), 703 (Russell, D., dissenting).

The Court then states, "In evaluating this argument, we are willing to assume, favorably to the taxpayers but only for argument's sake, that a tax refund suit and a private suit for restitution are sufficiently similar to warrant asking *Irwin*'s negatively phrased question: Is there good reason to believe that Congress did not want the equitable tolling doctrine to apply?" *Brockamp*, 519 U.S. at 350.

"Congress first established a limitations period for refund tax claims in the Revenue Act of 1924.[4] The committee reports on the Act say nothing of equitable tolling and 'give not the slightest hint that Congress even thought about it.'[5] During the entire seventy-two year existence of the limitations statute, Congress never expressed any intention that equitable tolling should not apply to §6511.[6] Indeed,

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[4] See S. Rep. No. 398, 68th Cong., 1st Sess. 33 (1924)
[5] Ronald A. Stein, *Will Equitable Tolling of the Statute of Limitations Gain Wider Acceptance in Tax Cases?*, 81 J. Tax'n 370, 373 (1994)
[6] *Brockamp*, 67 F.3d at 262 (citing *Johnsen v. United States*, 758 F. Supp. 834, 835-36 (E.D.N.Y. 1991))

'there is no reason to suppose Congress would condemn the invocation of the doctrine' as the record is silent."[7] Richard M. Gaal, *Equitable Tolling Of Internal Revenue Code Section 6511: Bridging The Divide Between Rules and Equity*, 27 Cumb. L. Rev. 297, 301.

Certainly one possible answer to the negatively phrased question that the Supreme Court could have considered is: Had Congress been made aware of any tension between different U.S.C. statutes that negatively affects a unique set of taxpayers (i.e. a specific group of veterans), they would want equitable tolling to apply.

II. THE LOWER COURTS DISMISSED THE CASE STRICTLY ON SUBJECT MATTER JURISDICTION RATHER THAN THE MERITS OF THE CLAIM. ONLY THE COURT CAN RESOLVE.

Two items in the Court of Federal Claims opinion have previously been addressed by the petitioners: 1) the discussion regarding the petitioners following §7422(a) and filing a claim for a tax refund before submitting a claim to the court -- however, the petitioners filed a 1040X after being advised through written correspondence from the IRS before filing a legal claim; and 2) the discussion that the petitioners should have filed a tax return contemporaneously -- an obvious impossibility.

Additional comments in the Court of Federal Claims opinion include, "Congress did not intend by [the provisions] to provide relief in all situations in which just claims are precluded by statutes of limitations.") (quoting *Olin Mathieson Chemical Corp. v.*

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[7] Stein, supra note 26, at 373

United States, 265 F.2d 293, 296 (7th Cir. 1959)). This may well be one of the situations in which a just claim is nevertheless barred." Pg. 6

"Thus, while the Court is sympathetic to the Forrests' situation, the United States' motion to dismiss must be granted." Pg. 7

"Because the Forrests' claim for a tax refund arising from tax year 1997 is time-barred, this Court lacks subject matter jurisdiction to hear the Forrests' claim. Therefore, the Court hereby GRANTS the United States' motion to dismiss pursuant to RCFC 12(b)(1)." Pg. 8

Finally, the court's opinion cites both *Dalm* and *Brockamp* noting their impact as precedent.

The opinion by the Court of Appeals for the Federal Circuit states, "Because their request fell well outside the time limits set forth in 26 U.S.C. §6511(a), the Court of Federal Claims correctly dismissed this action for lack of subject-matter jurisdiction, pursuant to 26 U.S.C. §7422(a). The arguments raised by the Forrests on appeal do not change this conclusion." Pg. 4

The court also states, "Like the Court of Federal Claims, we are sympathetic to the Forrests' situation..." Pg. 4

Although the petitioners received expressions of sympathy from both courts, and the trial court's identification that the petitioners' case is, "...one of the situations in which a just claim is nevertheless barred;" both the trial and appellate courts' rulings reiterate that the court's lack of subject-matter jurisdiction because of the *Brockamp* ruling is the reason for granting the motion to dismiss the "just" claim, not the merits

Because of the Supreme Court's likely unfamiliarity of the negative financial impact on retired veterans resulting from 10 U.S.C. §1174 and 26 U.S.C. §6511, requiring veterans to abide by both statutes without relief is unconscionable.

It is requested that the Court review and modify *Brockamp* by invoking the severability doctrine, leaving the valid portions of §6511 intact to allow for equitable tolling for veterans who must follow both §1174 and §6511, and require the IRS to refund all past tax obligations to veterans affected by the tension between the two laws.

A. Discovery Rule.

Although §6511(a) is law, it is also based on an arbitrary number of "3" years which allows the IRS to retain the one-time tax withheld when §1174(h)(1) is imposed on veterans. As a result, because of the tensions that exist between these two statutes, the "discovery rule" would be an appropriate solution regarding the three-year statute of limitations.

"A discovery rule of accrual determines when a statute of limitations begins to run. Under the most typical discovery rule, a cause of action 'accrues'-- that is, starts the limitations period running--when the plaintiff knows, or has reason to know, of his injury." Adam Bain & Ugo Colella, *Interpreting Federal Statutes Of Limitations*, 37 Creighton L. Rev. 493, 496. "...the justification for this particular discovery rule lies in the perceived unfairness to a plaintiff when a statute of limitations begins to

taxpayers. Based on a 'jurisprudence of presumptions,'[10] the proposal ensures the ability of courts 'to shape equitable exceptions to rules of law is openly acknowledged and sparingly exercised.'"[11] Gaal at 321-322. Consequently, it is an injustice to retain the tax paid on an amount that was recouped back to the government in full.

C. Allow Equitable Tolling for Taxpayers Caught Between Two Codes.

The Court states, "...§6511 sets forth explicit exceptions to its basic time limits, and those very specific exceptions do not include 'equitable tolling.'" *Brockamp*, 519 U.S. at 351. On the other hand, "Nothing about the structure of §6511 or the phrasing of the caption to §6511(b)(2) suggests that Congress intended §6511(b)(2) to serve as an absolute cut-off of refund claims. Like any statute of limitations, §6511(b)(2) can be equitably tolled in appropriate circumstances." *Webb*, 66 F.3d at 705 (Russell, D., dissenting). A similar argument is valid for §6511(a).

Cited previously, but no less relevant, "Congress first established a limitations period for refund tax claims in the Revenue Act of 1924.[12] The committee reports on the Act say nothing of equitable tolling and 'give not the slightest hint that Congress even thought about it.'[13] During the entire seventy-two year existence of the limitations statute, Congress never expressed any intention that equitable tolling

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[10] Judge Harvie Wilkinson III, *Toward a Jurisprudence of Presumptions*, 67 N.Y.U. L. Rev. 907, 920 (1992)

[11] Wilkinson, *supra* note 147, at 920

[12] See S. Rep. No. 398, 68th Cong., 1st Sess. 33 (1924)

[13] Ronald A. Stein, *Will Equitable Tolling of the Statute of Limitations Gain Wider Acceptance in Tax Cases?*, 81 J. Tax'n 370, 373 (1994)