No. 12-861C
Judge Bruggink

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

THOMAS R. CORNISH,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

BRIEF OF THE NATIONAL CONFERENCE OF BANKRUPTCY JUDGES
As Amicus Curiae In Support of Plaintiff's Opposition to Defendant's Motion for Partial Dismissal

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INTRODUCTION AND INTEREST OF AMICUS CURIAE

The National Conference of Bankruptcy Judges (NCBJ) is an association of federal bankruptcy judges. It has approximately 335 members, comprising more than 90% of the nation's 350 active bankruptcy judges, as well as retired and recalled bankruptcy judges. Founded in 1926, NCBJ funds bankruptcy research and education through stipends and grants, publishes the *American Bankruptcy Law Journal*, prepares reports related to bankruptcy law, provides continuing legal education to judges and practitioners, and pursues other projects aimed at enhancing the practice of bankruptcy law. NCBJ also advocates on behalf of its members before Congress and, if necessary, in the courts.

NCBJ's members have a significant interest in the outcome of this case. Bankruptcy judges are entitled by statute to an annual salary equal to 92% of a district judge's salary. 28 U.S.C. § 153(a). As a result, when Congress increases or diminishes the salaries of district judges, it does so for bankruptcy judges as well. Their salaries, in other words, rise or fall together. Because the government violated the Compensation Clause of the U.S. Constitution by failing to pay district judges their full compensation, *Beer v. United States*, 696 F.3d 1174 (Fed. Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 1997 (2013)—and because the government calculated bankruptcy judges' salaries based on the unlawfully low salaries paid to district judges—the government also failed to pay bankruptcy judges their full compensation as mandated by 28 U.S.C. § 153(a).

The plaintiff in this case, U.S. Bankruptcy Judge Thomas R. Cornish, seeks monetary damages for the compensation denied him. He also seeks declaratory relief ancillary to his damages claim to ensure that his salary is reset to the proper amount in the future. The United States has moved to dismiss that claim for equitable relief on the theory that this Court lacks jurisdiction to provide it. The government gives three reasons, the third of which applies only to Article I judges: (1) the claim "does not fit within the Tucker Act's enumerated categories," (2) the claim "is not subordinate to a judgment for money that is presently due and owing," and (3) this Court may not "enjoin Congress from changing the statute governing pay to bankruptcy judges." Motion 8-16. The government also makes the non-jurisdictional argument (at 16) that the "request for declaratory relief fails to state a claim" because it is based on a statute.

NCBJ files this amicus brief to explain why the government's arguments pertaining only to Article I judges are flawed, as well as to briefly respond to the government's other arguments. The statutory (as opposed to constitutional) nature of Judge Cornish's claim does not affect this Court's jurisdiction. Nor does it mean that this Court lacks the authority to provide ancillary declaratory relief.

ARGUMENT

I. The Government's Jurisdictional Argument Fails Because Judge Cornish Is Not Seeking To "Enjoin Congress."

The government argues in its motion to dismiss (at 14) that this Court lacks jurisdiction "to enjoin Congress from changing the statute governing pay to

bankruptcy judges." That is true, but beside the point: Judge Cornish is not seeking to enjoin Congress, and he is not asking this Court to prevent Congress from amending a statute, nor could the Court do that. He requests only that the Court declare that the government, going forward, is required to pay him the amount to which he is statutorily entitled—"92% of the salary paid to United States district judges as adjusted under the 1989 Act." Complaint 8. The government claims that granting this declaratory relief would prevent Congress from amending the statute in the future so that bankruptcy judges would no longer receive 92% of district court judges' salaries. It would not. As in any case involving statutory rights, the Court's order would have effect only so long as the statute has effect. Seeking relief from conduct that violates *current* law is hardly an unreasonable request, and this Court has jurisdiction to grant it.

If the government were correct, this Court would never have jurisdiction to issue declaratory relief in cases where the claim for money damages is based on a statute. But that interpretation has no support in the case law, and it is not what Congress intended. Congress wanted declaratory and prospective relief to be available in at least some cases involving statutory claims. The Tucker Act expressly confers jurisdiction on this Court to provide limited equitable relief "as an incident of and collateral to any . . . judgment" for money damages "founded either upon the Constitution, *or any Act of Congress*." 28 U.S.C. § 1491(a) (emphasis added). The limited prospective relief sought here—a declaration that future violations of section 153(a) would be unlawful—would be "an incident of and

collateral to" any money judgment because it would track precisely the declaratory relief authorizing that judgment. That is enough to give this Court jurisdiction, regardless of whether the claim is "founded . . . upon" an "Act of Congress" or "the Constitution." The Tucker Act draws no distinction between the two.

II. The Government's Non-Jurisdictional Argument Fails Because The Possibility That Congress May Change A Law Does Not Preclude Declaratory Relief.

The government's non-jurisdictional argument is no more than a repackaging of its flawed jurisdictional argument. The government recognizes (at 16) that "the compensation of bankruptcy judges is 'tied directly to that of Article III judges'" (quoting Complaint at 1), but contends that "Judge Cornish has failed to state a claim for future relief because nothing prevents Congress, at any time, from changing the statute that provides for bankruptcy judge pay." Again, statutes can *always* be amended; yet that is not a reason, in itself, to deny prospective relief. If it were, then no court could ever give prospective relief of any kind in a case involving the violation of a statute because "nothing prevents Congress, at any time, from changing the statute." That has never been the law.

III. The Government's Other Jurisdictional Arguments Are Meritless.

The balance of the government's arguments (at 8-14) for why this Court cannot grant declaratory relief—namely, that such relief "does not fit within the Tucker Act's enumerated categories" and "is not subordinate to a judgment for money"—apply equally to Article I and Article III judges. These arguments ignore

the text of the Tucker Act, undermine the Act's purpose, and would create an impractical result.

In 1972, Congress enacted the Remand Act, amending the Tucker Act to give this Court the power to grant equitable relief in certain appropriate cases:

> To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just.

28 U.S.C. § 1491(a)(2). Congress amended the Tucker Act in this way because it sought to consolidate claims seeking primarily monetary damages in one court. As the Chief Judge of this Court explained at the time: "The purpose of the bill is to allow citizens who have monetary claims falling within the jurisdiction of the court to obtain *all necessary relief* in one action." 92 Cong. 11 (1972) (Statement of Wilson Cowen, Chief Judge, United States Court of Claims) (emphasis added); *see also* S. Rep. No. 92-1066 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3116, 3121 (stating that amendment authorizes the Court of Claims, "in all cases in which it has previously had jurisdiction, to provide an entire remedy and grant complete relief").

A contrary rule would force the same plaintiff to file two different actions in two different courts: one for damages in this Court, and another for declaratory and other ancillary relief in a federal district court. Congress determined that requiring two courts to adjudicate the same case made no sense. Yet that is the

upshot of the government's position here. The government would require Judge Cornish to file a separate suit in district court if he wanted to obtain declaratory relief—exactly the outcome Congress was trying to avoid.

The Tucker Act's text forecloses that unpalatable result. It is broadly worded to confer jurisdiction on this Court "to issue such orders as are necessary '[t]o provide an entire remedy and to complete the relief afforded by the judgment,' including 'as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records.'" *Martinez v. United States*, 333 F.3d 1295, 1303 (Fed. Cir. 2003) (en banc) (quoting 28 U.S.C. § 1491(a)(2)). An order declaring that future violations of section 153(a) would be unlawful is necessary to provide "complete relief," is "an incident of and collateral to" any money judgment, and results in the "correction of applicable records"—the personnel records of the Administrative Office of the United States Courts that set the amount Judge Cornish is to be paid. Moreover, this Court has broad authority under the Tucker Act "to remand appropriate matters to any administrative or executive body of official with such direction as it may deem proper and just." 28 U.S.C. § 1491(a)(2).

This case is thus nothing like *Pellegrini v. United States*, 103 Fed. Cl. 47 (2012), which the government says (at 8) stands for the proposition that the Court is "not authorized to order whatever sort of injunctive relief it finds appropriate." *Id.* at 54. The plaintiffs there sought an order "enjoining further maintenance dredging

in the vicinity of [their] property and requiring the government to build a structure to minimize erosion." *Id.* at 54. Judge Cornish, by contrast, is not asking the Court to require the government to do anything more than recalculate his salary so that it complies with section 153(a). That is no different from what the government admits (at 11) is permissible under the Tucker Act, because granting the requested relief "would not so much order prospective relief as place" Judge Cornish's pay records "in the proper status, and the correction of records would merely be the consequence of the Court having found entitlement to monetary relief."

Finally, the government contends (at 12) that this Court lacks jurisdiction over "Judge Cornish's claim for prospective declaratory relief" because it "is not subordinate to a judgment for money that is presently due and owing." "Instead," according to the government, "the claim for declaratory relief is tied and subordinate to a claim for *future* salary adjustments." But as the government admits (at 13), "the Court can decide whether Congress violated the Compensation Clause and [bankruptcy-judge pay] statute for purposes of resolving Judge Cornish's claims for back pay that he alleges is presently due." In other words, the Court must necessarily declare that Judge Cornish's salary is unlawful to authorize a judgment for money damages. The limited prospective relief sought here would be tied directly to that judgment because both would be based on the same thing: a declaration that the federal government must pay Judge Cornish the amount he is owed by statute. This Court has jurisdiction to provide that relief.

CONCLUSION

The government's motion for partial dismissal should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2013, I electronically filed the foregoing brief through this Court's CM/ECF system. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

/s/ Deepak Gupta

Deepak Gupta