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THE CONSTITUTIONAL NATURE OF THE UNITED STATES TAX COURT

Brant J. Hellwig*

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I. INTRODUCTION

Is the United States Tax Court part of the Executive Branch of government? One would expect that question would be capable of being definitively answered without considerable difficulty. And as recently expressed by the Court of Appeals for the District of Columbia Circuit, that indeed is the case. In the course of addressing a challenge to the President’s ability to remove a judge of the Tax Court for cause on separation of powers grounds, the D.C. Circuit rejected the premise that the removal power implicates two branches of government: “[t]he Tax Court exercises Executive authority as part of the Executive Branch.”¹

This seemingly innocuous observation by the D.C. Circuit is difficult to reconcile with the congressional treatment of the United States Tax Court. Although the court originated as an executive agency in the Board of Tax Appeals (later to be renamed the Tax Court of the United States that expressly remained an executive agency), Congress sought to change the court’s constitutional status through the Tax Reform Act of 1969. Troubled by the propriety of one executive agency sitting in judgment of the determinations of another,² Congress eliminated the statutory reference to the Tax Court being an independent agency within the Executive Branch. In its place Congress established “under article I of the Constitution of the United States, a court of record to be known as the United States Tax Court.”³ The Senate report accompanying the legislation indicated that the

¹ *Kuretski v. Commissioner*, 755 F.3d 929, 932 (D.C. Cir. 2014), *cert. denied*, 2015 WL 234060 (S. Ct. May 18, 2015). Although the Supreme Court denied certiorari in *Kuretski*, the separation-of-powers issue remains to be raised in the Tax Court in cases for which appeal lies to a circuit court of appeals other than the D.C. Circuit. Hence, the prospect of a circuit split remains, which would increase the prospect of the Supreme Court agreeing to address the issue.

² See S. REP. NO. 91-552, at 302 (1969).

³ I.R.C. § 7441 (*as amended by* Tax Reform Act of 1969, Pub. L. No. 91-172, § 951, 83 Stat. 730).

statutory change was intended to establish the Tax Court as an Article I court, “rather than an executive agency.”⁴ Given the statutory change to the Tax Court’s charter and the committee reports attendant to the 1969 legislative revision, the Tax Court comfortably observed in a 1971 case that Congress “removed the Tax Court from the Executive Branch” by establishing it as court of record under Article I.⁵

The conventional understanding immediately following the passage of the 1969 Tax Reform Act — that the United States Tax Court emerged as a judicial body outside of the Executive Branch — found purchase in the 1991 Supreme Court decision in *Freytag v. Commissioner*.⁶ Resolving a challenge to the propriety of the appointment of special trial judges by the chief judge of the Tax Court, the Court in *Freytag* concluded the Tax Court was one of the Courts of Law for purposes of the Appointments Clause.⁷ In reaching this conclusion, the five-justice majority rejected the argument that the chief judge of the Tax Court served as the head of an executive Department within the meaning of the Appointments Clause.⁸ Yet beyond resolving the specific Appointments Clause challenge before it, the Court in *Freytag* took the occasion to examine the Tax Court’s role in the constitutional scheme of government. In the course of this review, the Court made several observations of note. Firstly, the Court declared that the Tax Court “exercises judicial, rather than executive, legislative, or administrative, power.”⁹ More pointedly, the Court concluded that, through its statutory jurisdiction to interpret the Internal Revenue Code to resolve disputes between taxpayers and the Government, the Tax Court “exercises a portion of the judicial power of the United States.”¹⁰ Lastly, the Court characterized the Tax Court as remaining “independent of the Executive and Legislative Branches.”¹¹ In this manner, the Supreme Court in *Freytag* stressed the judicial character of the United States Tax Court.

The recent decision of the D.C. Circuit Court of Appeals in *Kuretski* highlights what had been something of a latent ambiguity concerning the constitutional nature of the United States Tax Court. Although the Tax Court, along with several commentators, was quite confident that Congress had removed it from the Executive Branch of government,¹² other courts

⁴ S. REP. NO. 91-552, at 303 (1969).

⁵ *Burns, Stix Friedman & Co. v. Commissioner*, 57 T.C. 392, 395 (1971).

⁶ 501 U.S. 868 (1991).

⁷ *Id.* at 890.

⁸ *Id.* at 885–86.

⁹ *Id.* at 890–91.

¹⁰ *Id.* at 891.

¹¹ *Id.*

¹² See *Burns, Stix Friedman & Co. v. Commissioner*, 57 T.C. 392, 395 (1971) (“It is

have indicated that they have not been so convinced.¹³ This article therefore will use the *Kuretski* decision as a vehicle to revisit the placement of the United States Tax Court in the constitutional scheme of government. To provide the background for this endeavor, the article will briefly trace the evolution of the United States Tax Court before reviewing the Supreme Court's decision in *Freytag*. While the *Kuretski* decision may be nominally compatible with the *Freytag* decision — indeed, the D.C. Circuit describes its decision as being supported by *Freytag* — the article will explain that the *Kuretski* decision is best viewed as an endorsement of the non-prevailing four-justice concurring opinion in *Freytag*. After analyzing the *Kuretski* decision, the article will contemplate alternate locations of the Tax Court in the constitutional structure, ultimately concluding that no definitive resolution exists.

II. THE STRUCTURAL EVOLUTION OF THE TAX COURT

The evolution of the United States Tax Court is marked by legislative attempts to incrementally imbue this adjudicative body with independence from the administrative apparatus responsible for the assessment and collection of federal taxes.¹⁴

The origins of the Tax Court as a judicial body lie in the Board of Tax Appeals, created by Congress as part of the Revenue Act of 1924. Yet the impetus for the creation of the Board of Tax Appeals grew out of perceived deficiencies in its predecessor, the Committee on Appeals and Review.¹⁵ As part of the Revenue Act of 1921, Congress, for the first time, provided

clear from the statutory language and the Senate committee report . . . that Congress removed the Tax Court from the Executive Branch and established it as an article I court"); see also J. MARTIN BURKE & MICHAEL K. FRIEL, *TAXATION OF INDIVIDUAL INCOME* 6 (10th ed. 2012) (characterizing the establishment of the Tax Court as a court of record established under Article I of the Constitution as rendering the court "now part of the judicial branch").

¹³ See *South Carolina State Ports Auth. v. Federal Maritime Comm'n*, 243 F.3d 165, 171 (4th Cir. 2001) (characterizing the Tax Court as "a Court of Law despite being part of the Executive Branch"); *Klein v. United States*, 94 F. Supp. 2d 838, 844 (E.D. Mich. 2000) ("The Tax Court is a classic example of a congressionally created forum within the executive branch designed to adjudicate 'public rights.'"). Furthermore, Justice Breyer has also articulated his understanding that the Tax Court was not a court at all, but rather an administrative agency. Transcript of Oral Argument at 25, *Ballard v. Commissioner*, 544 U.S. 40 (2005) (No. 03-184).

¹⁴ For an exhaustive account of the origins and evolution of the United States Tax Court, see HAROLD DUBROFF, *THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS* pts. I-IV, pp. 1-215 (1979). The discussion that follows in this section draws heavily on Professor Dubroff's seminal work in this field.

¹⁵ Report of the Tax Simplification Board, H.R. Doc. 68-103, at 4 (1923).

taxpayers with a right to contest by hearing the determination of a tax deficiency prior to payment.¹⁶ The Committee on Appeals and Review, located within the Bureau of Internal Revenue, was the body selected to afford the requisite pre-assessment review. Because the Committee was subordinate to the Commissioner of Internal Revenue, its rulings were advisory only; the Commissioner was not legally bound by the Committee's recommendations.¹⁷

In 1921, Congress created the Tax Simplification Board to investigate the administration of the internal revenue laws. As part of its work, the Tax Simplification Board examined the Committee on Appeals and Review, and cited the Committee's lack of independence as its principal weakness:

[The Board's investigation] convinced practically everyone who participated in the discussions that it would never be possible to give to the taxpayer the fair and independent review to which he is of right entitled as long as the appellate tribunal is directly under, and its recommendations subject to the approval of, the officer whose duty is to administer the law and collect the tax. As long as the appellate tribunal is part and parcel of the collecting machinery it can hardly maintain the attitude essential to a judicial tribunal.¹⁸

The Tax Simplification Board therefore recommended that the Committee on Appeals and Review be replaced by a Board of Tax Appeals to be located within the Department of Treasury but outside of the control of the Commissioner of Internal Revenue.¹⁹

In connection with the Revenue Act of 1924, the Coolidge administration proposed the creation of a Board of Tax Appeals on the essential terms recommended by the Tax Simplification Board.²⁰ Namely, the proposed Board of Tax Appeals would be independent of the Bureau of Internal Revenue but it would continue to be housed within the Treasury Department.²¹ The Secretary of Treasury would appoint members of the Board and, presumably, would possess concomitant authority to remove them.²²

Although the proposed Board of Tax Appeals was to be independent of the Bureau of Internal Revenue, Congress balked at the level of influence

¹⁶ See Revenue Act of 1921, ch. 136, § 250(d), 42 Stat. 227, 265.

¹⁷ *Id.*

¹⁸ Report of the Tax Simplification Board, H.R. Doc. 68-103, at 4 (1923) (quoted in Dubroff, *supra* note 14, at 44).

¹⁹ *Id.* at 45.

²⁰ See Dubroff, *supra* note 14, at 53-57.

²¹ *Id.*

²² *Id.* at 58.

that could be exerted over the Board by the Treasury Department.²³ As the legislation moved through the House Ways and Means Committee, several structural changes were made to the administration's proposal. First, the language locating the Board within the Department of Treasury was eliminated.²⁴ Its members were to be appointed by the President, subject to removal only for "inefficiency, neglect of duty, or malfeasance in office."²⁵ Additionally, the Board would biennially select its chairman, rather than the chairman being appointed by the Secretary of Treasury.²⁶ These structural changes survived in the legislation as enacted. Concerning the location of the Board of Tax Appeals in the constitutional scheme, the legislation that emanated from the House did not locate the Board within a particular branch of government. Rather, the legislation merely stated that the Board was to be independent of the Department of Treasury. The Senate, however, positively addressed the organizational issue by adding language to the statute designating the Board as an "independent agency in the executive branch of the Government."²⁷

In connection with the Revenue Act of 1926, consideration was given to removing the Board of Tax Appeals from the Executive Branch and affording the body formal judicial status. The Board itself organized a committee to formulate legislative proposals on this front. The committee recommended replacing the Board with a court of record to be known as the "Court of Tax Appeals," the members of which would serve during good behavior.²⁸ Although the Treasury Department purported to favor these changes, administration officials did not forcefully advance them. The proposal to afford the Board the status of a constitutional court quickly receded in the face of reluctance from Congress to create additional federal

²³ *Id.* at 93.

²⁴ See H.R. REP. NO. 68-179, at 8 (1924). The House report was emphatic on this point, stating that the Board was to be "entirely outside the Treasury Department." Nonetheless, the legislation as enacted required the Secretary of Treasury to provide the board with office space, supplies, and clerical assistance. See Revenue Act of 1924, ch. 234, § 900(j), 43 Stat. 253, 338.

²⁵ *Id.* § 900(b), 43 Stat. at 337. An amendment later offered on the House floor required the advice and consent of the Senate to presidential appointments to the Board. See also 65 Cong. Rec. 3285-86 (1924).

²⁶ Revenue Act of 1924, ch. 234, § 900(d), 43 Stat. 253, 337.

²⁷ *Id.* § 900(k), 43 Stat. at 338. The Senate amendment apparently was inserted at the suggestion of Middleton Beaman, House Legislative Counsel, to provide for treatment of the Board's financial accounts by the General Accounting Office. See DUBROFF, *supra* note 14, at 176 (citing Letter from Presiding Judge Turner to Roswell Magill, June 17, 1947, on file with the United States Tax Court).

²⁸ See Dubroff, *supra* note 14, at 167 (citing Letter from A.E. Graupner to J. Gilmer Korner, Aug. 28, 1925, on file with the United States Tax Court).

courts whose judges enjoyed lifetime tenure.²⁹ However, the Revenue Act of 1926 did make less significant changes affecting the Board of Tax Appeals. Congress extended the term of board members from ten to twelve years. Additionally, Congress further limited the President's power to remove a Tax Court judge by requiring "notice and opportunity for a public hearing" before the removal could be effective.³⁰ Additionally, Congress displayed confidence in the Board's work by making its decisions appealable directly to the circuit courts of appeals (instead of to the local federal district court).³¹

In the early 1940s, the Chairman of the Board of Tax Appeals, John Edgar Murdock, pursued legislation concerning the Board of Tax Appeals of far more modest character. Rather than pursuing a change to the status of the Board, Judge Murdock sought to merely change the name of the body and its members. Specifically, Judge Murdock actively sought support to change the name of the Board of Tax Appeals to the "United States Tax Court" and to change the statutory designation of "members" of the Board to "judges."³² The title changes were sought for the purpose of reducing confusion among the public with respect to the Board's judicial procedures, to enable the Board to be provided with authority to enforce its own processes, and to validate the view that the Board functioned as a court in all but name.³³

The proposed change in nomenclature, despite its lack of legal significance, drew considerable opposition from Attorney General Francis Biddle. He characterized a "court" operating in the Executive Branch as incongruous, and he predicted that such an arrangement would breed litigation over this point. Additionally, the Attorney General was concerned that the Department of Justice would be obligated to represent the Government in any proceeding before a "court," replacing the Chief Counsel of the Bureau of Internal Revenue in this capacity. Lastly, the Attorney General viewed the proposed name change as but the first step in a plan to accord the Board the status of a constitutional court under Article

²⁹ *Id.* (citing *Hearings on Revenue Revision, 1925, Before the House Comm. on Ways and Means*, 69th Cong., 1st Sess., at 935). Although Congress did not alter the status of the Board at this time, it did imbue the Board with additional judicial features through the Revenue Act of 1926. Chief among these revisions was to make Board decisions appealable directly to the circuit courts of appeals and, on certiorari, to the Supreme Court and, in the absence of appeal, to insulate Board decisions from collateral attack. *See* Revenue Act of 1926, ch. 27, §§ 1001, 1005, 44 Stat. 9, 109–111.

³⁰ *Id.* § 1000, 44 Stat. at 105–06.

³¹ *Id.* § 1001(a), 44 Stat. at 109–10.

³² *See* DUBROFF, *supra* note 14, at 177.

³³ *Id.* at 178.

III.³⁴

Despite this opposition, Congress included the title changes as part of the Revenue Act of 1942,³⁵ albeit calling the body "The Tax Court of the United States" in lieu of "The United States Tax Court."³⁶ The legislation made clear that no substantive change was intended. The jurisdiction, powers, and duties of the court were to remain unchanged; the Commissioner would continue to be represented by the Office of Chief Counsel; and practice before the court would not be limited to attorneys.³⁷ Concerning the court's structural location, the statute provided that the Tax Court of the United States would remain "an independent agency in the Executive Branch of the Government."³⁸

Numerous proposals were made to eliminate the Tax Court's status as an executive agency and to relocate its governing provisions from Title 26 of the United States Code (the Code) to Title 28 (concerning the federal judicial system) in the late 1940s.³⁹ Yet these attempts failed to gain traction. Some twenty years later, in 1967, a renewed legislative push was made to alter the status of the Tax Court. At the request of the court, the chairpersons of the congressional tax-writing committees each introduced legislation not only to incorporate the Tax Court into the federal judicial system, but also to confer Article III status upon the court. The latter would have been accomplished by permitting Tax Court judges to serve during periods of good behavior and by eliminating the President's qualified removal power.⁴⁰ Justifications for moving the Tax Court into the Article III Judiciary included the desire for the court to have a formal status consistent with its judicial character, to avoid public misperceptions of the independence of the court owing to its administrative status, and to avoid thornier legal questions that had surfaced surrounding the application of the Administrative Procedure Act to its proceedings.⁴¹

³⁴ See *id.* at 184.

³⁵ Revenue Act of 1942, ch. 619, § 504(a), 56 Stat. 798, 957.

³⁶ This revision was made at the request of Commerce Clearing House in order to avoid confusion between the identity of the court and the "United States Tax Cases" series that it published. See DUBROFF, *supra* note 14, at 184.

³⁷ Revenue Act of 1942, ch. 619, § 504(b), 56 Stat. 798, 957.

³⁸ *Id.* § 504(a), 56 Stat. at 957 (amending I.R.C. § 7441). The legislation was warmly received by then Presiding Judge Murdock, its limited scope notwithstanding. Much of Judge Murdock's satisfaction came in avoiding the embarrassment of being referred to as a "judge" while his position did not warrant the title. See Dubroff, *supra* note 14, at 184.

³⁹ See Dubroff, *supra* note 14, at 185–202 (detailing various proposals attempting to revise the legislative charter of the Tax Court).

⁴⁰ See H.R. 10100, 90th Cong. (1st Sess. 1967); S. 2041, 90th Cong. (1st Sess. 1967). For discussion of the proposed legislation, see Dubroff, *supra* note 14, at 204–13.

⁴¹ *Id.*

These legislative proposals sparked hearings that spanned a two-year period. While the hearings originally centered on whether to afford the Tax Court Article III status, that issue receded in importance following formal expressions of opposition by the Department of Justice and the Treasury Department.⁴² At that point, the focus of the hearings turned to a more general examination of the existing judicial framework for the litigation of tax controversies.⁴³ Following further opposition to the Article III proposal by the United States Judicial Conference⁴⁴ and Senator Russell B. Long (who actually introduced the legislation “by request” in the Senate),⁴⁵ the push to bring the court under Article III was abandoned. The desire to afford the Tax Court independence from the Executive Branch, however, was not. In the summer of 1969, the chairman of the House Ways and Means Committee introduced an alternative proposal providing for the establishment of the United States Tax Court (employing a naming convention consistent with other federal courts) to be established “under article I of the Constitution.”⁴⁶ The proposed legislation extended the term of Tax Court judges from twelve years to fifteen years,⁴⁷ and it expanded the scope of the Tax Court’s limited judicial powers by authorizing the court to punish contempt of its authority by fine or imprisonment.⁴⁸ However, in addition to yielding on Article III status, the legislation did not attempt to relocate the Tax Court’s governing statutes from the Internal Revenue Code of Title 26 to Title 28, which governs the federal judicial system. Traditional opposition grounded in the ability of non-attorneys to practice before the court therefore was avoided, as was the prospect of shifting responsibility for representing the Government in Tax Court proceedings from the Internal Revenue Service (Service) to the Department of Justice. The legislation passed the House without the necessity of public hearings, and the Senate incorporated the bill into the Tax Reform Act of 1969 with little fanfare.

Legislative materials accompanying the passage of the Tax Reform Act of 1969 indicate that Congress intended the statutory transformation of the Tax Court from “an independent agency in the Executive Branch” to a “court of record” established “under article I of the Constitution” to have

⁴² See Dubroff, *supra* note 14, at 214–18.

⁴³ See *id.* at 218.

⁴⁴ The Judicial Conference was led by Chief Justice Earl Warren during this period. The Chief Justice reportedly opposed conferring Article III status upon the Tax Court on grounds that full court status was not appropriate for a court of limited, specialized jurisdiction. See *id.* at 226.

⁴⁵ See *id.* at 225.

⁴⁶ See H.R. 13494, 91st Cong., § 1 (1st Sess. 1969).

⁴⁷ *Id.* § 2(b).

⁴⁸ *Id.* § 7.

structural significance.⁴⁹ As reflected in its report accompanying the Act, the Senate Finance Committee expressed its view that “it is anomalous to continue to classify [the Tax Court] with quasi-judicial executive agencies that have rulemaking and investigative functions.”⁵⁰ Yet the Finance Committee was not motivated by poor functional alignment alone. The committee also expressed its concern over the propriety of one executive agency reviewing the determinations of another: “[The Tax Court’s] constitutional status as an executive agency, no matter how independent, raises questions in the minds of some as to whether it is appropriate for one executive agency to be sitting in judgment on the determinations of another executive agency.”⁵¹ The committee therefore explained that the legislation was aimed at “making the Tax Court an Article I court *rather than* an executive agency”⁵² Hence, in its consideration of the portions of the legislation affecting the Tax Court, Congress operated under the assumption that an Article I court is structurally distinct from an executive agency.

Although the portion of the Tax Reform Act of 1969 dedicated to the Tax Court was chiefly concerned with providing the court with structural independence from the Executive Branch, Congress did not see fit to create an entirely new court with newly appointed judges. Rather, an uncodified provision of the legislation specified that the post-Reform Act Tax Court was a continuation of the body as it previously existed:

The United States Tax Court established under the amendment made by section 951 [of Pub. L. No. 91-172] is a continuation of the Tax Court of the United States as it existed prior to the date of the enactment of this Act, the judges of the Tax Court of the United States immediately prior to the date of enactment of this Act shall become the judges of the United States Tax Court upon the enactment of this Act, and no loss of rights or powers, interruption or jurisdiction, or prejudice to matters pending in the Tax Court of the United States before the date of enactment of this Act shall result from the enactment of this Act.⁵³

In addition, no change was made to the President’s authority to remove a judge of the Tax Court for cause. The 1969 legislation therefore effected little if any change in the operations of the court. Instead, the legislation was intended to terminate the Tax Court’s status as an agency in the Executive Branch — even as an independent agency in the Executive

⁴⁹ S. REP. NO. 91-552, at 301 (1969).

⁵⁰ *Id.* at 302.

⁵¹ *Id.*

⁵² *Id.* at 303 (emphasis added).

⁵³ Tax Reform Act of 1969, Pub. L. No. 91-172, § 961, 83 Stat. 487, 735–36.

Branch — and to confirm the purely judicial nature of the body by chartering it as a “court of record.”

Not long after passage of the 1969 Act, the taxpayer in *Burns, Stix Friedman & Co. v. Commissioner*⁵⁴ challenged the jurisdiction of the newly chartered Tax Court on constitutional grounds. In particular, the taxpayer contended that the Tax Court, as a court of record under Article I, exercised the judicial power of the United States in violation of separation of powers principles because Tax Court judges did not enjoy the salary and tenure protections required under Article III. After noting that numerous cases had upheld the constitutionality of the jurisdiction of the Board of Tax Appeals and the Tax Court of the United States, both of which were independent agencies within the Executive Branch, the court examined whether the 1969 legislation so changed the status and function of the Tax Court to cause it to exercise “the judicial Power” of the United States as contemplated by Article III. As a starting matter, the Tax Court in *Burns* understood the Tax Reform Act of 1969 to have removed the court from the Executive Branch:

It is clear from the statutory language and the Senate committee report . . . that Congress removed the Tax Court from the Executive Branch and established it as an article I court primarily for the purpose of recognizing its status as a judicial body and disposing of any problems that its status as an executive agency sitting in judgment on another executive agency might pose.⁵⁵

However, in so doing, Congress left the basic jurisdiction of the Tax Court — to determine the amount of a deficiency or overpayment of tax — unchanged. While Congress provided the court with the power to punish for contempt, it did not afford the court more plenary judicial power such as the power to execute its decisions or to render a monetary judgment.⁵⁶ Hence, the Tax Court, following passage of the Tax Reform Act of 1969, continued to lack the common law concept of “judicial power” invested in courts of general jurisdiction under Article III. Having thus rejected the premise of the taxpayer’s constitutional challenge, the Tax Court in *Burns* saw no reason why the jurisdiction it formerly exercised as an independent agency within the Executive Branch could not be delegated by Congress to an Article I court.⁵⁷

⁵⁴ 57 T.C. 392 (1971).

⁵⁵ *Id.* at 395.

⁵⁶ *Id.* at 396.

⁵⁷ *Id.* For further discussion of the constitutionality of the Tax Court’s jurisdiction as an Article I court, see HAROLD DUBROFF & BRANT J. HELLWIG, *THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS* 222–26 (2d ed. revised and expanded 2015); see also Diane L. Fahey, *The Tax Court’s Jurisdiction Over Due Process Collection Appeals: Is it*

The Tax Court was not alone in its contemporaneous assessment that the Tax Reform Act of 1969 operated to remove it from the Executive Branch. Over the course of the 1970s, Professor Harold Dubroff published a definitive history of the United States Tax Court through serial installments of law review articles.⁵⁸ Although Professor Dubroff did not examine at length the effect of the 1969 legislation on the constitutional nature of the Tax Court, he did describe the post-1969 Tax Court as “a legislative body performing judicial functions.”⁵⁹ Note that this assessment can be easily reconciled with the Tax Court’s proclamation in *Burns* that Congress removed it from the Executive Branch through the 1969 legislation, but did not confer upon it the judicial power cognized by Article III.

III. THE *FREYTAG* CASE

The Supreme Court did not have occasion to address the constitutional nature of the Tax Court and the effect of the Tax Reform Act of 1969 on that body until its 1991 decision in *Freytag v. Commissioner*.⁶⁰ The taxpayers in *Freytag* contended that the appointment of special trial judges by the chief judge of the Tax Court⁶¹ failed to comply with the parameters of the Appointments Clause contained in Article II of the Constitution. The Appointments Clause, a central expression of separation-of-powers principles in the Constitution, permits Congress to vest the appointment of inferior officers in the President, in “the Courts of Law,” or in the “Heads

Constitutional?, 55 BAYLOR L. REV. 453 (2003); Deborah L. Geier, *The Tax Court, Article III, and the Proposal Advanced by the Federal Courts Study Committee: A Study in Applied Constitutional Theory*, 76 CORNELL L. REV. 985 (1991).

⁵⁸ See Harold Dubroff, *The United States Tax Court: An Historical Analysis / Part I: The Origins of the Tax Court*, 40 ALB. L. REV. 7 (1975); Harold Dubroff, *The United States Tax Court: An Historical Analysis / Part II: Creation of the Board of Tax Appeals – The Revenue Act of 1924*, 40 ALB. L. REV. 53 (1975); Harold Dubroff, *The United States Tax Court: An Historical Analysis / Part I: The Origins of the Tax Court*, 40 ALB. L. REV. 7 (1975); Harold Dubroff, *The United States Tax Court: An Historical Analysis / Part III: The Revenue Act of 1926 – Improving the Board of Tax Appeals*, 40 ALB. L. REV. 253 (1976); Harold Dubroff, *The United States Tax Court: An Historical Analysis / Part IV: The Board Becomes a Court*, 41 ALB. L. REV. 1 (1976); Joseph R. Cook & Harold Dubroff, *The United States Tax Court: An Historical Analysis / Part V: Pretrial Procedure*, 41 ALB. L. REV. 639 (1977); Harold Dubroff & Dan Grossman, *The United States Tax Court: An Historical Analysis / Part VI: Trial and Post-Trial Procedure*, 42 ALB. L. REV. 191 (1978). These articles later were collected and published in a single volume. See Dubroff, *supra* note 14.

⁵⁹ Harold Dubroff, *The United States Tax Court: An Historical Analysis, Part IV: The Board Becomes a Court*, 41 ALB. L. REV. 1, 51 (1976).

⁶⁰ 501 U.S. 868 (1991).

⁶¹ See I.R.C. § 7443A(a) (“The chief judge may, from time to time, appoint special trial judges who shall proceed under such rules and regulations as may be promulgated by the Tax Court.”).

of Departments.”⁶² Resolution of the taxpayers’ challenge required the Court to identify which of those avenues applied to validate the appointment. If neither, the appointment of the special trial judge was constitutionally infirm, presumably rendering the trial proceedings before that judge invalid. Although the *Freytag* case concerned the proper interpretation of the Appointments Clause, resolution of that matter required the Court to confront and articulate the status of the Tax Court in the larger scheme of constitutional government.⁶³

A. *The Samuels, Kramer Backdrop*

Before the Supreme Court issued its decision in *Freytag*, the Second Circuit Court of Appeals had addressed the identical Appointments Clause challenge raised by other participants in the tax shelter transaction at the heart of the *Freytag* case. In *Samuels, Kramer & Co. v. Commissioner*,⁶⁴ the Second Circuit upheld the validity of the appointment of the special trial judge on grounds that the chief judge of the Tax Court constituted the Head of a Department for Appointments Clause purposes.⁶⁵ In the course of so ruling, the Second Circuit explained that the Tax Reform Act of 1969 did not, in fact, remove the Tax Court from the Executive Branch. Rather, the legislation “did little more than change the label to be used” when referring to that body.⁶⁶ The Second Circuit grounded its observation that the 1969 Act failed to effect structural change for the Tax Court in an uncodified provision in the legislation — one providing that the United States Tax Court represented a continuation of the court as it existed prior to the Act.⁶⁷ Additionally, the Second Circuit in *Samuels, Kramer* found that the Tax Court remained “associated” with the Executive Branch on account of the President’s power not only to appoint judges of the court, but also to remove them.⁶⁸ The Second Circuit’s interpretation of the Tax Court’s

⁶² U.S. CONST. art. II, § 2, cl. 2. Every court to address the matter has found that a special trial judge of the Tax Court constituted an officer of the government for purposes of the Appointments Clause, rather than an employee outside the bounds of the clause. See *Freytag*, 501 U.S. at 880–82; *Samuels, Kramer & Co. v. Commissioner*, 930 F.2d 975, 985–86 (2d Cir. 1991); *First Western Government Securities, Inc. v. Commissioner*, 94 T.C. 549, 556–57 (1990).

⁶³ The discussion of *Freytag* that follows in this subsection draws heavily from a book chapter drafted by the author. See DUBROFF & HELLWIG, *supra* note 57, pt. V, at 241.

⁶⁴ 930 F.2d 975 (2d Cir. 1991).

⁶⁵ See *id.* at 991 (“Several factors lead us to conclude that the Tax Court remains a department associated with the Executive Branch.”).

⁶⁶ *Id.*

⁶⁷ *Id.* (citing Tax Reform Act of 1969, Pub. L. No. 91-172, § 961, 83 Stat. 487, 735).

⁶⁸ *Id.* at 993 (observing that judges of the Tax Court “ultimately remain answerable to the President and are not wholly divorced from his oversight.”).

standing in the constitutional scheme, which stood in direct conflict with the Tax Court's own understanding of the effect of the 1969 legislation, provided a critical contemporary backdrop to the Supreme Court's consideration of the issue in *Freytag*.⁶⁹ Furthermore, the Second Circuit's prior resolution of the very issue before the Supreme Court in *Freytag* provides important context for the Supreme Court's subsequent decision.

B. The Parties' Positions

The attorneys who represented the parties in *Samuels, Kramer* before the Second Circuit participated in the *Freytag* litigation before the Supreme Court. The future Chief Justice of the Supreme Court, John G. Roberts, Jr., argued the case on behalf of the Government in his capacity as Deputy Solicitor General. The taxpayers were represented by Kathleen Sullivan, a prominent expert in constitutional law who, at the time, was a member of the Harvard Law School faculty. Erwin Griswold, former Solicitor General and long-serving dean of Harvard Law School, participated in the case as *amicus curiae* in his individual capacity, at least formally.⁷⁰

The Government advanced the same position on which it had prevailed before the Second Circuit in *Samuels, Kramer*, contending that the chief judge of the Tax Court possessed the power to appoint the special trial judge as the Head of a Department. The Commissioner arrived at this position through a process of elimination. The Commissioner argued that the Tax Court clearly was not a legislative body under Article I, because the court served no legislative function. Furthermore, because the Tax Court was not an Article III court whose judges enjoyed lifetime tenure and salary protection, the Commissioner contended that it did not constitute one of

⁶⁹ In *Burns, Stix Friedman & Co. v. Commissioner*, the Tax Court explained as follows:

It is clear from the statutory language and the Senate committee report (S. Rept. No. 91-552, 91st Cong., 1st Sess., p. 302, 1969-3 C.B. 614) that Congress removed the Tax Court from the Executive Branch and established it as an article I court primarily for the purpose of recognizing its status as a judicial body and disposing of any problems that its status as an executive agency sitting in judgment on another executive agency might pose.

57 T.C. 392, 395 (1971).

⁷⁰ Erwin Griswold previously had attempted to represent the interests of the Tax Court judges in the *Samuels, Kramer* litigation, but the Government objected on grounds that only the Attorney General and officers of the Department of Justice could conduct litigation in which the United States, an agency, or an officer thereof was interested. See Letter from Shirley D. Peterson, Assistant Attorney General (Tax Division) to Elaine B. Goldsmith, Clerk, U.S. Court of Appeals for the Second Circuit at 1-2, *Samuels, Kramer & Co. v. Commissioner*, No. 90-4060 (2d Cir. Aug. 17, 1990).

“the Courts of Law” under the Appointments Clause.⁷¹ Accordingly, the Commissioner concluded that the Tax Court continued to reside within the Executive Branch of Article II where it originated, even though the Commissioner conceded that the Tax Court’s fit there “may not be a perfect one.”⁷² Having settled on the Article II approach, the Commissioner interpreted the scope of a “Department” under the Appointments Clause as including any independent component of the Executive Branch.⁷³ On that note, the Tax Court answered to no one, other than possibly the President through the exercise of the qualified removal power or Congress through the Tax Court’s annual budget appropriation.

The taxpayers were less concerned with identifying the Tax Court’s position in the tripartite governmental structure and more interested in articulating what the Tax Court was not. The taxpayers agreed with the Commissioner that “the Courts of Law” under the Appointments Clause were limited to Article III courts — the only courts mentioned in the Constitution.⁷⁴ However, they disagreed that the Tax Court remained within the Executive Branch, citing considerable support for that proposition in the 1969 Act and the legislative reports that accompanied its passage.⁷⁵ When pressed to articulate where the Tax Court fell within the constitutional scheme, taxpayers’ counsel did not provide an affirmative answer. Rather, she reiterated that the Tax Court was neither legislative, executive, nor judicial, and she concluded her response by positing that “perhaps Congress should not create entities that are outside the tripartite structure of government.”⁷⁶

Erwin Griswold, arguing on brief as *amicus curiae*, challenged the point of agreement between the taxpayers and the Commissioner: that “the Courts of Law” under the Appointments Clause were limited to those courts established under Article III of the Constitution. Noting that no such express limitation appeared in the relevant text, Griswold contended that the phrase should be afforded a “fair and natural construction,” which would encompass all courts that “administer, interpret, and apply the laws of the United States.”⁷⁷ From this perspective, the Tax Court possessed the

⁷¹ Brief for the Respondent at 33–38, *Freytag v. Commissioner*, 501 U.S. 868 (1991) (No. 90-762).

⁷² *Id.* at 41.

⁷³ *See id.* at 42.

⁷⁴ Transcript of Oral Argument at 23, *Freytag v. Commissioner*, 501 U.S. 868 (No. 90-762).

⁷⁵ Brief for the Petitioner at 29, *Freytag v. Commissioner*, 501 U.S. 868 (1991) (No. 90-762).

⁷⁶ *Id.* at 26.

⁷⁷ Brief of Erwin N. Griswold as Amicus Curiae at 7, *Freytag v. Commissioner*, 501 U.S. 868 (No. 90-762).

requisite judicial nature. As noted by Griswold, the Tax Court exercised judicial power in resolving disputes between taxpayers and the Government; its decisions were not subject to intermediate review by federal district courts but instead were appealable to the courts of appeals in the same manner as a district court decision; and Congress supplied the court with power to enforce its orders and punish contempt.⁷⁸ In this manner, Griswold advocated a functional interpretation of “the Courts of Law” under the Appointments Clause, one that did not turn on the derivation of the court’s charter.

C. The Majority Opinion

With these three approaches on the table, the Supreme Court began its analysis of the Appointments Clause issue by dismissing the Commissioner’s position that the chief judge of the Tax Court served as the head of a department within the Executive Branch. The Court noted that for the Commissioner’s argument to prevail, it was incumbent upon the Commissioner to demonstrate not only that the Tax Court was part of the Executive Branch but also that the court rose to the level of a “Department” therein.⁷⁹ Having framed the argument in these terms, the Court opened its analysis by simply stating: “We are not so persuaded.”⁸⁰

The Court did not identify at the outset whether it found only one or both of the conjunctive elements of the Commissioner’s argument lacking. Yet the Court began its analysis by examining the secondary point — the scope of a “Department” for purposes of the Appointments Clause. The Court explained that interpreting “Department” as including *any* independent component of the federal administrative regime would permit a wide dissemination of the appointment power that the Appointments Clause was intended to foreclose. Yet, drawing a precise boundary on the scope of a “Department” proved difficult. The Court viewed the term as referring to Cabinet-level agencies and, in addition, “Cabinet-like” agencies within the Executive Branch that Congress designated as Departments.⁸¹ The Tax Court, in the Supreme Court’s view, did not rise to this level.⁸²

The Court’s opening discussion of the scope of a Department for

⁷⁸ *Id.* at 9.

⁷⁹ *Freytag*, 501 U.S. at 885–86.

⁸⁰ *Id.* at 886.

⁸¹ *Id.* at 885–86. Years later, the Supreme Court interpreted a “Department” under the Appointments Clause as including the Securities and Exchange Commission on grounds that the commission constituted “a freestanding component of the Executive Branch,” which was “not subordinate to or contained within any other such component.” *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 511 (2010).

⁸² *Freytag*, 501 U.S. at 888.

Appointments Clause purposes was curious because it appeared to be non-determinative. After wading through that definitional matter, the Court addressed the first conjunctive element of the Commissioner's argument — that the Tax Court remained in the Executive Branch after being established as an Article I court of record — in the following manner:

Even if we were not persuaded that the Commissioner's view threatened to diffuse the appointment power and was contrary to the meaning of "Departmen[t]" in the Constitution, we still could not accept his treatment of the intent of Congress, which enacted legislation in 1969 with the express purpose of "making the Tax Court an Article I court rather than an executive agency." S. Rep. No. 91-552, p. 303 (1969), U.S. Code Cong. & Admin. News 1969, pp. 1645, 2207. Congress deemed it "anomalous to continue to classify" the Tax Court with executive agencies, *id.*, at 302, and questioned whether it was "appropriate for one executive agency [the pre-1969 tribunal] to be sitting in judgment on the determination of another executive agency [the Service]."⁸³

The Court then noted that treating the Tax Court as a Department within the Executive Branch would defy not only the purpose of the Appointments Clause and the meaning of its text, but also "the clear intent of Congress to *transform* the Tax Court into an Article I legislative court."⁸⁴ At this point, one would have expected the Court to announce that the Tax Court no longer resided in the Executive Branch. It did not. Instead, the Court simply concluded that the Tax Court was not a "Department."⁸⁵

The Court's conclusion on this point in *Freytag* could be interpreted as a mere recitation of its prior determination that the Tax Court did not rise to the level of a Department within the Executive Branch, assuming the Tax Court was located within the Executive Branch in the first place. Such an interpretation is certainly defensible as a literal matter, but it renders this portion of the opinion nonsensical. What was the point of the majority detailing that it "could not accept [the Commissioner's] treatment of the intent of Congress" with respect to the 1969 legislation?⁸⁶ That "treatment" that the Court found improper was the Commissioner's view that Congress failed in its attempt to remove the Tax Court from the Executive Branch — one of the two conjunctive elements of the Commissioner's argument that the *Freytag* majority enumerated at the outset of its discussion of this

⁸³ *Id.* at 887–88.

⁸⁴ *Id.* at 888 (emphasis added).

⁸⁵ *Id.*

⁸⁶ *Id.* at 887.

avenue for compliance with the Appointments Clause.⁸⁷ Hence, the Court's ultimate conclusion that the Tax Court did not constitute a "Department" is best understood as a rejection of both elements the Court identified as necessary for the Commissioner to prevail on this theory.⁸⁸ Although the Court in *Freytag* did not state with unmistakable clarity its conclusion that the Tax Court no longer resided in the Executive Branch, it is difficult to faithfully read the *Freytag* opinion in any other manner.⁸⁹

Having dispensed with the option to find the appointment of special trial judges by the chief judge of the Tax Court compliant with the Appointments Clause because the appointment was exercised by a "Head of a Department," the Court in *Freytag* next turned its attention to scope of "the Courts of Law" which also possesses constitutional authority to appoint inferior officers. The Court rejected the argument — interestingly advanced by both parties to the case — that the "Courts of Law" under the Appointments Clause were limited to Article III bodies. The Court found this interpretation contrary to the "time-honored reading" of the Constitution as permitting Congress considerable discretion to vest legislative courts with the power to adjudicate matters of federal law.⁹⁰ The Court then reviewed prior precedents concerning Article I tribunals, noting that these courts also exercise the judicial power of the United States based on their exclusively judicial character.⁹¹ That being the case, then surely such an Article I court could constitute a Court of Law for purposes of the Appointments Clause. The Court noted that this conclusion was consistent with prior practice, as no one had ever thought to question the ability of these legislative courts to appoint their own clerks of court.⁹²

⁸⁷ *Id.* at 885.

⁸⁸ Otherwise, the Court's statement that the Tax Court does not constitute a "Department" at this point in the opinion stands out as a bewildering non-sequitur.

⁸⁹ At least one other commentator interprets this portion of the *Freytag* opinion in the same manner. After noting that the Supreme Court rejected the contention that the chief judge of the Tax Court served as the Head of a Department, Professor Amandeep S. Grewal commented further: "The Court further rejected the Tax Court's alleged placement within the executive branch, noting that Congress enacted Section 7441 to make 'the Tax Court an Article I court rather than an executive agency,' and that any other classification would be 'anomalous.'" Amandeep S. Grewal, *The Un-Precedented Tax Court*, 101 IOWA L. REV. (forthcoming 2016) (manuscript at 26), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2586874.

⁹⁰ *Freytag*, 501 U.S. at 889.

⁹¹ *Id.* ("Our cases involving non-Article III tribunals have held that these courts exercise the judicial power of the United States."). This point — that the judicial power of the United States could be exercised by courts whose judges did not enjoy the privileges of Article III status — would prove to be the heart of the disagreement reflected in the four-Justice concurring opinion in the case discussed below.

⁹² *See id.*

With this setting, the Court in *Freytag* turned its attention to an examination of the Tax Court's functions for the stated purpose of defining "its constitutional status and its role in the constitutional scheme."⁹³ In the course of this examination, the Supreme Court made a number of critical observations. Through a variety of expressions, the Court stressed that the Tax Court exercises judicial power to the exclusion of any other type of governmental power, whether executive, legislative, or administrative.⁹⁴ Because the Tax Court interpreted and applied the Code in disputes between taxpayers and the Government, the Court in *Freytag* observed that the Tax Court "exercises a portion of the judicial power of the United States."⁹⁵ While the point of this exercise was to support the *Freytag* Court's conclusion that the Tax Court was among the Courts of Law empowered to appoint inferior officers, the Court appeared to be speaking to something larger than the Appointments Clause issue before it. The Court's discussion of Article I tribunals in general and of the Tax Court in particular suggests the existence of a functional Judicial Branch of government, one that certainly includes but is not limited to the Article III Judiciary. One could conceive of this functional Judicial Branch as any court validly created by Congress, whether pursuant to its power to do so under Article III or Article I, that performs exclusively judicial functions.

This concept helps explain the following passage in the *Freytag* opinion, one that is critical to identifying the Tax Court's place in the governmental structure:

The Tax Court remains independent of the Executive and Legislative Branches. Its decisions are not subject to review by either the Congress or the President. Nor has Congress made Tax Court decisions subject to review in the federal district courts. Rather, like the judgments of the district courts, the decisions of the Tax Court are appealable only to the regional United States courts of appeals, with ultimate review in this Court. Those courts of appeals, moreover, review those decisions "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury."⁹⁶

Continuing with its pattern of vagueness in its opinion, the Court in *Freytag*

⁹³ *Id.* at 890.

⁹⁴ *Id.* at 890–91 ("The Tax Court exercises judicial, rather than executive, legislative, or administrative, power."), 891 ("The Tax Court exercises judicial power to the exclusion of any other function."), 892 ("The Tax Court's exclusively judicial role distinguishes it from other non-Article III tribunals that perform multiple functions . . .").

⁹⁵ *Id.* at 891.

⁹⁶ *Id.* (citing I.R.C. § 7482).

never positively identified the Tax Court's location in the constitutional structure of government. However, in the course of discussing the Tax Court's "role in the constitutional scheme,"⁹⁷ the Supreme Court declared that the Tax Court was "independent of the Executive and Legislative Branches."⁹⁸ This would then appear to be a fairly simple process of elimination, save for one inescapable point: the Tax Court cannot be housed under Article III due to the limitations on the tenure of its judges. The *Freytag* case thus leaves two options concerning the location of the Tax Court in the constitutional structure of government: (1) the Tax Court is part of the Judicial Branch of government defined in functional terms (to be equated with the Courts of Law for Appointments Clause purposes), or (2) the Tax Court resides in the constitutional ether outside the tripartite structure of government altogether, as contended by taxpayers' counsel. While each conclusion carries its own measure of disconcertion, the first appears more consistent with the *Freytag* opinion as a whole — particularly in light of the Court's observation that the Tax Court exercises a portion of the judicial power of the United States.⁹⁹

D. Justice Scalia's Concurrence

If one finds both options outlined above concerning the Tax Court's location in the constitutional regime that follow from the Court's opinion in *Freytag* to be logically impermissible, then the Court's opinion in *Freytag* must be flawed. Cue the concurring opinion authored by Justice Scalia and joined by Justices O'Connor, Kennedy, and Souter. Like the majority opinion in *Freytag*, the concurring opinion would have upheld the validity of the appointment of special trial judges against the taxpayers' Appointments Clause challenge if pressed to address the issue on the merits (which the concurrence was disinclined to do).¹⁰⁰ However, the concurring Justices would have done so by characterizing the chief judge of the Tax Court as a "Head" of a "Department" under the Appointments Clause, as advocated by the Commissioner.¹⁰¹ Although the concurrence would have selected a different rationale to achieve the same result, the concurrence did not view the matter as an inconsequential parsing of constitutional doctrine. Rather, the concurring opinion characterized the majority's willingness to treat an Article I court as one of "the Courts of Law" under the

⁹⁷ *Id.* at 890.

⁹⁸ *Id.* at 891. This statement reinforces the Court's prior, albeit oblique, discussion of the prospect of the Tax Court remaining an executive agency following the Tax Reform Act of 1969. See text accompanying *supra* notes 83–89.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 892–901 (Scalia, J., concurring).

¹⁰¹ *Id.* at 901.

Appointments Clause as being “both wrong and full of danger for the future of our system of separate and coequal powers.”¹⁰²

Beyond the textual interpretation of “the Courts of Law” as including only those courts envisioned by and referenced in the Constitution (that is, those chartered under Article III),¹⁰³ the concurring opinion found support for this textual interpretation in the purpose of the Appointments Clause itself. The Appointments Clause was chiefly designed to preclude Congress from exercising the power to appoint officers to the governmental bodies it created. In the view of the concurrence, only judges of Article III courts possessed the requisite protections — lifetime tenure and salary protection — to resist congressional encroachment on its appointment power.¹⁰⁴ The concurring justices charged that interpreting “the Courts of Law” under the Appointments Clause to include courts that lack these protections “utterly destroys this carefully constructed scheme.”¹⁰⁵

The concurring opinion not only found that the majority approach undermined the purpose of the Appointments Clause, the opinion appeared floored by the prospect of the judicial power of the United States extending beyond that described in Article III of the Constitution.¹⁰⁶ The concurrence pointed to the opening text of Article III (“The judicial Power of the United States . . .”) and stressed that this reference to judicial power was exclusive.¹⁰⁷ Because the judicial power of the United States was entrusted to the Supreme Court and inferior courts established by Congress whose judges enjoyed tenure during good behavior and undiminished salary, any adjudicative power exercised by a court whose judges did not enjoy these protections could not rise to the level of judicial power of the United States. To contend otherwise would be to reject the constitutional framework espoused in Article III. The concurring justices ultimately satisfied themselves that the conclusion by the majority — that the judicial power of the United States could be exercised by Article I courts, including the Tax

¹⁰² *Id.* For an article expressing similar qualms regarding the merits and consequences of the Court’s decision in *Freytag*, see Tuan Samahon, *Blackmun (and Scalia) at the Bat: The Court’s Separation of Powers Strike Out in Freytag*, 12 NEV. L.J. 691 (2012).

¹⁰³ *Freytag*, 501 U.S. at 902 (Scalia, J., concurring).

¹⁰⁴ *Id.* at 907–08. In contrast, the Second Circuit had described the “potential for disruption to our constitutional scheme” posed by the issue in this context as “minimal.” *Samuels, Kramer & Co. v. Commissioner*, 930 F.2d 975, 988 (2d Cir. 1991).

¹⁰⁵ *Freytag*, 501 U.S. at 908.

¹⁰⁶ *Id.* (characterizing the expansion of judicial power beyond what is described in Article III as a “startling proposition”).

¹⁰⁷ See *id.* The concurrence highlighted for contrast that Article III does not refer to “Some of the judicial Power of the United States,” or even “Most of the judicial Power of the United States.” *Id.* (emphasis in original).

Court — was something of a “pun.”¹⁰⁸ In other words, the majority could not have been referring to the exercise of judicial power in the constitutional sense, but rather only to the power to adjudicate in the manner of courts by governmental bodies of any stripe.¹⁰⁹

It is worth stressing that the concurring opinion did not object to the propriety of a wide range of federal “adjudicative decisionmakers.”¹¹⁰ The opinion simply rejected the equation of adjudication with the exercise of the judicial power of the United States based on the nature of the adjudicative process and structure at issue. The concurring opinion instead viewed the exercise of judicial power in the constitutional sense as turning on the measure of independence afforded to the arbiter: “It is the identity of the officer — not something intrinsic about the mode of decisionmaking or type of decision — that tells us whether the judicial power is being exercised.”¹¹¹ Thus, to the extent the majority opinion in *Freytag* can be viewed as describing a functional Judicial Branch of government to which the Tax Court belonged, the concurring justices would have none of it.

The concurrence characterized the conclusion by the majority that the Tax Court exercises judicial power “independent . . . [of] the Executive Branch” as a “complete mystery.”¹¹² Further conveying its incredulity over the majority’s conclusion, the concurring opinion characterized its view that the Tax Court exercises executive power as “entirely obvious.”¹¹³ The concurring opinion made no attempt to address elimination of the statutory reference to the Tax Court as “an independent agency in the Executive Branch of the Government” by the Tax Reform Act of 1969 nor the accompanying legislative documents indicating congressional intent to render the Tax Court something other than an executive agency. Instead, the concurrence dove into the definition of a “Department” for Appointments Clause purposes, explaining why the Tax Court as a “free-standing, self-contained entity in the Executive Branch” qualified as such.¹¹⁴ Perhaps the concurring justices did not view the statutory revision to section 7441 as sufficiently expressive of the intent to remove the Tax Court from the Executive Branch. But that explanation is doubtful. Even had Congress augmented section 7441 by providing that “[t]he Tax Court is no longer an independent agency in the Executive Branch of the Government” at the end,

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 911 (employing that term).

¹¹¹ *Id.*

¹¹² *Id.* at 912.

¹¹³ *Id.*

¹¹⁴ *Id.* at 915.

the concurrence likely would have viewed such text as inoperative.¹¹⁵ Instead, for Congress to move the Tax Court out of the Executive Branch and into the Judicial Branch (leaving aside the prospect of moving the Tax Court to the Legislative Branch or outside of the tripartite system of government altogether, if those are even possibilities), it would have been necessary for Congress to afford the judges of the Tax Court Article III protections. For as the concurrence explained, “[w]hen the Tax Court was statutorily denominated an ‘Article I Court’ in 1969, its judges did not magically acquire the judicial power.”¹¹⁶

The analysis of the concurring opinion authored by Justice Scalia in *Freytag* is persuasive. The interpretation of the Appointments Clause and of the scope of federal judicial power espoused by the concurrence is easier to reconcile with the text of the Constitution and the traditional structure of tripartite government it creates (even if the opinion is not nearly as easy to reconcile with the intent of Congress in chartering the Tax Court as an Article I court of record). In that regard, despite falling on the disfavored side of the 5-4 split in *Freytag*, Justice Scalia’s concurring opinion in the case has enjoyed favorable citation — not on tangential points, but on points central to its split with the opinion of the majority. For instance, in *Federal Marine Commissioner v. South Carolina State Ports Authority*,¹¹⁷ the Supreme Court held that the doctrine of sovereign immunity precluded a federal agency from adjudicating a complaint lodged by a private party against a nonconsenting State for violations of federal law, basing its decision in part on the similarity between the administrative adjudication regime at issue and civil litigation in federal courts.¹¹⁸ In his dissenting opinion, Justice Breyer explained that administrative agencies, even so-called “independent” agencies, are not part of the Legislative or Judicial Branches of government; rather, such bodies “are more appropriately considered to be part of the Executive Branch.”¹¹⁹ Justice Breyer supported

¹¹⁵ On that note, in a later case addressing the constitutionality of the United States Sentencing Commission, Justice Scalia explained: “I doubt whether Congress can ‘locate’ an entity within one Branch or another for constitutional purposes by merely saying so” *Mistretta v. United States*, 488 U.S. 361, 420 (Scalia, J., dissenting).

¹¹⁶ *Freytag*, 501 U.S. at 912.

¹¹⁷ 535 U.S. 743 (2002).

¹¹⁸ See *id.* at 757–59 (“[T]he similarities between FMC proceedings and civil litigation are overwhelming.”).

¹¹⁹ *Id.* at 773, 774 (Breyer, J., dissenting). In a similar vein, the district court in *Klein v. United States*, 94 F. Supp. 2d 838, 844 (E.D. Mich. 2000), described the Tax Court as a “classic example of a congressionally created forum within the executive branch” The court cited the Second Circuit decision in *Samuels, Kramer & Co. v. Commissioner*, 930 F.2d 975, 991–92 (2d Cir. 1991), apparently not realizing that the *Samuels, Kramer* case had been abrogated on this point by the Supreme Court’s decision in *Freytag*. Perhaps the district court in *Klein* would have done better to cite to Justice Scalia’s concurring opinion in

this point with the first of two favorable citations to Justice Scalia's concurring opinion in *Freytag*.¹²⁰ [Justice Breyer was not alone in this view; his dissenting opinion was joined by Justices Stevens, Souter, and Ginsburg.] Yet, as described below, perhaps no greater homage has been paid to Justice Scalia's concurring opinion in *Freytag* than that recently shown by the D.C. Circuit Court of Appeals in *Kuretski v. Commissioner* — all while pledging fidelity to the opinion of the *Freytag* majority.¹²¹

IV. THE KURETSKI DECISION

The constitutional nature of the United States Tax Court essentially became a dormant issue until 2012, when the taxpayers in *Kuretski v. Commissioner* raised a separation powers objection to the authority of the Tax Court Judge to decide their case. The taxpayers in *Kuretski* invoked the Tax Court's jurisdiction to review determinations made by the Service in the collection due process setting.¹²² After the Tax Court largely sustained the Service's determination, the taxpayers filed a motion to vacate the decision and a motion for reconsideration, based in part on the contention that the power of the President to remove a Tax Court judge for "inefficiency, neglect of duty, or malfeasance in office" pursuant to section 7443(f) violated the constitutional doctrine of separation of powers.¹²³ Both motions were denied, and the taxpayers appealed the issue to the D.C. Circuit Court of Appeals.

The Supreme Court's decision in *Freytag* served as the foundation for

Freytag.

¹²⁰ Fed. Marine Commissioner vs. S.C. State Ports Auth., 535 U.S. 743, 773–74. Concerning Justice Breyer's understanding of the Tax Court's constitutional status, he made the following remarks at oral argument in a 2005 case concerning the Tax Court's procedures for reviewing a report issued by a special trial judge:

JUSTICE BREYER: What — what is — can I ask you a really esoteric administrative law question, which I have never been able to figure out? It's probably relevant, but I — this [the Tax Court] is an agency. That's what — my great tax professor — Ernie Brown, used to say there is no Tax Court. He says, the Board of Tax Appeals shall be known as the Tax Court. What he meant by that is it's not — it isn't the Tax Court, just known as. So — so this is an agency, an administrative agency.

Transcript of Oral Argument at 25, *Ballard v. Commissioner*, 544 U.S. 40 (2005) (No. 03-184).

¹²¹ *Kuretski v. Commissioner*, 755 F.3d 929, 940–41 (D.C. Cir. 2014).

¹²² *Id.* at 937; see also I.R.C. § 6330(d)(1) (providing the Tax Court with exclusive jurisdiction to review appeals of collection due process hearings).

¹²³ *Kuretski v. Commissioner*, Tax Court Docket No. 018545-10 L (T.C. Mar. 4, 2013). See also *Kuretski*, 755 F.3d at 935 (discussing the procedural posture of the case).

the taxpayers' argument in *Kuretski*: because the Tax Court exercises a "portion of the judicial power of the United States,"¹²⁴ the President's authority under section 7443(f) impermissibly subordinated the Tax Court's exercise of judicial power to an executive officer.¹²⁵ In addition to seeking a declaration that section 7443(f) contravened constitutional safeguards, the taxpayers sought a remand of their case to the Tax Court with instructions for new proceedings to be conducted before an adjudicator who was no longer subject to the removal power.

In a case of first impression, the D.C. Circuit Court of Appeals held that section 7443(f) did not infringe the constitutional separation of powers. While the court's reluctance to undermine the legitimacy of every Tax Court decision issued since the Tax Reform Act of 1969 may have been understandable, the court's rationale for its holding was somewhat surprising. Rather than addressing whether an "interbranch" removal power of the qualified sort contained in section 7443(f) raised constitutional concerns, the D.C. Circuit instead attacked the premise of the taxpayers' argument — that is, that the President's removal power under section 7443(f) implicated two branches of government. The court did so by asserting that the Tax Court "exercises Executive authority as part of the Executive Branch."¹²⁶ Having thus characterized the removal power at issue as of the "intrabranh" variety, the separation of powers argument fell by the wayside.

A. Rejection of Judicial Branch Option

When it turned to the merits of the taxpayers' contention that section 7443(f) represented an impermissible interbranch removal power, the D.C. Circuit framed the taxpayers' primary argument as follows: "The Kuretskis' principal submission is that Tax Court judges exercise the judicial power of

¹²⁴ *Freytag v. Commissioner*, 501 U.S. 868, 891 (1991).

¹²⁵ The prospect that section 7443(f) violates the separation of powers doctrine was raised by Prof. Tuan Samahon, as part of his article criticizing the Supreme Court's decision in *Freytag*. See Samahon, *supra* note 102, at 695–96. ["Criticizing" is something of an understatement. Professor Samahon's article was offered as part of a Symposium entitled "The Worst Supreme Court Case Ever? Identifying, Explaining, and Exploring Low Moments of the High Court."] Interestingly, Professor Samahon served as counsel to the Kuretskis before the D.C. Circuit, and he argued their case on appeal.

¹²⁶ *Kuretski*, 755 F.3d at 932. The Fourth Circuit Court of Appeals has similarly characterized the Tax Court as part of the Executive Branch following the *Freytag* decision, indeed citing *Freytag* for the proposition that the Tax Court "is a Court of Law despite being part of the Executive Branch." *S.C. State Ports Auth. v. Fed. Maritime Comm'n*, 243 F.3d 165, 171 (4th Cir. 2001). The Executive Branch characterization, however, was not repeated when the case proceeded to the Supreme Court. See *Fed. Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002).

the United States *under Article III of the Constitution*.”¹²⁷ Given the clear statement in the Constitution that judicial power under Article III can be exercised only by those judges who enjoy the safeguards of lifetime tenure and salary protection, it is difficult to imagine the taxpayers framing their argument in these exact terms.¹²⁸ By declaring that the Tax Court exercises a portion of the judicial power of the United States, the Court in *Freytag* characterized the judicial power of the United States as including but being limited to that of Article III. The taxpayers’ argument in *Kuretski* therefore did not depend on the Tax Court exercising Article III power. Rather, properly characterized, the taxpayers’ argument in *Kuretski* was based on the ability of the Tax Court to independently exercise its portion of the judicial power of the United States — independence that may be impermissibly undermined by the President’s removal power under section 7443(f). Accordingly, much of the opening discussion by the D.C. Circuit of the taxpayers’ constitutional challenge is simply inapposite. The court rejected a specious argument that the taxpayers did not actually raise.

Rather than relying on the Tax Court’s exercise of Article III power, the taxpayers in *Kuretski* relied on the Supreme Court’s characterization of the Tax Court’s role in the constitutional scheme in *Freytag*. The D.C. Circuit recognized the relevance of *Freytag*, although it did not view the Supreme Court’s decision as particularly troubling: “The Supreme Court’s decision in *Freytag v. Commissioner* . . . adds a wrinkle to what otherwise would be a straightforward analysis.”¹²⁹ The “wrinkle” necessarily entailed the statement that the Tax Court exercised a portion of the judicial power of the United States. Rather than taking this declaration at face value and evaluating whether the President’s limited removal power sufficiently undermined the Tax Court’s independent exercise of such power, the D.C. Circuit instead marginalized the statement. It reasoned that the Supreme Court used the concept of judicial power in *Freytag* “in an enlarged sense,” not in the particular sense employed by Article III.¹³⁰ This is of course true, and consistent with the notion of a functional Judicial Branch of government that extends beyond the Article III Judiciary. The D.C. Circuit did not see it that way. The court repeatedly equated the exercise of federal

¹²⁷ *Kuretski*, 755 F.3d at 939 (emphasis added); see also *id.* at 932 (“According to the *Kuretskis*, Tax Court judges exercise the judicial power of the United States under Article III of the Constitution . . .”).

¹²⁸ Indeed, in reviewing the taxpayers’ brief, they did not frame their argument in terms of Article III. See Brief for Appellant at 34, *Kuretski v. Commissioner*, No. 13-1090 (D.C. Cir. July, 7 2013) (“Since 1991 and *Freytag*’s characterization of the Tax Court’s power, it has been clear that the body exercises the judicial power of the United States, not executive power.”).

¹²⁹ *Kuretski*, 755 F.3d at 940.

¹³⁰ *Id.* at 941.

judicial power with Article III, and it later insinuated that the *Freytag* Court's statement concerning the Tax Court's exercise of judicial power was relevant for purposes of the Appointments Clause only.¹³¹ In other words, the D.C. Circuit could not believe that the *Freytag* Court meant what it said. This position echoes Justice Scalia's concurring opinion in *Freytag*, which referred to the majority's description of the exercise of federal judicial power by non-Article III courts as "really only a pun."¹³²

B. Rejection of Legislative Branch Option

The D.C. Circuit then turned to the taxpayers' alternative argument, that the Tax Court's exercise of judicial power as a court established under Article I of the Constitution places it within the Legislative Branch. The taxpayers based this fallback position on the congressional establishment of the Tax Court as a court of record "established[] under article I of the Constitution of the United States"¹³³ and the conventional reference to the Tax Court as an Article I legislative court. The D.C. Circuit rejected the taxpayers' invocation of the Legislative Branch in relatively short order, citing the Tax Court's lack of any sort of legislative function.¹³⁴

Note the whipsaw analysis at work here. Despite its purely judicial (or, so as to not assume the question, adjudicative) function, the Tax Court is excluded from the Judicial Branch because its judges lack Article III protections. Yet because of its purely adjudicative function, the Tax Court cannot reside in Article I. So where does that leave the Tax Court? The theory employed to keep the Tax Court out of the Legislative Branch also would preclude the Tax Court from residing in the Executive Branch, as the Tax Court does not exercise any discretion with respect to the administration of the tax system. Rather, the Tax Court has a singular focus. It interprets the Code to resolve disputes between taxpayers and the Government that fall within its statutory jurisdiction. So, perhaps the Tax Court falls outside the tripartite system of government, due to the inconsistency in the bases for defining the bounds of each of the three branches.

¹³¹ See *id.* at 941–42 (“[W]e conclude that the Tax Court’s status as a ‘Court of Law’ — and its exercise of ‘judicial power’ — for *Appointments Clause* purposes under *Freytag* casts no doubt on the constitutionality of the President’s authority to remove Tax Court judges.”).

¹³² *Freytag v. Commissioner*, 501 U.S. 868, 908 (1991) (Scalia, J., concurring).

¹³³ *Kuretski*, 755 F.3d at 940 (citing, I.R.C. § 7441).

¹³⁴ *Id.* at 943. The D.C. Circuit also persuasively explained that Congress’s exercise of its power under Article I to create the Tax Court, alone, is not a sufficient basis for concluding that the Tax Court resides in the Legislative Branch, as Congress exercises its Article I power to create a host of executive agencies.

C. Invocation of Executive Branch

One approach for avoiding the prospect of a branchless governmental entity is to define one of three branches as occupying a default position. That is the approach taken by the D.C. Circuit in *Kuretski*. After concluding its discussion of the taxpayers' alternate argument, the D.C. Circuit observed that "[i]t follows that the Tax Court exercises its authority as part of the Executive Branch."¹³⁵ In this manner, the Tax Court's constitutional nature is not defined in a positive manner; instead, the court's location is determined through a process of elimination.

1. Self-Proclaimed Consistency with *Freytag*

Immediately after announcing its deductive conclusion that the Tax Court resides in the Executive Branch of government, the D.C. Circuit characterized its assessment as being "fully consistent with *Freytag*."¹³⁶ This assessment is intriguing, as the *Freytag* case appeared to confirm that Congress accomplished what it set out to do with the portions of the Tax Reform Act of 1969 concerning the Tax Court — to terminate its status as an executive agency. This portion of the *Kuretski* opinion therefore warrants close examination.

The D.C. Circuit first highlighted the *Freytag* Court's conclusion that not all agencies within the Executive Branch rise to the level of a Department for purposes of the Appointments Clause.¹³⁷ That is certainly the case, as the Court in *Freytag* found that a Department whose head was authorized to appoint inferior officers was limited to a Cabinet-level agency or one of similar importance. Yet the potential for an agency that is something less than a Department to exist in the Executive Branch proves nothing with respect to the constitutional nature of the Tax Court. While one could read the *Freytag* Court's analysis of the scope of a Department under the Appointments Clause as indicating the Court's assumption that the initial conjunctive prong of the Commissioner's argument in *Freytag* — that the Tax Court remained in the Executive Branch in any capacity — was satisfied, that inference is belied by the balance of the *Freytag* opinion. Recall that the Court in *Freytag* explained that, even if it had accepted the Commissioner's argument concerning the scope of a Department under the Appointments Clause, it still "could not accept [the Commissioner's] treatment of the intent of Congress, which enacted legislation in 1969 with the express purpose of 'making the Tax Court an Article I court rather than

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

an executive agency.”¹³⁸ In other words, the Court in *Freytag* could not accept the Commissioner’s contention that the Tax Court remained in the Executive Branch.¹³⁹ The D.C. Circuit in *Kuretski* fails to address this aspect of the *Freytag* opinion. Instead, the D.C. Circuit cites the unexplained characterization of the *Freytag* decision by the Fourth Circuit Court of Appeals that the Tax Court is a Court of Law “‘despite being part of the Executive Branch.’”¹⁴⁰ That statement certainly is helpful to the D.C. Circuit’s analysis, but it does not erase the contrary aspect of the *Freytag* opinion.

Next, the D.C. Circuit addressed the *Freytag* Court’s statement that the Tax Court “remains independent of the Executive and Legislative Branches”¹⁴¹ and exercises judicial rather than “executive” power.¹⁴² These statements stand in stark contrast with the D.C. Circuit’s opening conclusion in *Kuretski* that the Tax Court exercises executive authority as part of the Executive Branch.¹⁴³ However, the D.C. Circuit in *Kuretski* did not view the observations by the *Freytag* Court as speaking to the Tax Court’s structural independence or its location in the constitutional scheme; rather, the D.C. Circuit viewed these statements as referring to the Tax Court’s functional independence only.¹⁴⁴ Interpreting the *Freytag* Court’s observations through a functional lens is understandable, as this portion of the opinion is largely dedicated to detailing the purely judicial function of the Tax Court and comparing its operations to that of a federal district court. On the other hand, the Supreme Court in *Freytag* opened this portion of its opinion by stating that it was examining the Tax Court’s functions “to

¹³⁸ *Freytag v. Commissioner*, 501 U.S. 868, 887 (1991) (quoting S. REP. NO. 91552, at 303 (1969)).

¹³⁹ One could thread the needle here to argue that the *Freytag* majority determined only that Congress terminated the Tax Court’s status as an executive agency, but left the Tax Court within the Executive Branch in some other capacity (e.g., an executive court). Yet there is no indication in the *Freytag* opinion that the Court envisioned nonagency entities within the Executive Branch. See text accompany *infra* notes 177 to 185 (detailing statements from judicial officers in hearings accompanying the creation of the United States Court of Appeals for Veterans Claims characterizing such a body as an “Article I executive branch court”). To the contrary, as discussed above, the *Freytag* opinion strongly suggests that the Court believed that Congress accomplished its goal of removing the Tax Court from the Executive Branch entirely.

¹⁴⁰ *Kuretski*, 755 F.3d at 943 (quoting *S.C. Ports Auth. v. Fed. Mar. Comm’n*, 243 F.3d 165, 171 (4th Cir. 2001) (emphasis added)).

¹⁴¹ *Freytag*, 501 U.S. at 891.

¹⁴² *Kuretski*, 755 F.3d at 943.

¹⁴³ *Id.* at 932.

¹⁴⁴ *Id.* at 943. The D.C. Circuit then proceeded to recount that a so-called independent agency still resides in the Executive Branch. *Id.* at 944.

define its constitutional status and its role in the constitutional scheme.”¹⁴⁵ Thus, it may not be as easy to separate discussions of function and constitutional structure as the D.C. Circuit suggested in *Kuretski*, given that the *Freytag* Court largely equated the two.

Overall, the *Kuretski* court’s characterization of its determination that the Tax Court continues to reside in the Executive Branch notwithstanding the 1969 legislation as “fully consistent” with the Supreme Court’s decision in *Freytag* is somewhat disingenuous. True, the *Kuretski* decision is consistent with *Freytag* in the sense that *Freytag* does not preclude the *Kuretski* holding. Yet, to the extent one views the phrase “consistent with” as conveying “faithful to” or “supported by,” well, that is simply not the case. The *Kuretski* opinion — particularly its resistance to the prospect of judicial power being exercised outside the bounds of Article III — reads very much like an endorsement of Justice Scalia’s concurring opinion in *Freytag*. One can readily surmise that Erwin Griswold would not have been pleased with the marginalization of his victory in *Freytag*.

2. Comparison with the Court of Appeals for the Armed Forces

The D.C. Circuit in *Kuretski* took considerable comfort in the historical similarities between the Tax Court and the Court of Appeals for the Armed Forces (formerly the Court of Military Appeals). Both courts were established by Congress as legislative courts under Article I. And, as noted by the *Kuretski* court, the Court of Military Appeals served as precedent for Congress in 1969 when it chartered the Tax Court as a court of record under Article I in lieu of an independent executive agency.¹⁴⁶ The *Kuretski* court later cited the Supreme Court’s observation in the 1997 decision in *Edmond v. United States* that it is “clear that the Court of Appeals for the Armed Forces is within the Executive Branch.”¹⁴⁷ The implication being that if the model for the creation of the Tax Court as an Article I court of record resides in the Executive Branch, the Tax Court must have followed the same path.

The comparison of the Tax Court to the former Court of Military Appeals is an interesting one. Congress originally created the Court of Military Appeals as part of the Uniform Code of Military Justice, enacted in 1950. The legislation establishing the court provided that it “shall be located for administrative purposes in the Department of Defense.”¹⁴⁸ The

¹⁴⁵ *Freytag*, 501 U.S. at 890.

¹⁴⁶ *Kuretski*, 755 F.3d at 944.

¹⁴⁷ *Id.* (quoting *Edmond v. United States*, 520 U.S. 651, 664–65).

¹⁴⁸ Uniform Code of Military Justice, ch. 169, art. 67(a)(1) (1997), Pub. L. No. 81-506, 64 Stat 107, 129 (1950).

location of the Court of Military Appeals within the Department of Defense for administrative purposes was intended to indicate that the court would exercise its authority independently of the Secretary of Defense.¹⁴⁹ As originally proposed, the judges of the court were to enjoy tenure during good behavior. However, as the legislation moved through the Senate, lifetime tenure was dropped in favor of term appointments for its judges that eventually were set at fifteen years.¹⁵⁰

While the legislation was being considered, Senator Patrick McCarran, chairman of the Senate Judiciary Committee, weighed in on the constitutional nature of the proposed tribunal. After explaining that the proposed court would not constitute a court in the “strict constitutional sense” because the body would not derive its power from Article III of the Constitution, the Senator determined that the court could be established within the National Military Establishment because it belonged in the Executive Branch of the Government.¹⁵¹ Later, after noting that the actions of the proposed court would be subject to executive or administrative action of the President or the Secretary of Defense, the Senator concluded that “the proposed tribunal is in the final analysis nothing more than an agency of the executive department.”¹⁵²

Roughly two decades after the Court of Military Appeals was created, Congress revisited the status of the court out of concern that the court’s association with the Executive Branch could undermine its mission. As explained by the House Committee on the Armed Services,

There has been some claim that the court, having been put under the Department of Defense for administrative purposes, is in effect an administrative agency. If it had such status, it would not be able to question any of the provisions of the Manual for Court-Martial since the manual had been promulgated by Presidential Order.

Accordingly, Congress amended the statute to establish the United States

¹⁴⁹ The report of the Senate Committee on the Armed Forces explained the designation as follows: “The Court of Military Appeals provided for in this article is established in the National Military Establishment for the purpose of administration only, and will not be subject to the authority, direction, or control of the Secretary of Defense.” S. REP. NO. 81-486, at 28 (1949).

¹⁵⁰ See *id.* at 6 (“The committee believed it desirable to have the judges of the court of military appeals serve for a term of 8 years rather than hold office during good behavior.”); see also H.R. REP. NO. 81-1946, at 3–4 (1949) (noting decision of the conference committee to extend the term of appointment to fifteen years).

¹⁵¹ *Unif. Code Of Military Justice: Hearings on S. 857 and H.R. 4080 Before a Subcomm. of the Senate Comm. on Armed Forces*, 81st Cong., 1st Sess., at 113 (1949) (statement of Senator Patrick McCarran).

¹⁵² *Id.* at 114.

Court of Military Appeals “under article I of the Constitution of the United States.”¹⁵³ Additionally, Congress clarified that the court was to be located within the Department of Defense “for administrative purposes *only*.”¹⁵⁴ The statutory amendment was thought to have substance. Congress pursued the statutory change to make it “abundantly clear” that the tribunal was indeed a court, one capable of questioning any executive regulation or action “as freely as though it were a court constituted under article III of the Constitution.”¹⁵⁵ Additionally, Congress intended the amendment to counter the contentions that the court “is not a court at all but is an instrumentality of the executive branch or an administrative agency within the Department of Defense,”¹⁵⁶ contentions that Congress recognized may have been inadvertently supported by locating the court in the Department of Defense for administrative purposes.¹⁵⁷ The judges of the Court of Military Appeals actively sought the statutory change, describing its import in the following terms:

The really important provision contained in this bill is that it establishes the U.S. Court of Military Appeals as a judicial tribunal in every sense of the word. In the past there have been intimations at least that it really was only an administrative agency. This bill removes any doubt about its full stature as a U.S. court. It increases its standing and prestige in the judicial hierarchy and, by implication, gives it the full powers of a U.S. court.¹⁵⁸

¹⁵³ Act of June 15, 1968, Pub. L. No. 90-340, § 1, 82 Stat. 178 (1968) (amending 10 U.S.C. § 867(a)).

¹⁵⁴ *Id.* (emphasis added). The legislation further provided that the newly established United States Court of Military Appeals represented a continuation of the Court of Military Appeals that preceded it, with no interruption to its proceedings or jurisdiction. *Id.* § 2, 82 Stat. 178, 178-79.

¹⁵⁵ H.R. REP. NO. 90-1480, at 2 (1968).

¹⁵⁶ S. REP. NO. 90-806, at 2 (1968).

¹⁵⁷ The report of the Senate Committee on Armed Forces explained the justification for originally locating the Court of Military Appeals in the Department of Defense for administrative purposes as follows:

This provision was adopted only to expenditures for the administration of the relatively small staff of the court. The phrase “for administrative purposes” was meant merely to authorize the Department of Defense to furnish such things as telephone services, transportation facilities, and to purchase supplies. The court justifies its own budget and funds are appropriated for its operations with no control exercised by the Department of Defense.

Id.

¹⁵⁸ H.R. REP. NO. 90-1480, at 3 (statement of Chief Judge Robert E. Quinn, Court of

Hence, the legislation that served as the model for the chartering of the United States Tax Court as an Article I court of record stemmed from the same motivation — to eliminate undesirable ties to the Executive Branch and to imbue the court with a formal measure of structural independence.

The D.C. Circuit in *Kuretski* did not explore the common motivation for the chartering of the United States Court of Military Appeals and the United States Tax Court as courts of record established under Article I of the Constitution. Instead, the *Kuretski* court cited the Supreme Court's conclusion in *Edmond v. United States* that the United States Court of Military Appeals is located in the Executive Branch,¹⁵⁹ remarkably for the proposition that Congress “sought to — and did — achieve” the same status for the Tax Court.¹⁶⁰

Putting aside for the moment that Congress intended to sever connections to the Executive Branch with respect to both courts, the analogy between the Tax Court and the United States Court of Appeals for the Armed Forces is not as strong as suggested in the *Kuretski* decision. Even though Congress did not intend for the location of the Court of Appeals for the Armed Forces within the Department of Defense for administrative purposes to have structural significance, that court is nonetheless statutorily associated with an executive agency. The Tax Court has no such association. Additionally, the judges of the Court of Appeals for the Armed Forces are obligated to meet annually in committee with the Judge Advocates General and two members appointed by the Secretary of Defense to survey the operations of the military justice system.¹⁶¹ The Tax Court, on the other hand, is not subject to regular administrative oversight by the agency charged with administering the federal tax regime, or, for that matter, any other sector of the Executive Branch. Indeed, apart from being Article I courts, the only similarity between the Court of Appeals for the Armed Forces and the Tax Court is the power of the President to remove a judge of both courts for cause — a power that may exist implicitly without express statutory authorization.¹⁶² The analogy to the Court of Appeals for

Military Appeals); *see also id.* at 4 (statement of Judge Homer Ferguson, Court of Military Appeals) (“I think it is very important that Congress go on record making this a legislative court in words.”); *id.* at 5 (statement of Judge Paul J. Kilday, Court of Military Appeals) (describing the legislative change as “of the greatest importance”).

¹⁵⁹ *Kuretski v. Commissioner*, 755 F.3d 929, 944 (D.C. Cir. 2014) (citing *Edmond v. United States*, 520 U.S. 651, 664–65 n.2 (1997)).

¹⁶⁰ *Id.* at 945.

¹⁶¹ 10 U.S.C. § 946 (1989).

¹⁶² While the President does not possess inherent constitutional authority to remove members of quasi-judicial bodies, *see Wiener v. United States*, 357 U.S. 349 (1958); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), it is hard to imagine that members of such bodies are beyond removal for cause during this period. Absent a regime

the Armed Forces therefore is not as persuasive as it may appear at first glance. And the analogy certainly is not conclusive, as suggested by the D.C. Circuit in *Kuretski*.

3. Treatment of Congressional Intent

Near the end of its discussion of the Tax Court's constitutional status, the D.C. Circuit in *Kuretski* finally addressed the congressional reports that accompanied the portion of the Tax Reform Act of 1969, which established the Tax Court as a court of record under Article I of the Constitution.¹⁶³ In particular, Congress expressed its concern about one executive agency sitting in judgment of the determinations of another, and therefore set out to charter the Tax Court as a court rather than an executive agency.¹⁶⁴ The D.C. Circuit in *Kuretski* mused that the change in the statutory reference to the Tax Court as a court of record instead of an independent executive agency may have legal significance for statutes such as the Administrative Procedure Act that apply solely to executive agencies.¹⁶⁵ Nonetheless, the *Kuretski* court concluded that Congress did not, in fact, move the Tax Court out of the Executive Branch altogether.¹⁶⁶

There are two ways to rationalize the *Kuretski* court's assessment regarding what Congress accomplished with respect to the Tax Court through the 1969 legislation. One approach is based on the assumption that Congress understood that an Article I court resided in the Executive Branch. Under that view, Congress could have thought it was accomplishing something meaningful by changing the statutory designation of the Tax Court from an independent agency in the Executive Branch to a court of record established under Article I of the Constitution, without actually relocating the Tax Court to a different branch of government. Yet there exists no contemporary indication that Congress understood Article I courts to exercise executive power; rather, all indications are that Congress understood Article I courts to exercise power independently of the Executive Branch.

The second approach for interpreting the *Kuretski* court's determination that Congress did not remove the Tax Court from the

for impeachment, the constitutional principle that the power to appoint carries with it the power to remove, suggests that any power to remove for cause would be exercised by the President. See *Myers v. United States*, 272 U.S. 52 (1926).

¹⁶³ *Kuretski*, 755 F.3d at 944.

¹⁶⁴ See S. REP. NO. 91-552, at 302-04.

¹⁶⁵ See *Kuretski*, 755 F.3d at 944 (citing *Megibow v. Clerk of the U.S. Tax Court*, No. 04-3321, 2004 WL 1961591 at *4-6 (S.D.N.Y. Aug. 31, 2004), for its conclusion that the Tax Court is not an "agency" subject to the Administrative Procedure Act).

¹⁶⁶ *Id.*

Executive Branch is grounded in legislative failure. That is, changing the statutory designation of the Tax Court as an independent agency with the Executive Branch to a court of record established under Article I was simply ineffective at accomplishing the desired structural change. Perhaps Congress needed to be more direct in the legislation, designating the Tax Court as a court of record established under Article I of the Constitution “and no longer a part of the Executive Branch of Government.” If that is the point of contention, then the *Kuretski* court is truly splitting hairs. It is difficult to interpret the statutory revision that Congress did enact, when coupled with its expressed concern about the Tax Court remaining within the Executive Branch even as an independent agency, in any other manner. On the other hand, the *Kuretski* court may have been looking for something more, such as a statutory designation of the Tax Court’s location in an alternate branch of government. Congress originally placed the Tax Court in the Executive Branch, and perhaps the only way to alter its constitutional status would be to expressly identify a new constitutional home for the tribunal. This approach is more satisfying, as it does not rely on a statutory foot fault. Yet even then, it is not clear whether the location of a governmental body within the tripartite system of government can be determined by statute;¹⁶⁷ indeed, the balance of the D.C. Circuit’s opinion suggests that any attempted relocation would have been ineffective.¹⁶⁸ One is therefore left to surmise that, in the view of the *Kuretski* court, the only means possible for removing the Tax Court from the Executive Branch would be to afford the judges of the Tax Court the privileges of Article III status.

V. CLARIFYING LEGISLATION

Partially in response to the decision of the D.C. Circuit Court of Appeals in *Kuretski* (and just prior to this article being published), Congress enacted legislation that, in part, addressed a variety of procedural matters relating to the Tax Court.¹⁶⁹ The final item concerning that Tax Court, styled as a “Clarification relating to United States Tax Court,” amended the Tax Court’s chartering statute.¹⁷⁰ The amendment added the following

¹⁶⁷ See *Mistretta v. United States*, 488 U.S. 361, 422 (Scalia, J., dissenting) (“I doubt whether Congress can ‘locate’ an entity in one Branch or another for constitutional purposes by merely saying so.”).

¹⁶⁸ See *Kuretski*, 755 F.3d at 940 (limiting the Judicial Branch to Article III courts), 942–43 (rejecting the contention that the Tax Court is located within the Legislative Branch).

¹⁶⁹ Protecting Americans from Tax Hikes Act of 2015, Text of House Amendment #2 to the Senate Amendment to H.R. 2029 (Rules Comm. Print 114-40), §§ 421–441, 114th Cong. (1st Sess. 2015).

¹⁷⁰ *Id.* § 441.

sentence at the end of section 7441: “The Tax Court is not an agency of, and shall be independent of, the executive branch of the Government.”¹⁷¹

On one hand, the legislative clarification can be seen as superfluous. The prior version of section 7441 — which established the Tax Court as a court of record under Article I of the Constitution — superseded statutory language designating the court as an independent agency of the Executive Branch of government. Hence, the addition to section 7441 could be viewed as making explicit the inescapably implicit effect of the statutory revision in 1969 — that the Tax Court was no longer an independent agency within the Executive Branch. In other words, the statute, even as modified, would leave open the possibility that the Tax Court constitutes an Article I court of record (rather than an independent agency), which nonetheless remains within the Executive Branch of government. The designation that the Tax Court would be independent of the Executive Branch could be interpreted as referring to the absence of Executive Branch operational oversight as opposed to suggesting that the Tax Court resides outside of the Executive Branch. In short, the statutory expansion of section 7441 may not provide much if any clarification.

However, the report of the Senate Finance Committee accompanying the legislation indicates that Congress intended the statutory revision to clarify that the Tax Court indeed resides outside of the Executive Branch of government. In explaining the need for legislative action, the report provided that “the perceived independence of the U.S. Tax Court would be enhanced by . . . clarification that it is not part of the Executive Branch.”¹⁷² No nuance there. Later in the report, in the provision explaining the proposed revision to section 7441, the Senate Finance Committee noted that the D.C. Circuit Court of Appeals in *Kuretski* had rejected the separation-of-powers challenge raised in the case by holding that the United States Tax Court constitutes “an independent Executive Branch agency” even though it constitutes a “Court of Law” for purposes of the Appointments Clause.¹⁷³ The Finance Committee did not expressly state that it rejected the analysis in *Kuretski*, but it came close. The committee noted it was “concerned” that certain statements in the *Kuretski* case may cause the public to question the independence of the Tax Court.¹⁷⁴ Accordingly, the committee explained that it desired to “remove any uncertainty caused by *Kuretski v.*

¹⁷¹ *Id.*

¹⁷² S. REP. NO. 114-14, at 2 (2015).

¹⁷³ *Id.* at 9–10. In commentary relating to the amendment to section 7441, Professor Bryan Camp observed that the D.C. Circuit Court of Appeals in *Kuretski* never actually referred to the Tax Court as an agency. See Bryan Camp, *Initial Take on the Kuretski Language in the Path Act*, PROCEDURALLY TAXING BLOG (Dec. 19, 2015), <http://www.procedurallytaxing.com/initial-take-on-the-kuretski-language-in-the-path-law/>.

¹⁷⁴ S. REP. NO. 114-14, at 10 (2015).

Commissioner, and to ensure that there is no appearance of institutional bias.” In light of the committee report, the statutory amendment clarifying that the Tax Court shall be “independent of the Executive Branch” is best interpreted as meaning the Tax Court resides outside of the Executive Branch altogether, rather than remaining within the Executive Branch in some non-agency capacity.

VI. OPTIONS FOR THE CONSTITUTIONAL HOME OF THE TAX COURT

A. *Within the Executive Branch*

For reasons described in connection with the discussion of the *Kuretski* decision, the analysis of the D.C. Circuit Court of Appeals in *Kuretski* supporting its conclusion that the Tax Court exercised executive power as part of the Executive Branch of government is subject to considerable critique. The opinion swims upstream, having to distinguish a conflicting statutory change with respect to the Tax Court’s charter, legislative history indicating congressional intent to terminate the Tax Court’s status as an executive agency, and a Supreme Court decision interpreting the statutory revision as rendering the Tax Court one of the “Courts of Law” for purposes of the Appointments Clause rather than a “Department” within the Executive Branch.

Nonetheless, there remains the possibility that the D.C. Circuit in *Kuretski* reached the correct conclusion. The case for finding that the Tax Court remains located within the Executive Branch is based on a number of assumptions that are worth highlighting. First, every unit of the federal government (apart from territorial instrumentalities) must be housed within one of the three branches of government. Second, the Judicial Branch is limited to the Supreme Court and those inferior courts established by Congress pursuant to Article III — that is, those courts capable of exercising the “judicial Power” cognized by Article III of the Constitution. Third, the Legislative Branch is limited to Congress and such other units that further its legislative function. The fourth assumption represents the logical extension of the first three — that any governmental unit not located within the Legislative or Judicial Branches must reside within the Executive Branch. This analytical framework finds purchase in the recent Supreme Court decision in *City of Arlington v. FCC*,¹⁷⁵ wherein the Court explained as follows:

Agencies make rules . . . and conduct adjudications . . . and have done so since the beginning of the Republic. These activities take

¹⁷⁵ 133 S. Ct. 1863 (2013).

“legislative” and “judicial” forms, but they are exercises of — indeed under our constitutional structure they *must be* exercises of — the “executive Power.”¹⁷⁶

Hence, the Executive Branch serves as the default repository for all government actors that do not fall within the discrete confines of the Legislative Branch (based on legislative function) or the Judicial Branch (based on adjudication by an Article III judge).

The Supreme Court’s decision in *Freytag* does not foreclose application of the above-described analysis, as the holding in *Freytag* concerned the status of the Tax Court for purposes of the Appointments Clause only. More to the point, the Court in *Freytag* did not expressly identify the Tax Court’s location within the tripartite structure of government. Although the Court in *Freytag* went to considerable lengths to stress the exclusively judicial nature of the Tax Court, the function of the Tax Court is not necessarily relevant to identifying its place in the constitutional organizational chart. Legislative function represents a necessary condition for locating a body in the Legislative Branch, and judicial function is relevant for locating a body in the Judicial Branch, provided that function is executed by an actor enjoying Article III protections. Lastly, the apparent intention of Congress to remove the Tax Court from the Executive Branch can be dismissed as simply ineffectual. Chartering the Tax Court as a court of record under Article I may have had legal significance apart from its position within the constitutional structure, but that change alone was not sufficient to remove the court from the

¹⁷⁶ *Id.* at 1873 n.4 (emphasis in original) (quoting U.S. CONST. art. II, § 1, cl. 1.). Perhaps to no surprise in light of this description of executive power, the majority opinion in *City of Arlington* was authored by Justice Scalia. Yet even the dissent penned by Chief Justice Roberts appears to agree on this point:

Although modern administrative agencies fit most comfortably within the Executive Branch, as a practical matter they exercise legislative power, by promulgating regulations with the force of law, executive power, by policing compliance those regulations, and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules. The accumulation of these powers in the same hands is not an occasional or isolated exception to the constitutional plan; it is a central feature of modern American Government.

Id. at 1877–78 (Roberts, C.J., dissenting). Here again, the nature of the governmental power being exercised does not appear to serve as a bar to that governmental actor being located within the Executive Branch. See also James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 676 (2004) (characterizing judicial tribunals created by Congress pursuant to its Article I powers as “departments of the executive branch”).

Executive Branch. Presumably, had Congress truly intended to remove the Tax Court from the Executive Branch, it would have afforded the judges of the court Article III protections. This captures the essential analysis of the *Kuretski* decision, an analysis that reflects a conventional approach to resolving the constitutional question.

Although not mentioned by the D.C. Circuit in *Kuretski*, the notion that a “court of record” established by Congress pursuant to its Article I powers to perform an exclusively judicial function could reside within the Executive Branch finds support in the hearings surrounding the creation of the United States Court of Appeals for Veterans Claims. In 1988, Congress chartered the predecessor of this court using statutory language almost identical to that of the Tax Court: “There is hereby established, under Article I of the Constitution of the United States, a court of record to be known as the United States Court of Veterans Appeals.”¹⁷⁷ The chartering statute (since revised to change the name of the court) is housed in Title 38 of the United States Code governing veterans’ benefits.¹⁷⁸ Hence, like the Tax Court, the court’s charter rests in a subject-specific portion of the United States Code, rather than falling under Title 28 governing the federal judiciary.

In debating whether to afford judicial review of denials of claims by the Board of Veterans Appeals and, if so, the extent of such review, Congress sought guidance from the Judicial Conference of the United States. The Judicial Conference obliged, expressing its opposition to providing judicial review in an Article III forum.¹⁷⁹ If judicial review were necessary, the Judicial Conference expressed its distinct preference that such review be limited to a specialized, Article I court. Interestingly, the judges providing input consistently referred to these courts as residing in the Executive Branch. The chair of the Judicial Conference committee on court administration expressed the Conference’s preference in the following terms:

It is the Conference’s view that if Congress deems review of

¹⁷⁷ Veterans’ Judicial Review Act, Pub. L. No. 100-687, div. A, tit. III, § 311(a), 102 Stat. 4105, 4113 (1988). The statute was modified in 1998 to change the name of the court to the United States Court of Appeals for Veterans Claims. See Veterans Programs Enhancement Act, Pub. L. No. 105-368, tit. V, § 511(b), 112 Stat. 3315, 3341 (1998).

¹⁷⁸ See 38 U.S.C. § 7251 (1988).

¹⁷⁹ *H.R. 585 and Other Bills Relating to Judicial Review of Veterans’s Claims: Hearings Before The Comm. on Veterans’ Affairs*, 99th Cong. 99-52, at 31 (1986) (statement of Elmo B. Hunter, U.S. Dist. Court Judge for the W. Dist. of Mo.) (“[T]he Judicial Conference opposes judicial branch review of veterans’ claims for benefits.”), 32 (“For 23 years the Judicial Conference has disapproved legislation to provide for judicial review of veterans benefit claims by U.S. District Courts.”).

veterans' benefits to be absolutely necessary, then we suggest that such review remain with the Board of Veterans Appeals or be conferred upon a new Article I executive branch court.¹⁸⁰

This view was shared by a number of judges who provided input, including then First Circuit Judge Stephen G. Breyer:

If Congress deems review of veterans' claims to be *absolutely* necessary, then we suggest that such review remain with the Board of Veterans Appeals or be conferred upon a new Article I Executive Branch court.¹⁸¹

While the federal judges who weighed in on the matter appeared confident that the proposed Article I court would reside within the Executive Branch, this view was not limited to the witnesses at the relevant hearings. In describing the prospect of this specialized court in a prior

¹⁸⁰ *Id.* at 31. In response to a question from a congressman concerning the difference between "Article I executive branch courts" and federal district courts, Judge Hunter explained as follows:

Well, I don't claim to be an expert on Article I courts, but there is a considerable difference in one respect. Ordinarily, they do not require the same amount of money. The salary bases are somewhat different. Secondly, and most important, they are a court within that branch that is being serviced. In other words, an Article I court would be a court within the executive branch of Government rather than the judicial branch of Government, and certainly they don't have the life tenure and the other things that go along with an Article III court of that nature.

On the other hand, they can still be made totally independent and carry out their function and obtain an expertise that we cannot obtain in view of our broad jurisdiction.

Id. at 35.

¹⁸¹ *Veterans Admin. Adjudication Procedure and Judicial Review Act and Veterans' Judicial Review Act: Hearing on S. 11 and S. 2292*, 100th Cong. 938, at 319-20 (1988) (prepared statement of Morris S. Arnold, United States District Court Judge for the Western District of Arkansas and member of the United States Judicial Conference Committee on Federal-State Jurisdiction, and Stephen G. Breyer, Judge of the United States Court of Appeals for the First Circuit and Judicial Conference Representative to the Administrative Office of the Courts); *see also id.* at 330 ("The Conference has continually recommended abolition of diversity jurisdiction and creation of Article I *Executive Branch* tribunals, modeled after the Tax Court, for review of benefit claims cases."); *H.R. 585 and Other Bills Relating to Judicial Review of Veterans's Claims: Hearings Before The Comm. on Veterans' Affairs*, 99th Cong. 99-52, at 409 (1986) (statement of John C. Godbold, Chief Judge of the United States Court of Appeals for the Eleventh Circuit) ("If there is to be judicial review of veterans' claims, I respectfully suggest that that review remain with the Board of Veterans Appeals or that it be conferred upon a new Article I executive branch court.").

version of the proposed legislation (one that would have replaced the Board of Veterans Appeals rather than provide judicial review of a decision of the Board adverse to the claimant), the House of Representatives Committee on Veterans' Affairs explained the effect of the legislation as follows:

An independent court of Veterans Appeals would be established in the executive branch in lieu of the existing Board of Veterans' Appeals. There are a number of similar executive branch or Article I Courts already in existence; two of the most notable are the Court of Military Appeals and the Tax Court.¹⁸²

Although the Committee's equation of an Article I court with an executive branch court came some twenty years after Congress chartered the Tax Court as an Article I court of record through the Tax Reform Act of 1969, the fact that a later Congress viewed an Article I court of record as residing in the Executive Branch presumably has some degree of relevance in determining the constitutional home of the Tax Court.¹⁸³ It certainly supports the conventional analysis espoused in the *Kuretski* decision that the Tax Court must reside in one of the three branches of government, and that the Executive Branch is the only viable candidate.

As an aside, the United States Court of Appeals for Veterans Claims does not exactly embrace the suggestion from the legislative history surrounding its creation that it is located within the Executive Branch. Rather, the court, through its website, explains its status in the federal system as follows: "As a court of record, the court is part of the United States judiciary and is not part of the Department of Veterans Affairs."¹⁸⁴ The declaration highlights the possibility that a court, created by Congress pursuant to its Article I powers, that performs an exclusively judicial function, may reside outside of the Executive Branch of government. In light of Congress's apparent attempt to remove the Tax Court from the Executive Branch of government,¹⁸⁵ possible alternate constitutional homes for the Tax Court are explored below.

B. Outside the Executive Branch

To the extent the D.C. Circuit's conclusion and reasoning in *Kuretski*

¹⁸² H.R. REP. NO. 100-963, pt. 1, at 5 (1988).

¹⁸³ That said, members of an even later Congress apparently believed that the Tax Court had been removed from the Executive Branch as part of the 1969 Tax Reform Act. See Part V, *supra* (discussing proposed legislation in 2015).

¹⁸⁴ See *About the Court*, UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS, <https://www.uscourts.cavc.gov/about.php>.

¹⁸⁵ See S. REP. NO. 91-552, at 302-04.

can be praised for embodying a traditional constitutional analysis, the decision also can be criticized as dogmatic and formalistic. Congress apparently believed it was effecting meaningful change to the constitutional status of the Tax Court when it eliminated its status as an independent agency within the Executive Branch and instead chartered it as a court of record under Article I. The Supreme Court in *Mistretta v. United States*¹⁸⁶ implied that an Article I court represented something other than an agency within the Executive Branch when, in addressing a separation of powers challenge presented by a cross-branch qualified removal power, the Court explained as follows:

Nothing in [*Bowsher v. Synar*, 478 U.S. 417 (1986) (holding that Congress cannot reserve removal power over an officer charged with execution of the laws except by impeachment)], however, suggests that one Branch may never exercise removal power, however limited, over members of another Branch. Indeed, we already have recognized that the President may remove a judge who serves on an Article I court.¹⁸⁷

The example cited by the Court in *Mistretta* makes sense only if an Article I court resides outside of the Executive Branch.

Consistent with this view, the Federal Government categorizes the Tax Court as a court residing outside of the Executive Branch. The U.S. Government Manual published by the Office of the Federal Register, National Archives and Records Administration describes the Tax Court as one of the “Special Courts” within the Judicial Branch. Notwithstanding slotting the Tax Court along with other Article I courts in the Judicial Branch, the Government Manual previously described the Tax Court in part as “[c]urrently an independent judicial body in the legislative branch” before noting its Executive Branch roots.¹⁸⁸ However, the quoted phrase describing the Tax Court as being located in the Legislative Branch was dropped in the 2009/2010 version of the Manual.¹⁸⁹ Consistent with the Government Manual, the United States Government Policy and Supporting Positions (commonly referred to as the “Plum Book” based on its cover)¹⁹⁰

¹⁸⁶ 488 U.S. 361 (1989).

¹⁸⁷ *Id.* at 411 n. 35.

¹⁸⁸ OFFICE OF THE FED. REGISTER, NAT’L ARCHIVES & RECORDS ADMIN., THE UNITED STATES GOVERNMENT MANUAL 76 (2008/2009), <http://www.gpo.gov/fdsys/pkg/GOVMAN-2008-06-01/pdf/GOVMAN-2008-06-01.pdf>.

¹⁸⁹ OFFICE OF THE FED. REGISTER, NAT’L ARCHIVES & RECORDS ADMIN., THE UNITED STATES GOVERNMENT MANUAL 73–74 (2009/2010), <http://www.gpo.gov/fdsys/pkg/GOVMAN-2009-09-15/pdf/GOVMAN-2009-09-15.pdf>.

¹⁹⁰ This publication, produced every four years following a presidential election

listed the Tax Court under the Legislative Branch as recently as the 2008 edition.¹⁹¹ However, in the following edition published in 2012, the Tax Court is not listed at all.¹⁹² This deletion is consistent with the characterization contained in the Government Manual that the Tax Court resides in the Judicial Branch, as the Plum Book contains data only on the federal civil service leadership and support positions in the Legislative and Executive Branches that may be subject to noncompetitive appointment. Hence, while those charged with describing the structure of the federal government may not be entirely consistent in their description of the Tax Court's location in the constitutional landscape,¹⁹³ the various assessments have one common denominator: none include or included the Tax Court within the Executive Branch. Alternative locations for the Tax Court therefore are explored below.

1. The Judicial Branch

From a standpoint of function, the United States Tax Court naturally belongs in the Judicial Branch of Government. Indeed, at least one federal district court has so held. In *Harpole v. United States*,¹⁹⁴ the court explained the Tax Court's constitutional status as follows: "The Tax Court is an Article I court, which is independent of the executive and legislative branches of the government and is considered part of the judicial branch of government."¹⁹⁵ Established as a court of record by Congress, the exclusive purpose of the Tax Court is to adjudicate legal disputes between taxpayers and the Government concerning the application of the Code. In terms of analogous governmental bodies, the functions of the Tax Court most closely resemble those of a federal district court. The Tax Court's decisions are not entitled to the degree of deference typically afforded to agency

alternatively by the Senate Committee on Homeland Security and Governmental Affairs and the House Committee on Oversight and Government Reform, contains data on the federal civil service leadership and support positions in the Legislative and Executive Branches of the federal government that may be subject to noncompetitive appointment. Hence, the publication does not address the Judicial Branch.

¹⁹¹ S. COMM. ON HOMELAND SECURITY AND GOVERNMENT AFFAIRS, 110TH CONGRESS, 2D SESS., *POLICY AND SUPPORTING POSITIONS 2* (2008).

¹⁹² H. COMM. ON OVERSIGHT AND GOVERNMENT REFORM, 112TH CONGRESS, 2D SESS., *POLICY AND SUPPORTING POSITIONS* (2012).

¹⁹³ Confusion is likely due to the exclusion of the Tax Court from title 28 of the United States Code addressing the federal judiciary, and, perhaps more importantly, the Tax Court's independence from the Administrative Office of the Courts. See generally Leandra Lederman, *Tax Appeal: A Proposal to Make the United States Tax Court More Judicial*, 85 WASH. L. REV. 1195 (2008).

¹⁹⁴ 2000 WL 1868952 (D. Alaska Nov. 2, 2000).

¹⁹⁵ *Id.* at *3.

determinations; rather, its conclusions of law are reviewed on a de novo basis as is the case with decisions from other federal trial level courts.¹⁹⁶ In terms of oversight, the most meaningful form of effective oversight may come from the Judiciary, in the form of appellate review of Tax Court decisions. Thus, as a functional matter, the Judicial Branch represents the most plausible location for the Tax Court in the governmental structure. Indeed, this functional view is what motivated the Supreme Court in *Freytag* to declare the Tax Court to be one of the “Courts of Law” under the Appointments Clause. It therefore is by no means surprising that the United States Government Manual lists the Tax Court with various other courts — created by Congress pursuant to its Article III power to create inferior courts and its various Article I powers — in the Judicial Branch.

Whether the Tax Court can reside in the Judicial Branch of Government as a constitutional matter, however, turns on whether a court whose judges lack Article III protections can nonetheless be included in the Judicial Branch. Stated differently, can the Judicial Branch encompass more than just those courts that exercise “the judicial Power of the United States”?

a. Potential Relevance of Mistretta v. United States

The Supreme Court’s 1989 decision in *Mistretta v. United States*¹⁹⁷ sheds light on the potential breadth of the Judicial Branch of Government. The case concerned a challenge to the constitutionality of federal sentencing guidelines that had been promulgated by the United States Sentencing Commission. Congress had established the Commission as “an independent commission in the judicial branch of the United States”¹⁹⁸ to promulgate guidelines for determining a sentence to be imposed in a criminal proceeding.¹⁹⁹ Membership of the Commission was set at seven voting members to be appointed by the President by and with the advice of the Senate.²⁰⁰ At least three of the voting members were to be federal judges selected by the President after consulting a list of six judges recommended by the Judicial Conference of the United States.²⁰¹ Those voting members served six-year terms²⁰² and were subject to removal by the President for

¹⁹⁶ I.R.C. § 7482(a)(1).

¹⁹⁷ 488 U.S. 361 (1989).

¹⁹⁸ 28 U.S.C. § 991(a), added by Pub. L. No. 98-473, Title II, § 217(a), 98 Stat. 1837 (1984).

¹⁹⁹ 28 U.S.C. § 994(a) (1984).

²⁰⁰ The Commission further provided that the Attorney General or the Attorney General’s designee would serve as an ex-officio nonvoting member. 28 U.S.C. § 991(a).

²⁰¹ *Id.*

²⁰² 28 U.S.C. § 992(a) (1984).

neglect of duty, malfeasance, or other good cause only.²⁰³ Hence, voting members of the body were not limited to Article III judges, and even the Article III judges appointed to the Commission did not enjoy lifetime tenure in this capacity.

The defendant in *Mistretta* challenged the application of the sentence he received under the sentencing guidelines framework, in part on the basis that the establishment of the Sentencing Commission violated the constitutional principle of separation of powers.²⁰⁴ Whereas the district court below had surmised that the Commission “should be judicially characterized as having Executive Branch status”²⁰⁵ notwithstanding the statutory designation of the Commission as being established in the Judicial Branch, the Supreme Court took Congress at its word²⁰⁶ and proceeded to address the separation of powers complaint on the merits.

The Court framed its separation of powers analysis by considering whether Congress had afforded the Commission powers that were more appropriately performed by other branches of government or that served to undermine the integrity of the Judiciary.²⁰⁷ After reviewing the constitutionality of judicial rulemaking, the Court in *Mistretta* determined

²⁰³ 28 U.S.C. § 991(a) (1984).

²⁰⁴ *Mistretta v. United States*, 488 U.S. 361, 370 (1989).

²⁰⁵ *United States v. Johnson*, 682 F. Supp. 1033, 1035 (W.D. Mo. 1988). In essence, the district court found that the legislative designation of the Commission as residing in the Judicial Branch did not have constitutional significance: “It is my conclusion, however, that the work of the Commission in carrying out the Congressional mandate can more conventionally be described as executive rather than judicial. Whether or not it qualifies as an independent agency the Commission should be judicially characterized as having Executive Branch status.” *Id.* at 1034–35.

²⁰⁶ This approach was unanimous. Justice Scalia, dissenting primarily on nondelegation grounds, viewed the statutory designation of the Commission within the Judicial Branch to be lacking constitutional significance:

I am at a loss to understand why the Commission is “within the Judicial Branch” in any sense that has relevance to today’s discussion. I am sure that Congress can divide up the Government any way it wishes, and employ whatever terminology it desires, for *non* constitutional purposes — for example, perhaps the statutory designation that the Commission is “within the Judicial Branch” places it outside the coverage of certain laws which say they are inapplicable to that Branch, such as the Freedom of Information Act For such statutory purposes, Congress can define the term as it pleases. But since our subject here is the Constitution, to admit that congressional designation “has [no] meaning for separation-of-powers analysis” is to admit that the Court must therefore decide for itself where the Commission *is* located for purposes of separation-of-powers analysis.

Mistretta, 488 U.S. at 422–423 (Scalia, J., dissenting). Justice Scalia would have decided the locational Branch on the basis of who controls its actions. *Id.* at 423.

²⁰⁷ See *id.* at 385.

that the legislative assignment of other nonadjudicatory functions to “federal courts or [other] auxiliary bodies within the Judicial Branch” was to be evaluated on the same terms.²⁰⁸ In the course of this discussion, the Court observed that, “by established practice,” it had recognized the power of Congress to create the Judicial Conference of the United States, the Rules Advisory Committee, and Administrative Office of the United States Courts, none of which exercise judicial power in the constitutional sense.²⁰⁹ Noting that these bodies shared the common purpose of “providing for the fair and efficient fulfillment of [the] responsibilities that are properly the province of the Judiciary,” the Court characterized these extrajudicial activities as consonant with the integrity of the Judicial Branch and appropriately allocated to it.²¹⁰ In light of the traditional role of the Judiciary in determining criminal sentences, the Court found that the Sentencing Commission did not usurp power traditionally allocated to another branch. Rather, the Court determined that the establishment of sentencing guidelines through the Commission “simply leaves with the Judiciary what long has belonged to it.”²¹¹

The Court’s decision in *Mistretta* provides a measure of support to the position that the United States Tax Court can be located in the Judicial Branch. Because the Court sanctioned the location within the Judicial Branch of an independent body whose members did not enjoy the tenure and salary protections of Article III, the absence of such protections for Tax Court judges alone cannot preclude the court from residing in that branch. In this sense, the *Mistretta* decision operates as a shield rather than a sword. The positive explanatory power of the *Mistretta* decision to the question of the Tax Court’s location is limited. The Court in *Mistretta* evaluated the propriety of housing a nonadjudicative body within the Judicial Branch, and the Court’s approval of such location clearly was influenced by the consolidation of a traditional judicial function in the Sentencing Commission. The commission thus can be viewed as one of the auxiliary bodies noted by the Court that supports the Judiciary in its operations. Whether the *Mistretta* decision has any relevance in evaluating the location of a purely adjudicative body is not certain. Indeed, the only way for *Mistretta* to provide positive support for locating the Tax Court within the Judicial Branch is if the Tax Court resolved disputes that otherwise would fall within the realm of federal district courts. On that note, the most significant component of the Tax Court’s jurisdiction — deficiency litigation between taxpayers and the Government — has never been part of

²⁰⁸ *Id.* at 388.

²⁰⁹ *Id.* at 388–89.

²¹⁰ *Id.* at 389.

²¹¹ *Id.* at 396.

the jurisdiction of the federal district courts.²¹²

b. United States Bankruptcy Courts

Like Tax Court judges, a judge of the United States Bankruptcy Court does not enjoy tenure during good behavior. Rather, bankruptcy court judges are appointed to serve a fourteen-year term. The Bankruptcy Reform Act of 1978,²¹³ which created independent bankruptcy courts in each federal judicial district, originally provided that bankruptcy court judges were to be appointed by the President and confirmed by the Senate for term appointments.²¹⁴ However, following the Supreme Court's 1982 decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*²¹⁵ finding that the broad grant of jurisdiction to bankruptcy courts impermissibly usurped federal Judicial Power confined to Article III courts, Congress enacted legislation in 1984 that shifted authority for appointment of federal bankruptcy judges to the relevant federal Circuit Court of Appeals.²¹⁶ Perhaps more importantly, the responsive legislation declared that bankruptcy judges served "as judicial officers of the United States district court established under Article III of the Constitution."²¹⁷ Consistent with this designation, the jurisdiction of a bankruptcy court over any particular case is attributable to the delegation of jurisdiction from the relevant federal district court,²¹⁸ which can revoke such delegation at any time.²¹⁹ Hence, federal bankruptcy courts do not constitute an independent, freestanding judicial division. Rather, they are appropriately viewed as arms of the federal district courts.²²⁰ By comparison, the United States Tax Court

²¹² However, the Tax Court does possess jurisdiction to determine a refund and order its repayment to the taxpayer once its deficiency jurisdiction has been properly invoked. I.R.C. § 6512(b)(1), (2).

²¹³ Pub. L. No. 95-598, 92 Stat. 2549 (1978).

²¹⁴ *Id.* § 201(a), 92 Stat. at 2657 (enacting 28 U.S.C. § 152).

²¹⁵ 458 U.S. 50 (1982).

²¹⁶ Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 104(a), 98 Stat. 333, 336 (1984) (enacting 28 U.S.C. § 152).

²¹⁷ *Id.*

²¹⁸ See 28 U.S.C. § 157(a). If the case does not concern a "core proceeding" as defined in 28 U.S.C. § 157(b)(2) but nonetheless relates to a bankruptcy proceeding, the bankruptcy judge may hear the case but may only issue a final order or judgment if the parties consent. 28 U.S.C. § 157(c)(1), (2). Otherwise, the final order or judgment must be entered by a district court judge after considering the proposed findings of fact and conclusions of law and evaluating any objections thereto on a de novo basis. 28 U.S.C. § 157(c)(1).

²¹⁹ See 28 U.S.C. § 157(d).

²²⁰ Original jurisdiction over all bankruptcy proceedings rests in the appropriate federal district court, which typically refers such cases to bankruptcy courts through a standing order of referral. Parties can file a motion with the district court to withdraw the reference in a

enjoys independent statutory jurisdiction, and it is not subject to oversight (other than appellate review of its decisions) by any other federal court. The structure of the federal bankruptcy court regime therefore offers little guidance in determining the proper location of the United States Tax Court in the constitutional scheme of government, other than possibly to suggest that location within the Judicial Branch may require formal subordination to an affiliated Article III court.

c. The United States Court of Federal Claims

In making the case that the Tax Court resides in the Judicial Branch, perhaps the most intriguing analogy is to the United States Court of Federal Claims. This court, whose governing statutes appear in Title 28 of the United States Code concerning the federal judiciary, is commonly viewed as part of the Judicial Branch. The Court of Federal Claims, established by Congress as a court of record under Article I of the Constitution, is described by the Administrative Office of the Courts as a “special trial court” under the District Court heading, rather than being listed among the Article I courts.²²¹

The Court of Federal Claims is the immediate successor to the United States Claims Court, which Congress created as part of the Federal Courts Improvement Act of 1982.²²² Through this legislation, Congress divided the former United States Court of Claims, an Article III court, into two judicial bodies. The appellate division of the former Court of Claims joined the United States Court of Customs and Patent Appeals to become the current Court of Appeals for the Federal Circuit. Like other federal circuit courts, the Court of Appeals for the Federal Circuit is an Article III court. The former trial division of the Court of Claims — which traditionally had relied on commissioners to preside over trial proceedings — was established as a separate trial-level court designated as the United States Claims Court. Congress chartered this body as a court of record under Article I of the Constitution.²²³ Through a name change in 1992, this tribunal became the United States Court of Federal Claims.²²⁴

particular case, in which case the district court will assume jurisdiction over the proceeding if the motion is granted.

²²¹ See *Court Role and Structure*, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, <http://www.uscourts.gov/about-federal-courts/court-role-and-structure>. The Administrative Office of the Courts lists only the United States Tax Court, the United States Court of Appeals for Veterans Claims, and the United States Court of Appeals for the Armed Forces under the heading of “Article I Courts.” *Id.*

²²² Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982).

²²³ *Id.* § 105(a), 96 Stat. at 26–28 (enacting 28 U.S.C. § 171(a)).

²²⁴ Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902(a), 106 Stat.

In addition to being established by Congress pursuant to its Article I powers, the Tax Court and the Court of Federal Claims have much in common. The judges of each are appointed by the President, subject to confirmation by the Senate, to serve a fifteen-year term. Like Tax Court judges, judges of the Court of Federal Claims are subject to a limited removal power. Whereas Tax Court judges may be removed for “inefficiency, neglect of duty, or malfeasance in office,”²²⁵ judges of the Court of Federal Claims may be removed for “incompetency, misconduct, neglect of duty, engaging in the practice of law, or physical or mental disability.”²²⁶ Although the conditions to the removal power thus differ slightly, the qualified removal powers applicable to the Tax Court and the Court of Federal Claims diverge in a more significant respect: the identity of the party who may exercise such power. Whereas Tax Court judges may be removed by the President,²²⁷ the Court of Appeals for the Federal Circuit, acting through a majority of its judges, holds the qualified power to remove judges of the Court of Federal Claims.²²⁸

The limited oversight of the Court of Federal Claims by an Article III court may be sufficient for the court to be considered within the Judicial Branch.²²⁹ Even Justice Scalia, one not fond of the notion expanding the reach of the federal Judiciary beyond the Article III realm, has explained that:

[i]t seems logical to decide the question of which Branch an agency belongs to on the basis of who controls its actions: If Congress, the Legislative Branch; if the President, the Executive Branch; if the courts (or perhaps the judges), the Judicial Branch.²³⁰

But, should possession of a qualified removal power that entitles the targeted judge to a public hearing be equated with “control” over the adjudicator for this purpose? Absent an abusive invocation of the removal power, a judge who dutifully discharges his or her official responsibilities without implicating one of the limited grounds for removal would be

4506, 4516 (1992).

²²⁵ I.R.C. § 7443(f).

²²⁶ 28 U.S.C. § 176(a) (1980).

²²⁷ I.R.C. § 7443(f).

²²⁸ 28 U.S.C. § 176(a) (1980).

²²⁹ But see James Anglin Flinn, *Interbranch Removal and the Court of Federal Claims: “Agencies in Drag”*, 125 YALE L.J. 313 (2015) (concluding that, in light of the decision of the D.C. Circuit Court of Appeals in *Kuretski*, the United States Court of Federal Claims exercises Executive authority).

²³⁰ *Mistretta v. United States*, 488 U.S. 361, 423 (1989) (Scalia, J., dissenting).

subject to no control whatsoever. Hence, the limited oversight embodied in a qualified removal power of the sort that applies to judges of the Tax Court and judges of the Court of Federal Claims does not provide a strong basis for determining the branch to which the respective tribunals belong.

Perhaps the most convincing explanation for why the Court of Federal Claims is considered to reside in the Judicial Branch is inertia. The court originated in the trial level of the Article III United States Court of Claims, where commissioners who served as adjuncts to the court presided over the trial proceedings. Notwithstanding the limited oversight currently exercised by the Court of Appeals for the Federal Circuit, the “adjunct” connotation of the successor Court of Federal Claims to the Court of Appeals for the Federal Circuit may well have persevered. Even though inertia may be a powerful force as a practical matter, it is not a sufficient basis for concluding that one Article I court can reside in the Judicial Branch while another cannot. Accordingly, the existence of the Court of Federal Claims and its presumed location within the Judicial Branch lends meaningful support to the argument that the Tax Court — another Article I court of limited statutory jurisdiction which also performs an exclusively judicial function — can be located there as well.

2. The Legislative Branch

Another potential location of the United States Tax Court within the constitutional structure of government is the Legislative Branch. This position is supported in part of the literal terms of the statute. The court’s chartering legislation, as amended by Congress as part of the Tax Reform Act of 1969, provides as follows: “There is hereby established, *under* article I of the Constitution of the United States, a court of record to be known as the United States Tax Court.”²³¹ The word “under” could be interpreted as “within,” leading to the conclusion that the Tax Court resides within the Legislative Branch contemplated in Article I of the Constitution. This literal interpretation finds some support in the legislative record accompanying the 1969 legislation. The Senate Report providing the most insight into congressional motivations behind the re-chartering of the Tax Court describes the proposed legislation as “establish[ing] the Tax Court as a court of record under Article I of the constitution, dealing with the Legislative Branch.”²³² Whether the word “under” should be interpreted as “within” for purposes of determining the constitutional location of the Tax Court is doubtful. “Under” could just as easily (in fact, more plausibly) be interpreted as “pursuant to,” so as to reference the origin of congressional

²³¹ I.R.C. § 7441 (emphasis added).

²³² S. REP. NO. 91-552, at 304 (1969).

authority to create a federal court outside of that contained in Article III.

A more substantive basis for concluding that the Tax Court resides in the Legislative Branch rests in the intent of Congress in re-chartering the Tax Court through the 1969 legislation coupled with what Congress actually legislated. As described above, in eliminating the designation of the Tax Court as an “independent agency within the Executive Branch of Government” and establishing the body as a court of record under Article I of the Constitution, Congress appeared intent on removing the Tax Court from the Executive Branch.²³³ Yet Congress did not establish the Tax Court under Article III. If this were not sufficient evidence of congressional intent to keep the Tax Court out of the Judicial Branch, Congress declined to relocate the statutes governing the Tax Court to Title 28 of the United States Code. Rather, Congress left the court’s governing statutes within the Code, with the apparent purpose of maintaining the Tax Court’s historical practical independence.²³⁴ As explained in the report of the Senate Finance Committee accompanying the 1969 legislation, “[t]he committee amendments do not place the Tax Court under the supervision of the Judicial Conference or the Director of the Administrative Office of the Article III courts or give them any power or control over the Tax Court.”²³⁵ Hence, Congress appeared intent on not locating the Tax Court within the Judicial Branch, at least for administrative purposes. Accordingly, if Congress intended to remove the Tax Court from the Executive Branch but refused to locate the Court within the Judicial Branch by denying the court Article III status, then the Legislative Branch would provide the default location within the tripartite structure.

Several prominent commentators have concluded that the Legislative Branch provides the constitutional home of the Tax Court following its chartering as an Article I court. In the most exhaustive contemporary

²³³ For a discussion of the legislative record supporting this characterization of congressional intent, *see* text accompanying *supra* notes 50–52.

²³⁴ Keeping the Tax Court’s governing statutes in the Code and out of Title 28 of the United States Code immunized the Tax Court from the federal judicial bureaucracy and permitted the Court to continue its direct interactions with Congress. In his assessment of the post-1969 Tax Court, Professor Dubroff described the benefit of the Tax Court’s independence from the Article III Judiciary in the following terms:

If the court was to become an article III court it would be one of many courts subject to the legislative jurisdiction of the judiciary committees and its budget requests and internal procedures would largely be controlled by the Administrative Office of the Courts. In a sense, the independence of the court would be thereby diminished.

HAROLD DUBROFF, *THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS* 215 (1979).

²³⁵ S. REP. NO. 91-552, at 304 n.3 (1969).

examination of the effect of the Tax Reform Act of 1969, Professor Harold Dubroff concluded that the court emerged from the 1969 legislation as “a legislative body performing judicial functions.”²³⁶ Similarly, a titan of the Tax Court bench, Judge Theodore Tannenwald, Jr., described the effect of the 1969 legislation as follows: “The Tax Reform Act of 1969 . . . made the Court a legislative court, thus technically part of the Legislative Branch of Government, although clearly recognized as a judicial body.”²³⁷ At least one federal district court has agreed that the Legislative Branch provides the Tax Court’s constitutional home. In *Ostheimer v. Chumbley*,²³⁸ the court explained that the Tax Court “became a part of the legislative branch of government in 1969.”²³⁹ And as mentioned above, numerous government publications have either listed the Tax Court as residing in the Legislative Branch for organizational purposes or affirmatively described the court as a judicial body housed within that Branch.²⁴⁰

The primary objection to concluding that the United States Tax Court is located within the Legislative Branch is grounded in functional misalignment. The Tax Court exercises an exclusively judicial function. It does not enact laws or formally participate in the legislative process. Hence, given the absence of any legislative function, the Tax Court cannot be viewed as part of the Legislative Branch for constitutional purposes. Indeed, this is the basis on which the D.C. Circuit Court of Appeals rejected the taxpayers’ invocation of the Legislative Branch as the Tax Court’s constitutional home.²⁴¹ Yet the contention that the Legislative Branch is limited to governmental entities that perform a legislative function is belied somewhat by the existence of the United States Copyright Office. The Copyright Office, a department of the Library of Congress, and therefore located in the Legislative Branch, performs various administrative duties. It registers claims to copyright, records documents relating to copyright, administers the mandatory deposit provisions of the copyright law, and administers various compulsory licensing requirements of the law including the collection of royalties.²⁴² If a governmental body performing an

²³⁶ DUBROFF, *supra* note 14, at 237 n. 393.

²³⁷ Theodore Tannenwald, Jr., *The United States Tax Court: Yesterday, Today, and Tomorrow*, 15 AM. J. TAX POL’Y 1, 3 (1998).

²³⁸ 498 F. Supp. 890 (D. Mont. 1980).

²³⁹ *Id.* at 892.

²⁴⁰ See text accompanying *supra* notes 188–189. Additionally, the Office of Budget and Management continues to list the Tax Court in the Legislative Branch. See BUDGET ANALYSIS BRANCH, OFFICE OF MGMT. & BUDGET, PUBLIC BUDGET DATABASE USER’S GUIDE 10 tbl. 1 (2015), http://www.whitehouse.gov/sites/default/files/omb/budget/fy2015/assets/db_guide.pdf.

²⁴¹ *Kuretski v. Commissioner*, 755 F. 3d 929, 942–43 (D.C. Cir. 2014).

²⁴² See UNITED STATES COPYRIGHT OFFICE, A BRIEF INTRODUCTION AND HISTORY 1,

administrative function can be located in the Legislative Branch, the performance of an adjudicative role — another non-legislative governmental function — would not alone appear to foreclose the Legislative Branch as a potential home for the Tax Court.

3. None of the Above

Having examined the three possible locations for the Tax Court in the tripartite structure of government, none stands out as the overwhelming correct choice. Each has significant flaws. To the extent the Judicial Branch for constitutional purposes is limited to courts whose judges enjoy the salary and tenure protections of Article III, the Tax Court clearly falls outside those bounds. The Tax Court is not properly viewed as serving in an adjunct capacity to an Article III court (as does a federal bankruptcy court), nor does the Tax Court possess a historical connection to an Article III court (as does the Court of Federal Claims). With respect to the other two branches, the Tax Court's exclusively judicial character and function present an immediate complication. It is incongruent with the function of the Legislative Branch. To the extent the court's exclusively judicial function can be more readily reconciled with the function of the Executive Branch given the prevailing regime of agency adjudication, concluding that the Tax Court resides in the Executive Branch runs counter to the intent of Congress in revisiting the status of the Tax Court through the Tax Reform Act of 1969. Furthermore, the prospect of the Tax Court remaining in the Executive Branch notwithstanding the 1969 legislation runs counter to the thrust of the Supreme Court's decision in *Freytag v. Commissioner*, if not the letter of the decision itself. The more detailed the examination of the home of the Tax Court in the constitutional structure of government, the more it seems the Tax Court has no such abode.

Perhaps that is the best answer. Is the Tax Court required to formally reside in one of the three branches of government? The Tax Court is understood to have been created through a valid exercise of Congress's Article I power supplied in the Taxing and Spending Clause as well as the Necessary and Proper Clause.²⁴³ Is that sufficient to sustain the constitutionality of the Tax Court, or is the court further required to possess a distinct home in the constitutional organizational chart? While a defined location in the tripartite structure of government may be necessary to evaluate a branch-driven separation-of-powers challenge, such a formalistic approach applied to each and every unit of government would be difficult to

<http://www.copyright.gov/circs/circ1a.html>.

²⁴³ *Kuretski*, 755 F.3d at 942 (citing *Burns, Stix Friedman & Co. v. Commissioner*, 57 T.C. 392, 394–95 (1971)).

reconcile with the modern structure of government. In the seminal article examining the place of agencies in government, Peter Strauss described as essentially naïve the notion that every government actor could be neatly placed in its own Branch:

[A]ny useful legal analysis of the limits on Congress's ability to structure administrative government must, at least in large measure, accept the reality of existing government. To no one's surprise, the description reveals a profuse variety of formal structures and a striking dispersion of governmental authorities. Both the variety and the dispersion are inconsistent with any notion that the powers of government are or can be neatly parceled out into three piles radically separated the one from the other and each under the domination of its particular "branch." Once one descends below the level of the branch heads named in the Constitution — Congress, President, and Supreme Court — separation of powers ceases to have descriptive power. Because agencies nonetheless exist in varying relationships with each of these paramount actors, the notion of checks and balances retains descriptive power and, hence, possible utility within the constraint of accepting the reality of this existing government.²⁴⁴

So perhaps there simply is no need, as a matter of legal analysis, to identify a particular branch of Government to which the Tax Court belongs. After all, the Tax Court in its most recent form has operated for almost half a century in a state of structural ambiguity, with hardly anyone pausing to notice. This is not to say that the ambiguity concerning the Tax Court's status does not carry costs. For instance, the Tax Court's relationship to the Administrative Procedure Act continues to be a matter of considerable debate.²⁴⁵ Others have argued that the lack of clarity — in particular, the

²⁴⁴ Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 581–82 (1984). In an earlier portion of the article, Prof. Strauss states the argument in more direct terms:

A shorthand way of putting the argument is that we should stop pretending that all our government (as distinct from its highest levels) can be allocated into three neat parts. The theory of separation-of-powers breaks down when attempting to locate administrative and regulatory agencies within one of the three branches; its vitality, rather, lies in the formulation and specification of the controls that Congress, the Supreme Court, and the President may exercise over administration and regulation.

Id. at 579.

²⁴⁵ See Stephanie Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. 221, 226–227 (2014) (contending that the Tax Court

failure of the Tax Court to fall subject to oversight from the Administrative Office of the U.S. Courts or the U.S. Judicial Conference — has allowed the court to operate free of supervision.²⁴⁶ The question is whether picking a definitive location for the Tax Court in the constitutional scheme of Government to resolve these and other ambiguities is worth the potential cost of doing so. That cost rests in the creation of unforeseen consequences.²⁴⁷ Making a definitive declaration of which branch, if any, to which the Tax Court belongs for purposes of resolving branch-driven separation of powers challenges could have significant consequences beyond resolving the particular challenge before the reviewing court. For instance, the Supreme Court's observation in the *Freytag* case that the Tax Court exercises judicial power in much the same manner as a federal district court²⁴⁸ encouraged the Tax Court to take a new, more expansive view of the scope of its equitable jurisdiction.²⁴⁹ In light of the Tax Court's track record in serving as the trial level forum for the vast majority of tax disputes over the past several decades, the drawbacks surrounding the ambiguity of its location in the structure of Government likely do not outweigh the potential but unknown ramifications of eliminating this ambiguity — particularly when no one location emerges as the undeniably correct answer.

Instead of resolving separation of powers challenges concerning the Tax Court based first on its location in the governmental scheme, such challenges could be resolved on the merits — that is, by examining whether the structure unduly threatens the division of power between the three heads of government. Of course, the primary question there is whether Congress can charter a court to preside over disputes between taxpayers and the Government concerning statutorily delineated aspects of the federal tax

should abandon “tax exceptionalism” and consider itself bound by the default APA rules concerning standard review and scope of review when reviewing determinations made by the Service). Debates concerning the proper standard of review and scope of review to be applied by the Tax Court in reviewing discretionary determinations by the Service have divided the Tax Court itself and various circuit courts of appeals. *See id.* at 257–63 (detailing these issues in the context of innocent spouse determinations and determinations made in the collection due process setting).

²⁴⁶ *See* Leandra Lederman, *Tax Appeal: A Proposal to Make the Tax Court More Judicial*, 85 WASH. U. L. REV. 1195 (2008).

²⁴⁷ This excellent point was made by Professor Steve Johnson at a panel discussion of these issues at the 2015 annual meeting of the Southeastern Association of Law Schools.

²⁴⁸ *Freytag v. Commissioner*, 501 U.S. 868, 891 (1991).

²⁴⁹ *See* *Estate of Branson v. Commissioner*, 113 T.C. 6, 10 (1999) (concluding that “this Court should be properly viewed as exercising full judicial power within its limited subject matter jurisdiction”), *aff’d*, 264 F.3d 904 (9th Cir. 2001). For extended discussion of the Tax Court's evolving view of the scope of its equitable jurisdiction, *see* DUBROFF & HELLWIG, *supra* note 57, at 357–85.

system without affording the judges of the court Article III protections. One could view the creation of a lower court outside of Article III possessing jurisdiction over a limited realm of federal law as an unconstitutional usurpation of judicial power.²⁵⁰ Yet any such absolute position has been rejected, as evidenced by the existence of an Article I judiciary of which the Tax Court is but a part.²⁵¹

The President's power to remove judges of the Tax Court pursuant to section 7443(f) poses a far less serious threat to the balance of governmental power. The power is limited to instances of inefficiency, neglect of duty, or malfeasance.²⁵² If and when invoked, the targeted judge is entitled to pursue a public hearing on the matter. If this level of potential cross-branch influence (if it two branches indeed are implicated) is prohibited on separation-of-powers grounds, then it would appear that the three Branches of government are required to operate in complete isolation, as independent silos of power. That is certainly not the case in our existing apparatus of federal government, nor does it appear that a division of power on absolute terms was ever intended. As explained by the Supreme Court in *Mistretta v. United States*, "the Framers did not require — and indeed rejected — the notion that the three branches must be entirely separate and distinct."²⁵³ Hence, when examining the power of the President to remove the members of the United States Sentencing Commission for cause, the Court in *Mistretta* upheld the removal power, in part, because the

²⁵⁰ See *Stern v. Marshall*, 131 S. Ct. 2594, 2609 (2011) (explaining that "Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decision-making if the other branches of the Federal Government could confer the Government's 'judicial Power' on entities outside Article III" and holding that the bankruptcy court's exercise of statutory jurisdiction to enter judgment on a common law tort claim violated the constitutional protections of Article III); see also Pfander, *supra* note 176, at 647 n.8 (noting scholarly advocates of a return to Article III literalism).

²⁵¹ See *Murray's Lessee v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 284 ("[T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper."); see also *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67–69 (1982) (recounting the "public rights" exception to Article III adjudication); Pfander, *supra* note 176, at 656–71 (noting deviations from a literal application of Article III — one that would limit the exercise of federal judicial power to courts afforded Article III protections — in case law and scholarly accounts).

²⁵² Legislation that cleared the Senate Finance Committee in 2015 directs the Tax Court to establish procedures consistent with judicial councils established under Title 28 of the United States Code to investigate and to take action on complaints with respect to the conduct or capacity of judge or special trial judge of the Tax Court. See S. 903, § 201 (as reported out of the Senate Finance Committee) (Apr. 14, 2015); see also S. REPT. NO. 114-14, at 8 (2015). Currently, no such procedures exist.

²⁵³ *Mistretta v. United States*, 488 U.S. 361, 380 (1980).

limitations on the President's authority prevented the President from exercising "coercive influence" over the subject agency.²⁵⁴

Interestingly, the D.C. Circuit Court of Appeals in *Kuretski* suggested that it would be comfortable resolving the separation of powers challenge on the merits. After noting the settled authority of the President to remove judges of territorial courts even without cause if permitted by statute,²⁵⁵ the D.C. Circuit later commented that it saw "no reason why the territorial courts and the Tax Court are not . . . similarly situated for purposes of presidential removal."²⁵⁶ The D.C. Circuit stopped short of doing so, using the comparison between the Tax Court and territorial courts to conclude that the Tax Court did not exercise the judicial power of the United States in a manner having constitutional significance (to effectively marginalize certain statements made by the Supreme Court in *Freytag* concerning the Tax Court's exercise of judicial power). Addressing the separation of powers challenge on the merits, rather than avoiding the issue through reliance on a debatable assertion concerning the Tax Court's residence in the constitutional structure of government, would have been a more satisfying resolution of the case.

VII. CONCLUSION

In 1969, Congress "transformed" the United States Tax Court from what had been statutorily described as an "independent agency in the executive branch of Government" into a court of record "established . . . under article I of the Constitution." Yet until the recent decision of the D.C. Circuit Court of Appeals in *Kuretski v. Commissioner*, no court had directly addressed what this transformation meant in terms of the constitutional nature of the Tax Court and its place in the tripartite structure of government. This article started with the purpose of highlighting the weaknesses in the *Kuretski* court's conclusion that the Tax Court continues to exercise executive power as part of the Executive Branch of government. That conclusion runs counter to the intent of Congress, reflected in the legislative history accompanying the 1969 legislation and strongly implied in the text of the statutory revision, to sever the Tax Court's historical connection to the Executive Branch. Furthermore, the *Kuretski* opinion is difficult to reconcile with the spirit if not the letter of the Supreme Court's decision in *Freytag*. Lastly, the determination that the Tax Court exercises executive power is incongruent with the everyday function of the Tax Court

²⁵⁴ *Id.* at 410–11 (quoting *Morrison v. Olson*, 487 U.S. 654, 688 (1988), and *Humphrey's Executor v. United States*, 295 U.S. 602, 630 (1935)).

²⁵⁵ *Kuretski v. Commissioner*, 755 F.3d 929, 941 (D.C. Cir. 2014).

²⁵⁶ *Id.*

— to adjudicate disputes between taxpayers and the Government in much the same manner as any other federal trial court.

In examining possible alternate locations for the court in the constitutional scheme, no apparently correct answer emerges. A strong case can be made for determining that the Tax Court constitutes a non-Article III component of the Judicial Branch (which, depending on how strictly the Judicial Branch is defined, may leave the Tax Court in a “branchless” arena). On the other hand, a credible case can be made for locating the Tax Court in the Legislative Branch, if one believes that Congress accomplished its goal of removing the Tax Court from the Executive Branch in 1969 and that the Judicial Branch simply is not an option due to the term appointments of Tax Court judges. Lastly, if the Executive Branch indeed constitutes the default branch for all governmental entities not specifically located in the other two, then perhaps the Executive Branch remains the best answer notwithstanding the various shortcomings of that conclusion.²⁵⁷ The exercise of attempting to definitively locate the United States Tax Court in a particular branch of government proves difficult at best, and at times feels like a hopeless exercise. In the end, the inquiry may devolve into selecting the least objectionable option.

Perhaps the United States Tax Court does not need to be definitively located in a particular branch of government. A definitive location appears necessary only for addressing separation-of-powers challenges, and, given the ambiguous status of the Tax Court in the constitutional organizational chart, any such challenge is best addressed on the merits rather than relying on an intra-branch characterization. Indeed, the Tax Court’s ability to successfully process thousands of disputes between the taxpaying public and the Government over decades since it was constituted as an Article I court of record through the Tax Reform Act of 1969, the drawbacks of its structural ambiguity are likely preferable to the unforeseen consequences of attempting to eliminate it. Hence, the lasting value of this article may be to highlight to downside of any one particular conclusion regarding the location of the United States Tax Court within the constitutional structure of government and, in the process, paint its current ambiguous status as less bothersome.

²⁵⁷ Indeed, one gets the sense that the Supreme Court would so rule if forced to address the matter.