

BLACKMUN (AND SCALIA) AT THE BAT: THE COURT'S SEPARATION-OF-POWERS STRIKE OUT IN *FREYTAG*

Tuan Samahon*

“The outlook wasn’t brilliant for the Mudville Nine that day.”¹ So begins Ernest Thayer’s famous homage to baseball and the fall of the proud. Two missed opportunities to swing at the ball and a third chance not-quite-joined led the mighty Casey to disappoint the crowds and strike out.² Life occasionally imitates fiction, and alas, American separation-of-powers law occasionally mimics baseball.

*Freytag v. Commissioner of Internal Revenue*³ hardly represents the Supreme Court’s finest moment in separation-of-powers jurisprudence. The majority penned an anemic opinion that inexplicably characterized an officer who was subject to presidential removal as exercising the judicial power of the United States. Rather than acknowledge that a power to remove is a power to control and that the Court endorsed presidential control of the exercise of judicial power, the majority scarcely recognized any problem.

Nonetheless, it is unlikely the legal commentariat will add the 1991 majority opinion any time soon to an “anti-canon” of bad opinions.⁴ After all, the specific issue presented is as bloodless as separation-of-powers law gets. It is unlikely to elicit the anger and passion that substantive due process opinions—especially those concerning abortion—so readily generate.⁵

Taxpayer *Freytag* had asked the Court to hold that Congress had improperly vested the power to appoint special trial judges in the chief judge of the U.S. Tax Court, in violation of the Appointments Clause, and that accordingly

* Professor of Law, Villanova University School of Law. I thank Les Book, Keith Fogg, Brant Hellwig, Steve Johnson, Leandra Leaderman, James Maule, James Pfander, Sai Prakash, and Carlton Smith for various conversations as I prepared this Essay. I thank also Jordan Barry, Michael Daly, J.J. Williamson, Brandon Zeller, and the National Archives and Records Administration for their research assistance.

¹ Ernest Lawrence Thayer, *Casey at the Bat*, S.F. EXAMINER, June 3, 1888, available at http://www.baseball-almanac.com/poetry/po_case.shtml (last visited Mar. 3, 2012).

² *Id.*

³ *Freytag v. Comm’r*, 501 U.S. 868 (1991).

⁴ Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011) (noting anticanon of cases that “embodies a set of propositions that all legitimate constitutional decisions must be prepared to refute”); see also Edward J. Larson, *Symposium: Supreme Mistakes, Anti-Canonical Considerations*, 39 PEPP. L. REV. 1 (2011) (introducing constitutional anti-canon of *Dred Scott*, *Plessy*, *Buck*, *Erie Railroad*, and *Korematsu*).

⁵ See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing a substantive due process right to abortion).

the special trial judge's exercise of judicial power was void.⁶ No justice dissented from the Court's 9-0 judgment that the arrangement comported with the Appointments Clause.⁷ The majority's opinion, however, drew a sharp 5-4 division as to Justice Blackmun's rationale,⁸ which Justice Scalia called not only wrong, but "full of danger for the future of our system of separate and coequal powers."⁹ Thus, like *Morrison v. Olson* before it, *Freytag* pitted two conservative Republican former heads of the Office of Legal Counsel (OLC) against one another on a separation-of-powers question¹⁰—on the one hand, Chief Justice Rehnquist, who joined the majority and assigned the opinion to Blackmun, and on the other, Justice Scalia, who led the concurring justices opposing the majority rationale.

Scalia did not fall into Blackmun's error of authorizing cross-branch control of officers. His concurring opinion, however, is infected with an anti-conceptualism that proves problematic for the separation of powers. This approach resists classification of governmental functions by resort to any definition of what functions constitute the proper exercise of "legislative," "executive," or "judicial" power. Instead, Scalia's approach in *Freytag* defines the nature of the judicial power solely with recourse to the officer's identity and official attributes.¹¹ Unfortunately, this approach—doubtlessly motivated in part by Scalia's judicial methodological preference for categorical rules over case-by-case judgments under potentially elastic standards—makes it difficult to distinguish, among other things, impermissible from permissible delegations of power.

Why is it important to take the time to dissect *Freytag* in a post mortem? In some ways, a benighted opinion, when its result is right, but for the wrong reasons, is easier to overlook than a very bad decision that reaches the wrong result. This is particularly the case where, as here, the opinion purports to interpret the Constitution. In structural constitutional matters, the Court writes almost in granite. *Stare decisis* in the face of a high bar to formal amendment means that (realistically) the Court needs to undo its own mischief. The Court has already indicated willingness to chip away at aspects of *Freytag*.¹² Moreo-

⁶ *Freytag*, 501 U.S. at 872. This was the petitioner's fallback argument. The petitioner argued that the authorizing statute limited the use of special trial judges to only cases that are "minor, simple, or narrow." *Id.* at 873-74.

⁷ *Id.* at 869-70; *id.* at 892 (Scalia, J., concurring in the judgment).

⁸ It would probably be more accurate to describe the work product as an opinion from "Justice Blackmun's chambers." See, e.g., David J. Garrow, *The Brains Behind Blackmun*, LEGAL AFF., May/June 2005, at 34 (describing Justice Blackmun "as a justice who increasingly ceded far too much of his judicial authority to his clerks").

⁹ *Freytag*, 501 U.S. at 901.

¹⁰ Jay S. Bybee & Tuan N. Samahon, *William Rehnquist, The Separation of Powers, and the Riddle of the Sphinx*, 58 STAN. L. REV. 1735, 1755 (2006).

¹¹ *Freytag*, 501 U.S. at 911 ("[I]t is the identity of the officer—not something intrinsic about the mode of decision-making or type of decision—that tells us whether the judicial power is being exercised.").

¹² See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3162-63 (2010) (adopting Scalia's view from his *Freytag* concurrence that a "department" is "a freestanding component of the Executive Branch" and rejecting *Freytag* majority's view that "department" is only a cabinet-level entity); see also *Edmond v. United States*, 520

ver, the Court as presently constituted,¹³ which includes none of the original *Freytag* majority,¹⁴ might be prepared to overrule *Freytag*'s majority rationale. Indeed, a new separation-of-powers challenge to the authority of the U.S. Tax Court, presented this time as a removal issue rather than as an Appointments Clause issue as in *Freytag*, may provide the Court with a vehicle for the reconsideration of the issue. Should this faulty majority rationale be revisited, an analysis of the limitations of the concurring opinion's alternative approach could prove helpful.

Part I considers the unusual litigation of *Freytag* and explains how the Tax Court managed not only to have its views heard, but ultimately adopted in the Supreme Court. Part II examines the majority's opinion and how its myopic focus on appointments allowed the removal issue it created to be left largely unaddressed. In addition, Part II addresses Blackmun's half-hearted effort at articulating what constitutes "the judicial power of the United States." Finally, Part III focuses on Scalia's separate concurrence and suggests his formal approach to defining power with resort to an officers' characteristics mistakes as sufficient what is merely necessary.

I. THE TAX COURT'S FRIEND AND THE LITIGATION OF *FREYTAG*

Freytag was litigated in the Supreme Court as a three-way clash of the titans. Counsel for petitioning taxpayer *Freytag* was none other than Kathleen Sullivan,¹⁵ noted constitutional law scholar and (later) Stanford Law School dean. She advocated the view that the chief judge of the U.S. Tax Court could not constitutionally appoint the special trial judges. According to Sullivan, the special trial judges were officers,¹⁶ and the chief judge was ineligible to receive the appointment power.¹⁷ The chief judge was plainly not the President. Neither was the chief judge the head of an executive department,¹⁸ nor was the Tax Court a part of "the Courts of Law."¹⁹

Then-Deputy Solicitor General John G. Roberts, Jr., now Chief Justice of the United States, represented the U.S. government.²⁰ He contended special trial judges were employees, not officers, and therefore the Appointments

U.S. 651, 664 & n.2 (1997) (characterizing Court of Appeals for the Armed Forces as an executive branch entity notwithstanding its exclusively adjudicative functions).

¹³ In addition to Justices Scalia and Kennedy who joined the separate concurrence, Chief Justice John Roberts (who advocated for the position adopted by Scalia in *Freytag*) and Justices Thomas, Alito, and possibly Kagan, who all had very substantial executive branch professional experience, are potential votes to overrule, or at least seriously limit, the most objectionable aspects of *Freytag* detailed in this Essay.

¹⁴ The *Freytag* majority included Chief Justice Rehnquist and Justices White, Marshall, Blackmun, and Stevens.

¹⁵ *Freytag*, 501 U.S. at 870.

¹⁶ *Id.* at 880.

¹⁷ See Brief for Petitioners at 29, *Freytag v. Comm'r*, 501 U.S. 868 (1991) (No. 90-762), 1991 WL 11007938.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Freytag*, 501 U.S. at 870.

Clause, which controls only appointment of officers, was not implicated.²¹ Alternatively, Roberts argued that if the special trial judges were indeed inferior officers, then the Chief Judge of the Tax Court was a head of an executive department,²² just as the Second Circuit had ruled during the pendency of the *Freytag* litigation.²³ He agreed with Sullivan that the Chief Judge was ineligible as a non-Article III officer to receive appointment power as a part of “the Courts of Law.”²⁴

Neither Sullivan nor Roberts, however, carried the day. Curiously, the Court adopted a position neither had advocated. Erwin Griswold, amicus curiae and the former dean of the Harvard Law School, participated in the case to present his own views, and ostensibly not as counsel for any party. Griswold had attempted to appear as counsel for the judges of the U.S. Tax Court in the Second Circuit,²⁵ but was able to appear only as amicus on his own behalf.²⁶ The Tax Court judges for their part wished to advance their view that the chief judge of the Tax Court and all the other Tax Court judges, including the special trial judges, belonged to “the Courts of Law.”²⁷ The Solicitor General’s office rejected that view.²⁸ It took the position that the Tax Court, notwithstanding its statutory denomination as a “legislative court,” was a division of the Article II executive branch.²⁹ Although the Solicitor General’s office refused to permit Griswold to file an amicus brief on behalf of the Tax Court,³⁰ it agreed to allow him to file one to represent his own views, but not as counsel for the Tax Court judges.³¹ Nonetheless, Griswold consulted with, and effectively represented, the judges of the Tax Court.³²

Griswold’s virtual representation was unusual (and perhaps even improper), but does not form any procedural ground for discarding *Freytag*’s result. Griswold’s shadow advocacy did not steal upon an unsuspecting Court or parties. His brief candidly disclosed to the Court that his position was the same as the Tax Court’s.³³ Indeed, the possibility of this grey eminence—as

²¹ Brief for Respondent at 28–32, *Freytag v. Comm’r*, 501 U.S. 868 (1991) (No. 90-762), 1991 WL 11007941.

²² *Id.* at 33, 38–40.

²³ *Samuels, Kramer & Co. v. Comm’r*, 930 F.2d 975, 990–94 (2nd Cir. 1991).

²⁴ See Brief for Respondent, *supra* note 21, at 9, 36–38 & nn.28–29.

²⁵ Affidavit in Support of Motion for Leave to File a Brief as Amici Curiae and for an Extension of Time at 1–2, *Samuels, Kramer & Company v. Comm’r*, Nos. 90-4060, 90-4064 (2d Cir. Aug. 10, 1990).

²⁶ *Samuels*, 930 F.2d at 977.

²⁷ Affidavit, *supra* note 25, ¶4.

²⁸ Brief for Respondent, *supra* note 21, at 9, 36–38 & nn.28–29.

²⁹ *Id.* at 9, 38.

³⁰ Letter from Erwin N. Griswold to Laurence H. Tribe, Harvard Law School (May 1, 1991) in ERWIN N. GRISWOLD PAPERS, BOX 198, Folder 18 (Harvard Law Library) (on file with author). Griswold reported that the Department of Justice took the position that only it was authorized to “represent officers of the United States.” *Id.*

³¹ *Id.*

³² See, e.g., Letter from Arthur L. Nims, III, Chief Judge, U.S. Tax Court, to Erwin N. Griswold, Jones, Day, Reavis & Pogue (June 28, 1991) in ERWIN N. GRISWOLD PAPERS, BOX 152, Folder 3 (Harvard Law Library) (on file with author) (thanking Griswold for his ongoing representation).

³³ Brief of Erwin N. Griswold as Amicus Curiae at 1, *Freytag v. Comm’r*, 501 U.S. 868 (1991) (No. 90-762), 1991 WL 11007939.

unofficial advocate for the Tax Court judges—having sway with an older generation of jurists on the Court suggests the Tax Court may have *wanted* Griswold to tip his hand as to his effective representation.³⁴ For its part, the Solicitor General's office was not taken by surprise and responded to Griswold's arguments that the Tax Court was a part of "the Courts of Law."³⁵

Although the special trial judges' appointments were vindicated by a 9-0 margin and the Tax Court *fêted* its shadow advocate's victory,³⁶ the judges viewed the case as a close call.³⁷ For them, the real battle was not *whether* the Supreme Court sustained the appointments arrangement but *how* it was upheld: Would the Court classify the Tax Court as an Article II executive department, subject to presidential control, or as a unit of "the Courts of Law"? On that count, the Tax Court's victory was "by a narrow margin," decided by a single vote.³⁸

II. BLACKMUN AT THE BAT

A. *Strike One: Cross-Branch Removal*

The petitioners in *Freytag* challenged the authority of the special trial judge's order under the Appointments Clause. The way the Court resolved that challenge, however, left the door open for a potential separation-of-powers challenge from a different angle—not as an appointment issue, but as a challenge based on the Tax Court judges' removability by the President. Title 26, § 7443(f) authorizes the President to remove Tax Court judges for cause.³⁹ That provision becomes particularly problematic after *Freytag*. Blackmun and the majority characterized the Tax Court judges (and their special trial judges) as exercising "the judicial power of the United States,"⁴⁰ even though they lack Article III tenure and salary protection and, significantly, are subject to poten-

³⁴ See Letter from Nims, *supra* note 32. "I wanted to formally thank you personally and on behalf of the Tax Court for giving us the benefit of your knowledge, wisdom *and prestige* in connection with our travails in *Samuels*, *Kramer* in the Second Circuit and *Freytag* in the Supreme Court." *Id.* (emphasis added). This gambit appeared to work. The older justices were persuaded by Griswold, including William Rehnquist. Griswold's tenure as Solicitor General (1967–73) had overlapped with Rehnquist's tenure as Assistant Attorney General in the Nixon administration's Office of Legal Counsel (1969–71) and then Rehnquist's early years on the Supreme Court.

³⁵ Brief for the Respondent, *supra* note 21, at 36 n.28, 42 n.34.

³⁶ Letter from Erwin N. Griswold, Jones, Day, Reavis & Pogue to Arthur L. Nims, III, Chief Judge, U.S. Tax Court (July 10, 1991) in ERWIN N. GRISWOLD PAPERS, BOX 152, Folder 3 (Harvard Law Library) (thanking Chief Judge for a celebratory victory luncheon hosted by Tax Court in Griswold's honor) (on file with author).

³⁷ Chief Judge Arthur L. Nims, III thanked Griswold for his advocacy. "The result in *Freytag*, though by a narrow margin, does ultimately vindicate our position that the Tax Court is a court of law, and for that we owe you, Dean Griswold, a deep debt of gratitude." Letter from Arthur L. Nims, III, Chief Judge, United States Tax Court, to Erwin N. Griswold, Jones, Day, Reavis & Pogue (July 17, 1991) in ERWIN N. GRISWOLD PAPERS, BOX 152, Folder 3 (Harvard Law Library) (emphasis added) (on file with author).

³⁸ *Id.*

³⁹ 26 U.S.C. § 7443(f) (2006) ("Judges of the Tax Court may be removed by the President, after notice and opportunity for public hearing, for inefficiency, neglect of duty, or malfeasance in office, but for no other cause.").

⁴⁰ *Freytag v. Comm'r*, 501 U.S. 868, 891 (1991).

tial presidential removal.⁴¹ This cross-branch removal power confers upon the President a power to control those officers and threatens the independent exercise of the judicial power.⁴² This mixing of judicial and executive authorities violates a basic separation-of-powers maxim and courts the attendant danger of tyranny.⁴³ Madison approvingly quoted Montesquieu on this very point: “Were [the power of judging] joined to the executive power, the judge might behave with all the violence of an oppressor.”⁴⁴

The separate concurrence suggested that the majority failed to appreciate the consequences of effectively authorizing cross-branch removal power (even only for cause),⁴⁵ but understandably did not elaborate the point. Freytag’s counsel had framed the challenge only as an appointments challenge. She had not pressed the other separation-of-powers issue of judicial officer removability by the President. The majority, for its part, did little to rebut the concurrence’s passing observation. It concluded “the Tax Court remains independent of the Executive and Legislative Branches” simply because its decisions are “not subject to review by . . . the President.”⁴⁶ It did not mention the presidential power to remove tax judges or any other mechanism of control.

Why did the *Freytag* majority attend so little to the consequences of its appointments analysis for the presidential removal power? Perhaps much like Thayer’s Casey up to bat, it simply refused to swing “in haughty grandeur” and functionalist disdain—“that ain’t my style”—and earned itself a first strike.⁴⁷

An instant replay, however, suggests the issue was worth examining in depth. The power to remove is the most powerful tool that a principal has to control an agent: it backstops all other tools for control. If a principal lacks the ultimate authority to enforce orders and requests with an agent’s termination, the agent may simply choose not to follow the principal.

Although the Court has recognized that the power to appoint is also a powerful tool for control,⁴⁸ it is less powerful than removal authority as an instrument to bend an agent to a principal’s will. Removal authority (and the in

⁴¹ To be sure, the grounds for removal are only for “cause.” 26 U.S.C. § 7443(f) (enumerating grounds for removal as “inefficiency, neglect of duty, or malfeasance in office”). *Bowsher v. Synar*, 478 U.S. 714 (1986), however, noted these very same grounds for removal were “very broad” and “could sustain removal . . . for any number of actual or perceived transgressions.” *Id.* at 729.

⁴² *Bowsher*, 478 U.S. at 727 n.5.

⁴³ THE FEDERALIST NO. 47 (James Madison).

⁴⁴ *Id.*

⁴⁵ See *Freytag*, 501 U.S. at 912.

⁴⁶ *Id.* at 891. In *Mistretta v. United States*, 488 U.S. 361 (1989), Blackmun had approved a distressingly similar cross-branch presidential authority to remove Article III judges from the U.S. Sentencing Commission “only for neglect of duty or malfeasance in office or for other good cause shown.” *Id.* at 368, 409–11. That arrangement, while still problematic, did not oust judges from their position as judges, only as members of the Commission. *Id.* at 411.

⁴⁷ See Thayer, *supra* note 1.

⁴⁸ *Printz v. United States*, 521 U.S. 898, 922 (1997) (questioning parenthetically “if indeed meaningful Presidential control is possible without the power to appoint and remove”). Appointment power permits the appointing officer to select subordinates that share policy priorities and ideology. See also Tuan Samahon, *The Czar’s Place in Presidential Administration, and What the Excepting Clause Teaches Us About Delegation*, 2011 U. CHI. LEGAL F. 169, 193 (2011) (describing presidential motive to exclude the Senate from the appointments process).

terrorem threat of removal) is a continuing mechanism for control. In contrast, the enticement of promotion to a higher office through a subsequent appointment may provide some incentive for an agent's ongoing compliance, but removal power provides immediate control, or as the Court has termed it, a "here-and-now subservience."⁴⁹ This relatively greater control imparted by the power to remove reflects a theory of ambitious and self-seeking human nature embodied in Machiavelli's infamous advice to a prince that it "is much safer to be feared than loved,"⁵⁰ if by "loved" we understand an agent's voluntary compliance to a superior's requests.⁵¹ Accordingly, Machiavelli's advice to the prince was that as "men lov[e] according to their own will and fear[] according to that of the prince, a wise prince should establish himself on that which is in his own control and not in that of others."⁵² Those who have been appointed may feel favor toward the appointing officer, but that loyalty is not necessarily enduring. Thus, although the President appoints Article III judges, they are thought to be independent because they hold their offices during good behavior. As Madison put it, "the permanent tenure by which the appointments are held in that [judicial] department, must soon destroy all sense of dependence on the authority conferring them."⁵³ Thus, it is the power to remove that serves as a continuing power to control.

But is a *qualified* power to remove still a power to control? The scope of removal authority dictates the scope of control. A plenary power to remove for any reason whatsoever, i.e., classic removal at will, affords the principal the most complete control over an agent and is requisite for a true agency relationship. The power to control becomes less effective if the power to remove is limited or conditioned on certain preconditions. "For cause" grounds for removal, such as inefficiency, neglect of duty, or malfeasance, may restrict the principal's ability to remove (and thereby control) and may require that the officer exercising the removal authority articulate a justificatory ground for removal. Interpreted at their most permissive, the restrictions could allow the removing officer plenary control of what counts as good cause or removal on an unscrutinized pretext of the presence of a ground to remove.⁵⁴ At their most

⁴⁹ *Bowsher v. Synar*, 478 U.S. 714, 727 n.5 (1986).

⁵⁰ NICCOLO MACHIAVELLI, *THE PRINCE*, ch. XVII.

⁵¹ Madison shared this view of mankind, or at least thought it most prudent to structure government based on the supposition that men were not "angels." *THE FEDERALIST* No. 51 (James Madison).

⁵² MACHIAVELLI, *supra* note 50.

⁵³ *THE FEDERALIST* No. 51 (James Madison).

⁵⁴ *Wiener v. United States*, 357 U.S. 349 (1958), is not to the contrary. The Court created an implied "for cause" limitation against presidential removal of War Claims Commission members because they performed a "quasi-judicial" and not purely executive function. *See id.* at 356. *Wiener*, however, does not stand for the proposition that the President cannot have his own man serve. Wiener sought only damages for past wages (which the Court allowed him to pursue), not reinstatement to office. *Id.* at 349. This approach is consistent with how common law courts handle agency contracts that specify a term of service. An agent is not entitled to continue to bind the principal for the duration of the contractual term. Instead, the agency is terminated at the will of the principal and the courts employ a contractual term of service only to calculate the quantum of damages. Thus, on this approach, a term of service accompanied with a "for cause" limitation provides no shield against removal as an agent, only a means for calculating the amount of damages.

stringent, such removal restrictions could eliminate control altogether, except on proof of conditions present.

Blanket presidential authority to remove a subordinate does entail greater control, but the tradeoff is usually greater transparency and political accountability to constituents and Congress for any ill-conceived exercise of that power. This greater transparency likely results from a political presumption that arises from plenary control. Consider, for example, a high visibility removal, such as the “Saturday Night Massacre” in which President Richard Nixon ordered his DOJ subordinates to terminate Watergate special counsel Archibald Cox.⁵⁵ Attorney General Elliot Richardson and then Deputy Attorney General William French Smith received the order, but refused to comply and instead tendered their noisy resignations.⁵⁶ Nixon, however, insisted on the removal. Solicitor General Robert Bork, acting head of the Justice Department, ultimately obeyed and terminated Cox.⁵⁷ The resulting political firestorm generated presidential accountability for the removal. Subsequently, Nixon was politically obligated to appoint a new Watergate special counsel.⁵⁸

By contrast, “for cause” removal confers less control but is likely to be less transparent. This lack of transparency results from the stigma attached with removal “for cause,” the lack of any public presumption of control, and the possibility that subordinates bargain in the shadow of the potential opprobrium of “for cause” removal—even “cause” improperly asserted. Thus, in *terrorem* “voluntary” resignations function as removals-in-fact but without the attendant transparency and political accountability for the removing officer.

To illustrate, consider the back-story of the Reagan administration’s threatened exercise of removal power over a legislative court judge. Judge Albert B. Fletcher, Jr., who served on the U.S. Court of Military Appeals (later renamed the U.S. Court of Appeals for the Armed Forces), was arrested, tried, and subsequently convicted for homosexual solicitation of an undercover police officer.⁵⁹ Public records concerning the now-deceased Judge Fletcher indicate that political pressure was brought to bear by the White House to force Fletcher’s resignation from the military court for his same-sex peccadilloes.⁶⁰ Although the Office of Legal Counsel determined the White House likely

⁵⁵ Philip Allen Lacovara, *United States v. Nixon: The Prelude*, 83 MINN. L. REV. 1061, 1064 (1999).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Removal of an officer entails receiving approval for a replacement, which may require some form of confirmation, congressional oversight, or other political accountability. *See, e.g.*, Seth Barrett Tillman, *The Puzzle of Hamilton’s Federalist No. 77*, 33 HARV. J.L. & PUB. POL’Y 149, 151–57 (2010) (explaining Hamilton’s suggestion Senate’s consent would be required to “displace” as well as appoint).

⁵⁹ Charles Fishman, *Federal Judge Convicted of Soliciting Homosexual Act*, WASH. POST, Feb. 28, 1985, at C1.

⁶⁰ These records were recently made available to me pursuant to a Presidential Records Act request. The leading history of the U.S. Court of Appeals for the Armed Forces, which covered only its history to 1980, did not mention Fletcher’s 1985 conviction and subsequent retirement. *See generally* JONATHAN LURIE, *PURSUING MILITARY JUSTICE: THE HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, 1951–1980* (1998) (describing history of military court to 1980).

lacked any “for cause” grounds to terminate Fletcher,⁶¹ the in terrorem effect was nonetheless potent and precipitated his resignation.⁶² Fletcher negotiated with the White House a retirement based on physical disability, complete with a supporting doctor’s note.⁶³ To be sure, the episode presented no cross-branch removal issue,⁶⁴ but it does demonstrate the potential for non-transparent removals not supported by any legal cause, narrowly conceived.

Whether a President, his partisans, or third parties might orchestrate a similar forced resignation-cum-removal from the U.S. Tax Court is not a mere speculative exercise. Lanny Davis, counsel for the aggrieved Kanter plaintiffs in *Ballard v. Commissioner*, petitioned President Obama to institute an investigation of Senior Tax Court Judge Howard A. Dawson Jr. with the object of possibly removing him.⁶⁵ To date, Senior Judge Dawson has not been removed. Barring a transparent and formal process, however, it would be difficult to determine if any judge negotiated a quiet removal by way of resignation in lieu of a potentially public spectacle. Whether any prior administration may have precipitated resignations of Tax Court judges, or entertained referrals proposing such a course of action, is not a matter detailed in any generally available public record.⁶⁶

⁶¹ Ralph W. Tarr, Acting Assistant Attorney Gen., Office of Legal Counsel, Memorandum for Carol E. Dinkins, Deputy Attorney Gen. (Nov. 27, 1984) (on file with author) (“[W]e do not believe that the President is authorized by the applicable statute to dismiss the judge on the basis of his arrest.”).

⁶² Letter from Albert B. Fletcher, Jr., U.S. Court of Military Appeals to Ronald W. Reagan, President (Mar. 12, 1985) (requesting retirement because of physical disability) (on file with author).

⁶³ Fred F. Fielding, White House Gen. Counsel, Memorandum for the President (Sept. 6, 1985) (noting coronary artery disease as asserted disability, but noting also more immediate and pressing cause for resignation was his recent conviction) (on file with author).

⁶⁴ Post-*Edmond v. United States*, the Court clarified that the legislative court known as the “Court of Appeals for the Armed Forces” is located within the executive, and not the judicial, branch. *Edmond v. United States*, 520 U.S. 651, 664 & n.2 (1997) (noting presidential power to remove as a reason why legislative court is located in executive branch) (Scalia, J.).

⁶⁵ “[W]e call on the president, who has the power to remove a Tax Court judge, to immediately institute an investigation on whether such removal is justified.” Sam Young, *Kanter Plaintiffs Call for Investigation of Tax Court Judges*, TAX NOTES TODAY, Mar. 8, 2010, at 1181.

⁶⁶ A telltale sign of such a precipitated resignation may be a procedurally irregular, or unusually hasty, resignation. *Cf. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) (noting, in equal protection race discrimination setting, “[d]epartures from the normal procedural sequence also might afford evidence that improper purposes are playing a role”). There is an example in Tax Court history of irregularity that possibly suggests a quiet removal. Nixon appointee U.S. Tax Court Judge William H. Quealy suddenly retired during the Carter administration in advance of his term’s expiry. Several subsequent Tax Court memoranda opinions noisily noted his apparently abrupt departure and reassignment of cases in early 1980. In particular, one judge remarked a case was “somewhat unusual” because Judge Quealy heard the case but then promptly resigned, making him “not available for reference.” *See, e.g., Kendrick v. Comm’r*, 40 T.C.M. (CCH) 741 (1980), P-H T.C. Memo ¶ 80,270 (Sterrett, J.). In *Bail Bonds by Marvin Nelson, Inc. v. Commissioner*, another judge again called attention to a case’s procedural history as “unusual” and then noted that “[a]fter the cases were tried, briefed and submitted in 1979, but before any findings of fact were made or opinion written, Judge Quealy retired from the Court in 1980.” *Bail Bonds*, 51 T.C.M. (CCH) 294 (1986), P-H T.C. Memo.¶ 86,023. Per *Village of Arlington Heights*, these abrupt procedural departures might signal an in terrorem resignation or

B. Strike Two: Missing the Essence of Judicial

Beyond the failure to recognize a power to remove as a power to control, the question of how to characterize the Tax Court's power is central to *Freytag*. Blackmun's opinion does not engage in serious conceptual analysis by trying to ascertain what is encompassed within the exercise of judicial power. Blackmun and his fellow jurisprudential travelers usually accuse Scalia of being "formalistic," an epithet usually meant to convey a sense that a jurist is placing undue weight on labels. That description, if intended to capture a simpleminded endeavor, better describes Blackmun's, rather than Scalia's, approach to the characterization and classification of power at stake in *Freytag*. Blackmun engaged in simplistic equivalence: adjudicatory power equals judicial power; the statute calls the officers "judges" and the institution "court"; and the officers "subpoena and examine witnesses, order production of documents, and administer oaths," etc.⁶⁷

Scalia's concurrence adopted the government's argument that adjudication is merely a mode of decision-making.⁶⁸ On this account, it is a mistake to simplistically equate "adjudication" with "the judicial power." For Scalia, adjudication is not the same as the exercise of judicial power, but a mode of case-by-case decision-making used by other branches of government as a means of carrying out their powers. Congress adjudicates under Article I when the House votes to indict and when the Senate acts as a court of impeachment.⁶⁹ The executive branch also uses adjudication as a mode of decision-making in agencies and in determining when a prosecution should be pursued.

Indeed, it is unclear that the judicial power of the United States is inherently limited only to adjudication. The judicial vesting clause grants to the Supreme Court the judicial power of the United States.⁷⁰ That initial grant of power to the federal judiciary is qualified only subsequently by the requirement of a "case" or "controversy" placed on the judicial power in the enumeration of jurisdictional grounds.⁷¹ Thus, the Constitution's case-or-controversy language requires the Court to use adjudication as its principal means of decision-making. In the absence of any such limitation, however, the Courts of Law could exercise judicial power in ways that are *not* adjudicative or case-by-case, but categorical, such as would be the case with abstract judicial review.

III. SCALIA'S TURN AT BAT—STRIKE THREE:
CONFUSING NECESSITY FOR SUFFICIENCY

Justice Scalia is surely correct that adjudication is a mode of decision-making not unique to Article III. Adjudication may be engaged in by executive branch officers when exercising discretion (on a case-by-case basis) to deter-

other pressure brought to bear, whether from the White House, the Congress, or the Tax Court itself.

⁶⁷ *Freytag v. Comm'r*, 501 U.S. 868, 890–92.

⁶⁸ *Id.* at 909 (Scalia, J., concurring).

⁶⁹ U.S. Const. art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments.").

⁷⁰ U.S. CONST. art. III, § 1.

⁷¹ U.S. CONST. art. III, § 2, cl. 1.

mine whether a particular law has been violated under a particular set of circumstances. But this is not to say that Scalia has captured the entire story with this insight. For Scalia, rather than resort to abstract definitions of what it means to exercise judicial power, he would look to the identity of the actor to determine placement in the tripartite scheme. On this formalist account, a similar approach applied to executive power would render whatever the President undertakes to do as executive (by definition), even if the mode of action is more commonly associated with another branch's activity, such as codified rulemaking or case-by-case adjudication.⁷² It is executive power being exercised because of who does it (the President or other executive officers), not because of what is being done (rulemaking, prosecuting, administrative law adjudicating). There is no distinctive "quasi-judicial" or "quasi-legislative" power exercised by executive officers, simply different modes of making decisions and acting.⁷³

In short, given the performance of adjudicatory functions by a federal officer, it is the identity of the officer—not something intrinsic about the mode of decision-making or type of decision—that tells us whether the judicial power is being exercised. "Our cases demonstrate [that] a particular function, like a chameleon, will often take on the aspect of the office to which it is assigned. Where adjudicative decision-makers do not possess life tenure and a permanent salary, they are 'incapable of exercising any portion of the judicial power.'"⁷⁴

This tautological approach, "he is a judge with salary protection and tenure during good behavior, ergo his exercise of adjudication is the exercise of the judicial power of the United States," is tempting. It has the appeal, for example, of squaring much of what the modern administrative state does with the Founder's Constitution. Rulemaking, enforcement, and adjudication before an executive agency ought present no difficulty—it is not the union of all powers legislative, executive, and judicial in a single body—because all those activities are done by executive officials, ergo they are all "executive."

Scalia's formalist account, however, may miss the ball for the simple reason that it may mistake as sufficient what is only necessary. The decision maker's identity is necessary to classification of the exercise of power (i.e., for something to be the exercise of the judicial power of the United States, the individual doing the action must be an Article III judge), but that identification of the actor is not by itself sufficient to classify a power's exercise as legislative, executive, or judicial. After all, there is substantive content to the descriptive terms "legislative," "executive," and "judicial." State constitutions are similarly organized and ordinary speakers of the English language have more than a sneaking suspicion that those terms have substantive content beyond the identity of the actors. One could not, for example, simply re-label the legisla-

⁷² Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035, 1048–49 (2007) (describing formalist account of delegation that categorizes type of power exercised based on who is exercising it).

⁷³ "It has often been observed, correctly in my view, that the line between 'purely executive' functions and 'quasi-legislative' or 'quasi-judicial' functions is not a clear one, or even a rational one." *Morrison v. Olson*, 487 U.S. 654, 725 (1988) (Scalia, J., dissenting).

⁷⁴ *Freytag*, 501 U.S. at 911 (citations omitted).

tive branch “apple,” the executive branch “orange,” and the judicial branch “lemon” without losing some substantive sense of what each branch does.

Scalia’s approach may be sufficient as a suitable negative rule for exclusion of improper exercises of power, i.e., “the power exercised by the Tax Courts could not be ‘the judicial power of the United States.’ They lack the characteristics of Article III judges.” But neither does that approach provide a positive rule for inclusion. If an officer has Article III tenure and undertakes a statutory function, such as promulgating sentencing regulations that have the binding force of law based on a congressional delegation,⁷⁵ we could not conclusively say based on only the officer’s Article III identity whether the activity was constitutionally permissible without recourse to some definition or conception of what is encompassed within the scope of “the judicial power of the United States.”

It is beyond the scope of this brief Essay to propose a solution of the meaning of the terms “legislative,” “executive,” and “judicial” but it would seem that the *Freytag* concurrence’s approach to classifying the exercise of judicial power mistakes for sufficient what is merely necessary. If, indeed, that is the case, truly “there is no joy in Mudville—the mighty Supreme Court has struck out.”⁷⁶

⁷⁵ See *Mistretta v. United States*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting).

⁷⁶ Thayer, *supra* note 1.