

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: THOMAS FREYTAG, ET AL., Petitioners v.
COMMISSIONER OF INTERNAL REVENUE

CASE NO: 90-762

PLACE: Washington, D.C.

DATE: April 23, 1991

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----X
3 THOMAS FREYTAG, ET AL., :

4 Petitioners :

5 v. :

 : No. 90-762

6 COMMISSIONER OF INTERNAL :

7 REVENUE :

8 -----X

9 Washington, D.C.

10 Tuesday, April 23, 1991

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 11:08 a.m.

14 APPEARANCES:

15 KATHLEEN M. SULLIVAN, ESQ., Cambridge, Massachusetts;

16 on behalf of the Petitioners.

17 JOHN G. ROBERTS, JR., ESQ., Deputy Solicitor General,

18 Department of Justice, Washington, D.C.; on behalf of
19 the Respondent.

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On behalf of the Petitioners	3
JOHN G. ROBERTS, JR., ESQ.	
On behalf of the Respondent	28

1 PROCEEDINGS

2 (11:08 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear next in
4 argument No. 90-762, Thomas Freytag v. Commissioner of
5 Internal Revenue.

6 Ms. Sullivan, you may proceed whenever you're
7 ready.

8 ORAL ARGUMENT OF KATHLEEN SULLIVAN

9 ON BEHALF OF THE PETITIONERS

10 MS. SULLIVAN: Mr. Chief Justice, and may it
11 please the Court:

12 This is a tax case with implications for up to
13 3,000 taxpayers and a billion and a half in alleged tax
14 deficiencies, and it involved one of the longest trials
15 below in the tax court's history -- 14 weeks of evidence,
16 complex financial testimony, 9,000 pages of transcripts,
17 3,000-plus exhibits.

18 But we won't tax you with any of the substantive
19 detail of that tax case, because the sole issue before
20 this Court is the authority of the special trial judge who
21 presided over and, we assert, effectively decided the
22 case.

23 We will raise issues both of the statutory and
24 the constitutional authority of the special trial judge.
25 But I'd like to start of course with the statutory claim,

1 because should you reverse this case, agreeing with our
2 statutory claim, you would avoid the need to reach the
3 constitutional question.

4 Now, the statutory framework that governs the
5 special trial judges is straightforward. It's set forth
6 in Internal Revenue Code 7443A, which is reprinted at A100
7 in the cert. petition. And it divides the work of the tax
8 court potentially between the regularly appointed tax
9 court judges, who now number 19, and special trial judges
10 whom Congress has authorized the chief judge of the trial
11 court to appoint and to remove at his pleasure.

12 Now special trial judges are governed by 7443A,
13 B, and C. And to make it simple, they have two kinds of
14 function. The special trial judges may hear and decide
15 certain specified kinds of tax cases, specially specified
16 declaratory judgment claims and small tax claims involving
17 amounts under \$10,000. They may hear and decide those
18 cases set forth in 7443A(b)(1) to (3). (b)(4), the sole
19 provision at issue in this case is the catch-all provision
20 that says they may also hear but not decide any other
21 proceeding.

22 Now let me try to clarify the points of
23 agreement and disagreement between petitioners and the
24 Government with respect to the statutory claim.
25 Petitioners and the Government agree completely that

1 Congress did not authorize special trial judges to decide
2 (b)(4) cases. (b)(4), coupled with (c), precludes
3 decision by a special trial judge.

4 Our difference with the Government -- the heart
5 of our statutory claim -- is that in this case he did
6 decide --

7 QUESTION: Well, it precludes -- it precludes
8 making the decision of the court.

9 MS. SULLIVAN: That's correct. It --

10 QUESTION: I'm not sure if it precludes making
11 the decision, which is subject to the review of the court,
12 in de novo proceeding.

13 MS. SULLIVAN: That may be right, Justice
14 Kennedy. That is not what the tax court rules permit. So
15 our argument is that the tax court rules here are in
16 violation of the statute even if the statute is properly
17 read the way you describe to permit reports by special
18 trial judges subject to de novo review.

19 Our key argument here under the statute is not
20 only that the conduct of the judge below here amounted
21 effectively to a decision in the case, but that the tax
22 court rules ensure that special trial judges will
23 effectively decide (b)(4) cases. And I'd like to point
24 out it -- precisely how we read the rules to do just that.

25 The tax court rules -- the key rule here is rule

1 183. And we've reprinted that, if you wish to look at it,
2 in the cert. petition appendix at A91. Now the key
3 features of that rule that we argue preclude what Justice
4 Kennedy said might be permissible within the statute are
5 rules and (b) and (c).

6 Specifically I'd like to start with (c), if I
7 might, on page A92. Tax court rule 183(c), which is the
8 governing rule in (b)(4) cases and was the rule at the
9 order --

10 QUESTION: What page of the -- this is --

11 MS. SULLIVAN: Cert. petition appendix A92.

12 QUESTION: A92. Thank you.

13 MS. SULLIVAN: Specifically, Mr. Chief Justice,
14 the last sentence of that paragraph (c) on A92. You'll
15 see in that sentence that the action on the report -- and
16 now we're talking about what the regular tax court judge
17 to whom the case returns after the special trial judge has
18 finished a report.

19 If you look at 183(c) last sentence, it provides
20 -- last clause of the sentence -- that the findings of
21 fact recommended by the special trial judge shall be
22 presumed to be correct. In other words, the tax court's
23 own rules, Justice Kennedy, in answer to your question,
24 preclude de novo review of the kind that is typical in
25 other settings in the Federal Government where adjunct

1 adjudicators are operating under the real -- not merely
2 formal -- supervision of a regular judge.

3 To connect up to Justice O'Connor's question
4 earlier, had magistrates' decisions in suppression
5 hearings not been reviewable de novo, they would not be in
6 compliance with the statute -- the Magistrates Act -- and
7 may raise other constitutional questions. But here de
8 novo review of the kind that is typical under the
9 Magistrates Act is actually precluded by the tax court's
10 rule.

11 QUESTION: When you say -- when you say de novo
12 review, Ms. Sullivan, you mean complete examination of
13 every question of fact without any presumption of
14 correction at all?

15 MS. SULLIVAN: Not necessarily, Mr. Chief
16 Justice. We at least mean in order for the statute to be
17 complied with that the regular tax court judge to whom the
18 report of the special trial judge returns must at least
19 demonstrate as he -- as the district court must over in
20 the magistrate setting that he has looked at or engaged
21 with -- looked beneath the findings of the special judge
22 to the record and the arguments of the parties below.

23 QUESTION: Well, you -- do you mean demonstrate
24 by some sort of a written opinion of his own?

25 MS. SULLIVAN: Not necessarily, but at least by

1 the operation of a general rule that provides that this
2 engagement will take place. That's the kind of rule that
3 is in place in the Magistrates Act.

4 QUESTION: Well, but you're saying as I
5 understand it that this particular tax court rule which
6 we're talking about here ensures that the special judges
7 will end up deciding the cases. Now, I --I don't read the
8 rule that way. It seems to me that you could say that if
9 you're talking about a factual finding being -- presumed
10 to be correct, you could apply the clearly erroneous
11 standard.

12 MS. SULLIVAN: That's right. And the only --
13 the only circuit court to interpret the statute has read
14 it to require clearly erroneous review. But the problem
15 with the rule goes further than the -- its application of
16 the clearly erroneous standard if you wish to read it that
17 way.

18 Notice that in rule 183, there is no opportunity
19 to for the parties to see or to object to the special
20 trial judge's report between the time it is written and
21 filed with the regular tax court judge and the tax court
22 judge's issuance of the opinion. The first --

23 QUESTION: Ms. Sullivan --

24 MS. SULLIVAN: Yes, Justice O'Connor.

25 QUESTION: Did the -- did the petitioners here

1 agree to the assignment to the special trial judge?

2 QUESTION: Yeah.

3 MS. SULLIVAN: Look -- there are three key
4 moments in the case, Justice O'Connor, in answer to that
5 question. When petitioners came to the tax court back in
6 1982, they sought adjudication of their alleged
7 deficiencies before a regular tax court judge, and they
8 were so assigned to regular tax court Judge Wilbur,
9 presidential appointee. Judge Wilbur began to try the
10 case -- try the case from June 1984 through November 1985,
11 when he suddenly became ill. So there was no pre-trial
12 consent to the special trial judge presiding in the case.

13 First key moment in the case is in November
14 1985, after this illness sets in, when -- in mid trial --
15 the petitioners consented to have a special trial judge,
16 special trial Judge Powell, sit as an evidentiary referee
17 while the proceedings were videotaped so that Judge Wilbur
18 could still make the decision in the first instance based
19 on the videotape.

20 Time goes by -- December 1985 to June 1986.
21 Special trial Judge Powell does conduct the proceedings.
22 And then after the trial is complete, after all the
23 evidence is taken, in July 1986 for the first time is it
24 proposed by Chief Judge Sterrett of the tax court that
25 Justice -- Judge Powell, special trial Judge Powell,

1 actually file the report under the provisions of (b)(4).

2 So there was a mid-trial consent to his
3 continuing the case as an evidentiary referee. And there
4 was a post-trial consent to his filing the report.

5 QUESTION: So, your answer is, yes, there was
6 consent.

7 MS. SULLIVAN: Yes.

8 QUESTION: I -- if that's the situation, I'm not
9 sure that we would reach any problem with the rule.

10 MS. SULLIVAN: Justice O'Connor, let me clear on
11 a distinction between this case -- the Freytag case -- and
12 the Peretz case which you just heard. In Peretz there was
13 an issue of waiver of the statutory claim. There is
14 before this Court no issue of waiver of the statutory
15 claim. The Fifth Circuit held that the statutory claim
16 was not waived by the petitioners' mid-trial consent to
17 evidentiary refereeing or post-trial consent to the filing
18 of the report. The Government didn't cross-petition and
19 has raised no claim of statutory waiver here. So, in
20 contrast to Peretz, I believe the statutory question
21 really must be reached.

22 As to the question of whether the constitutional
23 claim can be waived, we argue quite simply that it's a
24 structural claim of precisely the kind that you, speaking
25 for the Court, Justice O'Connor, in CFTC v. Schor said

1 waiver should not affect.

2 But just to return to the third key moment in
3 the trial if I could, it's October 21st, 1987, when we
4 argue that the key decision effectively by the special
5 trial judge is realized. To answer your question, Mr.
6 Chief Justice, October 21st, 1987, is the day on which the
7 Chief Judge of the tax court, Judge Sterrett, does two
8 things on the same day. Number one, he issues an order
9 reassigning the case to himself from special trial Judge
10 Powell, who sometime in the proceeding 4 months had filed
11 a report with the Chief Judge of the tax court.

12 Second, on the same day, he adopts and a -- he
13 states in an opinion that he agrees with and adopts the
14 findings of the special trial judge.

15 QUESTION: You're going to tell us now what's
16 wrong with that?

17 MS. SULLIVAN: Yes, Justice Blackmun. The
18 problem with that two-sentence -- a signature plus two
19 sentences added to the 55 pages of the special trial
20 judge's report -- is that there is no basis to suppose
21 there was meaningful review or therefore meaningful
22 supervision that would enable us to accept this as the
23 decision of the tax court rather than of the special trial
24 judge himself.

25 QUESTION: What if -- what if it were 5 days?

1 MS. SULLIVAN: Justice Blackmun, as I've said
2 before, we rely on the presumption of administrative
3 regularity under the tax court's own rules, even if you
4 should indulge the Government's speculation that it might
5 have been 5 days. I would add the Government does not
6 disagree with us that a rubber stamp would be ultravires
7 against statutory authority. The Government simply tries
8 to suggest that perhaps it was 5 days or 2 days or 14 days
9 -- who knows? The parties can't know, because they have
10 no opportunity to see the special trial judge's report or
11 know when it is filed or object to it, unlike the
12 procedure in the Magistrate's court.

13 But supposing it was 5 days, Justice Blackmun,
14 we argue that the tax court's rules, which we should
15 presume were followed here, preclude de novo review,
16 permit at most clearly erroneous review and, because there
17 is no opportunity for the parties to object, do not put
18 the regular tax court judge to any obligation to look
19 beneath the special trial judge's own findings.

20 QUESTION: Well, that -- that's the very reason
21 why I wonder why you're making such a big point out of the
22 same day.

23 MS. SULLIVAN: Ah, yes. Well, it's an
24 alternative argument, Justice Blackmun. We do think that
25 there is nothing -- absolutely nothing in this record to

1 suggest that the regular tax court judge actually reviewed
2 the case. In fact, October 21st, 1987, is the day he
3 reassigned it to himself. And if you look at tax court
4 rule 182(b) -- if I could turn you back to A91 for a
5 moment. A91, tax court rule 183(b), you will see the
6 appropriate sequence for the reassignment of a case from a
7 special trial judge to a regular court judge. The special
8 trial judge shall submit his report to the chief judge.
9 And the chief judge will assign --

10 QUESTION: Reading from page A91?

11 MS. SULLIVAN: Page A91, rule 183, paragraph b,
12 final two lines of the rule -- final three lines. The
13 special trial judge submits a report and at that point the
14 chief judge will assign the case to a division of the
15 court. Turning over to the next side of the page, rule
16 (c). Rule (c) says the division to which the case is
17 assigned may adopt, modify, reject, or as happened here,
18 simply adopt verbatim completely the rulings of the
19 special trial judge.

20 If we presume administrative regularity, Justice
21 Blackmun, there can be no inference other than that.
22 October 21st, the case came --

23 QUESTION: The first -- Judge Sterrett was chief
24 judge.

25 MS. SULLIVAN: That's right.

1 QUESTION: He knew what was going on.
2 MS. SULLIVAN: Well --
3 QUESTION: He must have known what was going on.
4 MS. SULLIVAN: Actually, Your Honor --
5 QUESTION: I'd like to ask him. He's present in
6 the courtroom --
7 (Laughter.)
8 MS. SULLIVAN: Like the line in Annie Hall where
9 Woody Allen says, I just happen to have Marshall McLuhan
10 right here.
11 (Laughter.)
12 MS. SULLIVAN: I won't ask him, Your Honor.
13 What I would like to point out not that -- we cast no
14 aspersion on Chief Judge Sterrett personally in the least.
15 What we are doing here in the absence of any evidence that
16 there was meaningful review is arguing about what we
17 should presume from the regular procedures of the tax
18 court that Chief Judge Sterrett can be expected faithfully
19 to adhere to. And the published rules of the tax court
20 say you reassign the special trial judge's case to a judge
21 of the tax court and then that judge reviews it.
22 QUESTION: Ms. Sullivan.
23 MS. SULLIVAN: Yes, Justice?
24 QUESTION: Would you be satisfied with the usual
25 expression that I think you and I have seen of an

1 appellate court judge who says, I have reviewed all of the
2 objections of appellate and find no merit in any of them?
3 Is that what you want?

4 MS. SULLIVAN: I believe we might accept that,
5 Justice Marshall. But the fact is under the tax court's
6 rules, the chief judge of the tax court could not review
7 all of the objections of the parties to the special trial
8 judge's findings because they never got to see them.

9 Up until 1984, the tax court had provided by its
10 rules for exceptions by the parties to the special trial
11 judge's report and an opportunity to try to get the tax
12 court judge to reject some of those findings. That
13 opportunity was eliminated in 1984.

14 One more fact in answer to your question,
15 Justice Blackmun, that in fact it was not clear that Chief
16 Judge Sterrett would be the judge of the regularly
17 appointed tax court judges to whom the case was
18 reassigned. The stipulation -- the agreement by the
19 parties to which Justice O'Connor referred earlier was to
20 permit Judge Powell, the special trial judge, to make a
21 report of his findings for reassignment either to Chief
22 Judge Sterrett or to Judge Wilbur, the judge who had
23 become ill and whom, even up until October 21st, 1987, the
24 parties believed might still be the one to get the case.

25 So you cannot presume on this record that judge

1 -- Chief Judge Sterrett would have paid attention to the
2 case specifically at any moment up until he reassigned the
3 case to himself, October 21st, 1987, the day he also
4 issued his --

5 QUESTION: Ms. Sullivan --

6 MS. SULLIVAN: Yes, Mr. Chief Justice.

7 QUESTION: I wonder if questions of these rather
8 detailed facts are fairly subsumed under the questions
9 presented in your writ of petition -- writ of certiorari?

10 MS. SULLIVAN: Mr. Chief Justice, we think
11 clearly so and in haec verba, our first question was not
12 contrary to the Government's suggestion, does the statute
13 permit assignment of special trial judges only to preside
14 at (b)(4) cases. Our question presented and the one
15 accepted -- granted the review in the Court was, as you
16 can see from the first page of our cert. petition, are
17 complex tax cases allowed to be assigned to a special
18 trial judge for trial and effective resolution. In fact,
19 effective resolution is the heart of our statutory claim
20 and it was the ground on which the Fifth Circuit decided
21 below. The Fifth Circuit decided there was no rubber
22 stamp, and hence, we were out of luck. We claim that,
23 regardless of whether you call it a rubber stamp or not,
24 the tax court's rules ensure that, as happened in this
25 case, the usual opportunities for supervision and control

1 that one would expect in an adjunct adjudicatory scheme
2 like this are missing.

3 In other words, just to put our point
4 succinctly, Congress did not and could not have intended
5 special trial judges in large, complex, multiparty,
6 multimillion dollar tax shelter cases -- alleged tax
7 shelter cases such as this one -- Congress did not and
8 could not have intended such cases to be in effect decided
9 by the autonomous actions of a special trial judge.

10 Now, if there are no further questions on the
11 statutory claim, I'll move on to our constitutional
12 argument. As I mentioned at the outset, should you agree
13 with us that the statute was violated by the tax court's
14 rules and conduct in this case, you would then nonetheless
15 need to reach -- sorry -- should -- if you agree with us
16 on the statute, you need not reach our constitutional
17 claim. But should you disagree with us on the statute,
18 let me state as simply as I can what the key points of
19 difference and agreement are between us and the
20 Government.

21 Now, of course, we deal here with one of the
22 plainest texts in the Constitution -- the appointments
23 clause that permits Congress to delegate the power to
24 appoint inferior officers to the President alone, not at
25 issue here, to the heads of departments, or the courts of

1 law.

2 Now, if I could dispose quickly of the employee
3 point and the court of law point, I will get to the key
4 point of difference between us and the Government, which
5 is whether or not the tax court may possibly be considered
6 an executive department for appointments clause purposes
7 and thus its Chief Judge the head of that department.

8 I think the employee point and the court of law
9 argument can be dismissed quickly. It is beyond serious
10 dispute that special trial judges are inferior officers of
11 the United States. They are far more than mere
12 ministerial aides. They -- and every court to have
13 decided this question has agreed. In terms of this
14 Court's own definition there can be no doubt that they
15 satisfy every formal definition of what an officer is.
16 They hold office created by Congress.

17 Justice O'Connor?

18 QUESTION: Well, have we really gone into any
19 depth in defining who is an inferior officer and who is an
20 employee?

21 MS. SULLIVAN: The cases that we cite in our
22 brief of Germaine from the late 19th century and Burnap, a
23 Justice Brandeis opinion from the early 20th, are perhaps
24 helpful in resolving the question of who is and isn't an
25 officer. But we would rely more heavily on your statement

1 more recently in Buckley that the function -- the
2 functional test for an officer is whether he exercises
3 significant authority pursuant to the law.

4 Now, there can be no doubt that a special trial
5 judge, whether presiding, or as we argue he did here,
6 deciding the case, is exercising significant authority.
7 In fact we would argue that there's a parallel here
8 between special trial judges and magistrates, except that
9 magistrates are more effectively supervised under the
10 practice of the article III courts by their -- the
11 district courts under article III.

12 But in any event --

13 QUESTION: Plus your argument here is at --

14 MS. SULLIVAN: Yes, Justice Scalia.

15 QUESTION: -- cross purposes with your argument
16 earlier --

17 MS. SULLIVAN: How's that?

18 QUESTION: -- your argument earlier. I mean,
19 well, the more -- the more authority the special judge has
20 the -- to decide the case conclusively, the less likely
21 he's just an employee and vice versa. The --

22 MS. SULLIVAN: That's right, Your Honor. It's
23 -- it's more clear, but we absolutely disagree that the
24 officer is demoted to employee when he is merely
25 presiding. We think that's inappropriate. He -- a

1 magistrate does not cease to be an officer and become a
2 merely employee when he is carrying out pretrial hearings
3 as opposed to disposing of a case. And just as a lawyer
4 is still a lawyer, protected by the attorney-client
5 privilege, if she's at the xerox machine, just as the
6 President is still President when he's walking the dog on
7 the White House lawn, so a special trial judge cannot
8 become an employee just because he is performing a task
9 that could have been performed by an employee.

10 So we would respectfully say -- respectfully
11 suggest that even if there were effective supervision
12 consistent with the statute, the special trial judge would
13 still be an officer. And thus, even in presiding in
14 (b)(4) cases, would raise the constitutional issue.

15 But in any case, if you agree as -- that the
16 special trial judge is an inferior officer, we agree fully
17 with the Government that the tax court cannot be
18 considered a court of law for purposes of the appointments
19 clause.

20 QUESTION: How about the -- all these other
21 courts that Mr. Griswold describes in his brief -- the
22 claims court, the territorial courts, the land courts, the
23 District of Columbia courts. Those all executive
24 departments?

25 MS. SULLIVAN: Territorial courts we think are

1 unreached by any appointments clause constraint, because
2 when Congress exercises its territorial authority, it is
3 acting in effect as a State. Separation of powers
4 concerns don't apply.

5 As to nonterritorial article I courts --

6 QUESTION: What is the District of Columbia, by
7 the way, in your particular dichotomy here?

8 MS. SULLIVAN: I -- I'd have to put it over with
9 the territorial courts for purposes of the last remark. I
10 --

11 QUESTION: I see. So they -- and again -- tell
12 me again, you say they are a department there?

13 MS. SULLIVAN: You need not reach the question
14 whether they're a department because separation of --

15 QUESTION: Well, I know, but I'm curious about
16 what your answer would be even if we don't have to reach
17 it.

18 MS. SULLIVAN: Not a department if you had to
19 reach it. Not a department if you had to reach it.

20 QUESTION: So they are courts of law within the
21 meaning of the appointments clause.

22 MS. SULLIVAN: Not courts of law or executive
23 departments.

24 For appointments clause purposes --

25 QUESTION: What are they?

1 MS. SULLIVAN: -- they are out -- you need not
2 decide that. You need not decide --

3 (Laughter.)

4 MS. SULLIVAN: -- any question about the fourth
5 branch of Government here.

6 QUESTION: No we -- assume we want to.

7 (Laughter.)

8 MS. SULLIVAN: Assuming you wish to issue -- I
9 can't assume you would wish to issue an advisory opinion
10 on the status of the fourth branch. Let me just say that
11 the Government has argued that there are only three
12 branches. Everything in the Federal Government has to
13 fall within those --

14 QUESTION: Yes, but what I'm -- I'm asking --

15 QUESTION: What do you argue -- what do you
16 argue as to the status of the courts that Justice Stevens
17 mentioned?

18 MS. SULLIVAN: We argue that they are not
19 empowered under the appointments clause to appoint
20 officers because they are -- you need not reach it but if
21 you had to -- they are neither courts of law nor --

22 QUESTION: Well, they were empowered by statute
23 to appoint clerks, who are inferior officers.

24 MS. SULLIVAN: Maybe employees. You've never
25 held they're inferior officers. Maybe employees.

1 QUESTION: Well, let's assume for a moment they
2 were inferior officers. The clerks of the court are
3 pretty important. They're officers of the court. Our
4 clerk is an officer of the Court.

5 Now, if they are inferior officers, you would --
6 and the courts exercise judicial power beginning with the
7 -- Justice Marshall's opinion in the very early case, why
8 are they not courts of law? And if they're not -- if
9 they're courts of law, why is not this tax court also a
10 court of law?

11 MS. SULLIVAN: They are not courts of law
12 because they lack the independence guaranteed article III
13 courts through the salary and tenure clauses of article
14 III. Courts of law in article II must mean courts of law
15 in article III.

16 QUESTION: Do they exercise the judicial power
17 or are --

18 MS. SULLIVAN: They may do so. They may
19 exercise the judicial power of the United States. But the
20 appointment power does not follow the judicial power
21 wherever it may go. And all bankruptcy judges appoint
22 their clerks --

23 QUESTION: Well, we're asking what is a court,
24 and you're saying it exercises part of the judicial power,
25 and Congress calls it -- calls it a court. We call it a

1 court in Palmore. And you say it's not a court?

2 MS. SULLIVAN: Absolutely for appointment clause
3 purposes. Because remember the purposes of the
4 appointments clause on which we and the Government agree
5 -- the purpose of the appointment clause was to --

6 QUESTION: Which you and the Government now
7 agree.

8 MS. SULLIVAN: Now agree after many changes of
9 heart on the Government's part, which is why you cannot
10 rely on the executive branch to preserve and champion the
11 appointments clause in this case.

12 (Laughter.)

13 MS. SULLIVAN: But on the waiver point --

14 QUESTION: And that's why maybe the appointment
15 was if -- with the courts of law then.

16 MS. SULLIVAN: On courts of law -- to be --
17 courts of law and heads of department make sense if the
18 goal of the Constitution is to distance from Congress the
19 awesome power to appoint executive officers. What
20 distances an entity from Congress? Either the
21 independence that you and the other article III judges
22 enjoy through the tenure and salary clauses, which article
23 I courts lack -- or protection through the political might
24 and muscle of the President. The tax court -- and it's
25 like in this respect the courts Justice Stevens mentions

1 -- lacks -- uniquely lacks both those attributes. They
2 are not independent like article III judges. They are not
3 executive -- or controlled or supervised or protected by
4 the President.

5 QUESTION: Well, Ms. Sullivan is it your
6 position that in the case of a territorial court, Congress
7 could provide that the Speaker of the House would appoint
8 the judges?

9 MS. SULLIVAN: They might raise in -- certain --
10 certainly not. That -- well, it would not raise an
11 article III problem. It might be in Congress, and the key
12 point is that --

13 QUESTION: The appointments clause just wouldn't
14 apply in your view?

15 MS. SULLIVAN: The appointments clause would not
16 apply.

17 QUESTION: Well, what's our closest case to
18 support --

19 MS. SULLIVAN: The answer to your question is
20 yes, that our argument would permit Congress to make that
21 --

22 QUESTION: And what's the closest case --

23 MS. SULLIVAN: -- hiring decision. It's not an
24 appointment.

25 QUESTION: What's the closest case from this

1 Court that supports that position do you think?

2 MS. SULLIVAN: There's no case I know of that
3 supports that position, so long as Congress is not
4 appointing itself officers of the United States, as you
5 ruled it couldn't do in Buckley, an appointments clause is
6 not presented.

7 If I could just conclude, Your Honor, and save
8 the rest of my time for rebuttal if there's any left.

9 QUESTION: Well, let me ask you one other
10 question though.

11 MS. SULLIVAN: Yes, Justice Stevens.

12 QUESTION: If they're -- if they're not courts
13 of law and they're an executive department, as you agree
14 with the Government, why then isn't the chief judge the
15 head of the department?

16 MS. SULLIVAN: Not a department, can't be a
17 department, no executive functions whatsoever. The tax --

18 QUESTION: What are they? They're not a
19 department and they're not a court of law.

20 MS. SULLIVAN: It may be that Congress should
21 not -- in the Government's view perhaps in other view --
22 people's view -- perhaps Congress should not create
23 entities that are outside the tripartite structure of
24 Government (inaudible).

25 QUESTION: Well, maybe they shouldn't have.

1 What is your view as to the status of these tribunals?

2 MS. SULLIVAN: Congress moved it out of the
3 executive branch in 1969. It cannot be in the executive
4 branch. Congress did not put it in the judicial branch.
5 It is not in the legislative branch. It is neither
6 executive, judicial, nor legislative.

7 Last point, we don't necessarily --

8 QUESTION: That -- that's like the FCC and the
9 independent regulatory agencies who are considered -- who
10 are considered heads of -- heads of departments. They
11 have their chairman on it.

12 MS. SULLIVAN: They might well be. Key point in
13 our case is that the legislative courts are not the same
14 thing as the independent agencies. The Government's main
15 argument is not that the Constitution has been complied
16 with here. It's that if the Constitution were complied
17 with, the Government says the FCC, the FTC, the SEC might
18 lose their appointment power.

19 Well, that's just not so. The legislative court
20 known as the tax court is distinct from the agencies in
21 very significant ways. It's budget goes straight to
22 Congress, not through OMB. It elects its own chief judge.
23 The President hand-picks the chairmen of the agencies and
24 can be expected to control them.

25 We respectfully request that the case be

1 reversed and remanded for a new trial before the --

2 QUESTION: Thank you, Ms. Sullivan.

3 MS. SULLIVAN: -- regular tax court judge.

4 Thank you.

5 QUESTION: Mr. Roberts, we'll hear now from you.

6 ORAL ARGUMENT OF JOHN ROBERTS, JR.

7 ON BEHALF OF THE RESPONDENT

8 MR. ROBERTS: Mr. Chief Justice, and may it
9 please the Court:

10 Petitioners claim that the appointment of a
11 special trial judge to hear and report on their cases
12 which is authorized by the plain language of section
13 7443A(b)(4) is unconstitutional under the appointments
14 clause. There are two reasons that this Court should not
15 reach that claim.

16 First, petitioners waived it by consenting to
17 have their cases heard by a special trial judge in the tax
18 court and waiting to raise their claim until it reached
19 the court of appeals, which quite properly declined to
20 consider it.

21 Second, the special trial judge assigned to hear
22 and report on petitioners' cases under subsection (b)(4)
23 performed duties that may be performed by an employee and
24 do not require an officer of the United States. The
25 appointments clause is therefore not implicated on the

1 facts of this case.

2 First, the waiver point. When the regular tax
3 court judge became too ill to continue hearing
4 petitioners' cases, the chief judge did not simply
5 reassign the cases to a special trial judge. He issued an
6 order proposing such a reassignment and inviting any
7 objections. Hearings were held to consider objections.
8 Petitioners, represented by counsel, discussed with the
9 chief judge the issue of reassignment and settled upon
10 terms under which they would consent to the reassignment.
11 One taxpayer did object, and his case was severed.

12 Petitioners never did object. And even after
13 the tax court decision, in two motions to reconsider,
14 never once raised the appointments clause problem.

15 Now, the reasons for a waiver rule I think we've
16 seen this morning --

17 QUESTION: Well, Mr. Roberts, I guess the first
18 part of the argument here today went to the statutory
19 argument, and as to that it was asserted that there was no
20 waiver of the argument that the tax courts own rules are
21 improper.

22 MR. ROBERTS: Your Honor, the petitioners did
23 waive that argument as well in a sense that they did not
24 raise it before the tax court. The Fifth Circuit however
25 went on to consider it. And therefore, under the rule

1 that matters, although not raised, are actually decided --
2 may be reviewed, we agree that that question may be
3 reviewed. We think it's --

4 QUESTION: So that question is before us, and do
5 you -- are you going to address yourself to part (c) of
6 the rule that says the findings of fact recommended by the
7 special trial judge shall be presumed to be correct?

8 MR. ROBERTS: I'll do so right now, but before I
9 do so would point out that that issue is a very good
10 indication of why we have a waiver rule. The question of
11 how the tax court interprets its rule 183, how a regular
12 tax court judge handles the report of a special trial
13 judge when he gets it, are all matters that the tax court
14 could have definitively resolved if it had been asked to
15 do so.

16 Instead, because of petitioners' default, this
17 Court is asked to decide that -- those questions of
18 technical tax court procedure in the first instance and in
19 a decisional vacuum.

20 Now --

21 QUESTION: At what point would it have done so?
22 On a petition for a rehearing after Judge Sterrett's
23 decision?

24 MR. ROBERTS: Well, petitioners today argue that
25 rule 183(c) prevents the tax court from exercising de novo

1 review. Now, if that's the case, they should have known
2 that when the Chief Judge proposed to reassign their case
3 to a special trial judge for hearing a report under rule
4 183(c). The rule said the same thing then as it does
5 today, and yet they raised no objection at that point.
6 That was their opportunity to do so. They had an
7 opportunity to do so also after the decision in two
8 different motions to rehear.

9 QUESTION: Mr. Roberts, before you get into the
10 substance, what about the argument that you didn't cross
11 appeal -- that the -- that the court of appeals did decide
12 the waiver point, decided against you, and you didn't
13 cross appeal?

14 MR. ROBERTS: It decided two waiver points.
15 One, the issue they permitted petitioners to raise in the
16 court of appeals was whether or not this type of a case
17 can be assigned under subsection (b)(4) to a special trial
18 judge for hearing and report. Petitioners' argument was
19 (b)(4), which says any other proceeding actually means any
20 other small proceeding like the ones in (b)(1) -- (b)(1)
21 through (3). They permitted them to raise the issue. So
22 that one is not -- not waived.

23 But the Fifth Circuit did not decide
24 petitioners' constitutional claim. They quite properly
25 decided that that was waived.

1 Now, to return, Justice O'Connor, to rule 183,
2 and in particular (c). There is a last sentence to the
3 rule, but there's a first sentence as well. The first
4 sentence describes what a regular tax court judge is to do
5 with the special trial judge's report. And it says he may
6 adopt it. He may modify it, reject it, call for briefing,
7 call for oral argument. He may receive additional
8 evidence or may recommit the report with instructions.

9 That in our mind indicates, as section 743A(c)
10 makes clear, that it is the regular tax court judge and
11 not the special tax court judge who decides the case.
12 That reading is confirmed by the fact that the interaction
13 between the regular tax court judge and the special trial
14 judge is a matter that is purely internal to the tax
15 court.

16 It -- petitioners object that they didn't have
17 an opportunity to review the report before it went to the
18 regular judge. They didn't have --

19 QUESTION: Mr. Roberts, surely what matters is
20 what he must do, not what he may do. Is it enough to say
21 that he may decide the case himself if he wants to?

22 MR. ROBERTS: He is --

23 QUESTION: It seems to me, to support your
24 position, you have to say he must.

25 MR. ROBERTS: He must, and --

1 QUESTION: I know all this is -- all the
2 sentence you rely on just says he may.

3 MR. ROBERTS: No, section --

4 QUESTION: Whereas the last sentence says, due
5 regard shall be given to the circumstance of the special
6 trial judge had the opportunity to evaluate -- blah, blah,
7 blah -- and the findings of fact shall be presumed to be
8 correct.

9 MR. ROBERTS: The sentence that I read says may
10 because it lists a number of things, including some that
11 are inconsistent that he may do. He may adopt it; he may
12 reject it. The statute, after setting forth the
13 categories of cases that the Chief Judge may authorize a
14 special trial judge to hear, says that in the first three
15 categories the chief judge -- the court may also authorize
16 the special trial judge to decide the case. He may --

17 QUESTION: Well, Mr. Roberts, just -- if we
18 thought that the last sentence of that rule required the
19 tax court division to which the report is assigned to give
20 the special trial judge's recommendations a presumption
21 that they are correct -- a clearly erroneous standard of
22 review -- now, if that -- if that is our reading of it, is
23 that consistent with the authorizing statute?

24 MR. ROBERTS: Well, with respect, there are two
25 different points in your question. There's a difference I

1 believe between a presumption of correctness and a clearly
2 erroneous standard of review.

3 QUESTION: Take them both.

4 MR. ROBERTS: I --

5 QUESTION: Is -- are they consistent with the
6 statute?

7 MR. ROBERTS: The first is. The rule says that
8 the findings of fact shall be presumed to be correct. The
9 rule does not say what it takes to overcome the
10 presumption. The tax court has. In its Rosenbaum
11 decision, it's indicated both by what it says -- said,
12 which is that the language does -- in no impairs or dilute
13 their responsibility, and by what it did, which was a
14 reweighing of the evidence in the case and in many
15 instances reaching a conclusion different from that of the
16 special trial judge.

17 The tax court has indicated that it reads its
18 rule as proposing -- as -- the presumption is in effect as
19 we said a starting point from which the tax -- the regular
20 tax court judge must consider the proposed findings of the
21 parties.

22 Now, as I've indicated -- given the fact that
23 the interaction between the regular tax court judge and
24 the special trial judge --

25 QUESTION: Are the proposed findings of the

1 parties submitted to the special trial judge?

2 MR. ROBERTS: Yes, Your Honor. And --

3 QUESTION: Mr. Roberts --

4 MR. ROBERTS: And they're, of course, available
5 and go on to the regular judge when he's reviewing.

6 QUESTION: At a minimum, Mr. Roberts, "shall be
7 presumed to be correct" means that if everything else is
8 in equipoise, what the -- what the special trial judge
9 found prevails. Doesn't it mean that at a minimum?

10 MR. ROBERTS: If it's -- if it's a straight tie,
11 then that's what it -- that's what it means. Yes.

12 QUESTION: Right. I see. Is that consistent
13 with the statute?

14 MR. ROBERTS: Yes, I believe it is, because I
15 don't think that type of review is abdicating
16 responsibility in any way for a decision. Now, of course,
17 it has to also take into account --

18 QUESTION: He in effect decides the case then.

19 MR. ROBERTS: Well --

20 QUESTION: If what he says goes.

21 MR. ROBERTS: Well, no --

22 QUESTION: If everything else is in --

23 MR. ROBERTS: -- because it also has to be
24 evaluated with the -- with the -- the burden of proof.
25 One of the parties bears the burden of proof. And if that

1 party has not carried its burden of proof, if it is an
2 exact tie, then the other party would prevail. Now --

3 QUESTION: Suppose the tax court judge said in
4 exercising my determination whether to reject or accept
5 this depart -- this report, I must keep in mind that it is
6 presumed to be correct. Is that a proper interpretation
7 of the regulation?

8 MR. ROBERTS: Certainly. It's just -- it's just
9 reechoing the rule. The question is what does somebody --

10 QUESTION: So that he -- so that he must presume
11 it correct before he exercises his discretion to reject it
12 or adopt it?

13 MR. ROBERTS: The question is what weight is
14 given the presumption, and that's not a uniform rule.
15 Presumed correct doesn't necessarily mean the same thing
16 across the board. It's the tax court rule. The place you
17 look to find out what the presumption means is the ruling
18 of the tax court. And that court has indicated that the
19 presumption is not -- certainly not the clearly erroneous
20 standard, but more in the nature, as I said, of a starting
21 point.

22 And again to get back to the relationship
23 between the regular tax court judge and the special trial
24 judge, it is internal. Petitioners object, we never had a
25 chance to review the report. We never had a chance to

1 object to it. And they say that's very different than the
2 procedure that applies with respect to magistrates.
3 That's our point exactly. A magistrate decides a matter
4 that he is -- he is hearing -- a civil trial. And
5 therefore, the parties need to be able to review that
6 decision to determine if they want to object and seek
7 further review. Special trial judge under subsection
8 (b)(4) decides nothing, and therefore, it's perfectly
9 appropriate that there is no opportunity for review and
10 objection, just as there is not an opportunity for a party
11 to review and object to a law clerk's draft that is --
12 that is submitted to a judge. A law clerk acts as an aide
13 and assistant to the judge, just as a special trial judge
14 does to a regular judge under this provision.

15 QUESTION: Of course you don't submit proposed
16 findings to a law clerk.

17 MR. ROBERTS: Well, I suppose in the district
18 court it's not unusual to have proposed findings submitted
19 to a court, and then a law clerk could do a draft of those
20 and submit it to his judge, who of course has the
21 responsibility for decision. And --

22 QUESTION: What does it mean -- due regard
23 shall be given to the circumstance of the special judge
24 have the opportunity to evaluate the credibility of
25 witnesses?

1 MR. ROBERTS: Well --

2 QUESTION: What does it mean to give due regard
3 to that? Doesn't that mean that you -- you defer to -- to
4 the finding of fact?

5 MR. ROBERTS: No.

6 QUESTION: If it doesn't mean that, it's
7 meaningless, isn't it?

8 MR. ROBERTS: Well, it may well be meaningless
9 in the sense that the regular judge always the retains the
10 responsibility to decide the case. Due regard means due
11 regard. And what the tax court has said, as it
12 understands its rule, that this in no way dilutes or
13 impairs --

14 QUESTION: Oh, I see. I see.

15 MR. ROBERTS: -- their responsibility to decide
16 the case.

17 QUESTION: I see. You think due regard means no
18 regard?

19 (Laughter.)

20 MR. ROBERTS: No, I think due regard means due
21 regard. And in -- and in the case of credibility
22 determination, the regular tax court judge will give due
23 regard. But he gives regard in such a way, as the tax
24 court has made clear -- and this is a decision for the tax
25 court in interpreting its rules -- does not impair or

1 dilute the regular judge's responsibility to decide the
2 matter.

3 QUESTION: But he's not -- he's not going to
4 interview the witnesses. To give due regard to that
5 individual's ability to see the witnesses is to defer to
6 that -- to that individual's judgment. And nobody would
7 read it in any other way.

8 MR. ROBERTS: Well, with respect, Your Honor,
9 the tax court has, and the Rosenbaum decision is a good
10 example. There they went through and overturned findings
11 of the special trial judge on credibility matters. Now,
12 they were reversed by the D.C. Circuit in the Stone case
13 precisely because they said, you didn't give enough
14 deference. But --

15 QUESTION: But the good (inaudible), which their
16 rule requires, I'd reverse them, too. Due regard means
17 due regard, not no --

18 MR. ROBERTS: Absolutely not, Your Honor,
19 because the tax court has not acquiesced in the Stone
20 decision. It of course is a national court, and it said
21 the Stone court got it wrong. We don't review this under
22 a clearly erroneous standard. And they shortly thereafter
23 changed their practice so that it is now purely internal
24 and confirms the relationship between the regular tax
25 court judge and the special trial judge.

1 QUESTION: Well, Mr. Roberts, to get back to my
2 question, which you never did answer, suppose it does mean
3 it's reviewed under a clearly erroneous standard. Would
4 that violate the authorizing statute in your view?

5 MR. ROBERTS: I think it might well, Your Honor.

6 QUESTION: Okay.

7 MR. ROBERTS: In the sense that a clearly
8 erroneous standard is closer -- the statute requires that
9 the regular tax court judge in this category of cases make
10 the decision.

11 QUESTION: Yes.

12 MR. ROBERTS: And I think under a clearly
13 erroneous standard that may be abdicating too much of his
14 statutory responsibility.

15 QUESTION: Well, what if it's just a
16 presumption?

17 MR. ROBERTS: Well, if it's a presumption of the
18 sort that it is here, as the tax court has told us --
19 essentially that means that's where you start -- now, let
20 me see what the evidence is, let me review the matter --
21 then it's perfectly consistent with the statutory
22 language.

23 But I would like to point out that the case has
24 evolved somewhat even today. If petitioners' objection
25 was that rule 183(c) was invalid, it seems a curious way

1 to proceed in raising that objection to raise an
2 appointments clause problem.

3 If a -- for example, by analogy if a district
4 court judge was allowing his or her law clerk to do all
5 the work and then just rubber-stamping everything, I don't
6 think our first reaction would be that that violates the
7 appointments clause because the law clerk hasn't been
8 appointed by the President and confirmed by the Senate.
9 No. We'd say that what the district court is doing is
10 wrong. And the way you correct things that a district
11 court does that is wrong is you appeal.

12 Now, the questions presented --

13 QUESTION: Well, I take it there would be some
14 concern if there was a rule that the law clerk's draft was
15 presumed correct. I mean, they might think so.

16 (Laughter.)

17 MR. ROBERTS: I recognize I'm -- as treading on
18 sensitive grounds but --

19 (Laughter.)

20 MR. ROBERTS: -- if the presumption -- if the
21 presumption is simply that this is a starting point and
22 now the judge -- I'm going to look at everything, I think
23 that that would still be fine.

24 But the questions presented before this Court do
25 not say that rule 183(c) of the tax court's rules is

1 invalid. That's not subsumed within -- within the
2 questions presented.

3 Now, what a special trial -- tax court judge
4 does, apart from hear -- submitting the report, is of
5 course conduct -- preside at the hearing. His duties in
6 that respect are in no instance greater than the duties of
7 the special masters that this Court regularly and
8 routinely appoints in cases. We know that those special
9 masters are employees. They cannot be officers of the
10 United States, because Congress has not, by law, vested
11 that appointment authority in this Court. And therefore,
12 by analogy the special trial judge is also an employee in
13 -- when he performs those responsibilities.

14 QUESTION: I'm trying to think, Mr. Roberts --
15 and not since I've been here anyway -- but do we ever,
16 when we have a special master here in original case and
17 the parties don't agree with the disposition of the
18 special master, do we ever adopt the decision of the
19 special master without giving a hearing?

20 MR. ROBERTS: I don't know either way, Your
21 Honor. The --

22 QUESTION: I think we don't.

23 MR. ROBERTS: Well, in this case, of course --

24 QUESTION: Before the Court.

25 MR. ROBERTS: Before the Court. In this case,

1 of course, the same power is available to a regular judge.
2 He can call for oral argument. He can call for additional
3 evidence which is a feature that is plainly inconsistent
4 with any clearly erroneous standard of review that I'm --
5 of which I'm aware. That usually is restricted to the
6 record before the reviewer. Here he can call for
7 additional evidence, if he needs more evidence. And he
8 can just send it back and say, you know, try again and
9 start over.

10 Now, the special trial judges have other duties
11 that are not at issue in this case. Under (b)(1) through
12 (3) they may be authorized to decide the matter. But
13 petitioners cannot rely on that statutory provision. They
14 have not been injured by any assignment under (b)(1)
15 through (3). They have no standing to object to that.

16 The Buckley case, Buckley v. Valeo, makes clear
17 that in considering appointments clause challenges, you
18 look to the particular duties that are being challenged.
19 In that case, the court held that the Federal Elections
20 Commission was improperly constituted under the
21 appointments clause. But it also said that the FEC as
22 constituted could continue to perform certain of its
23 responsibilities -- those that did not require an officer
24 of the United States.

25 So whether or not an officer of the United

1 States is required under (b)(1) through (3), it is not
2 required under (b)(4), and that is the only provision that
3 is at issue in this case.

4 Now, if the Court disagrees with us on the
5 waiver point, and if the Court disagrees with us on the
6 employee point, it will then be necessary to reach the
7 constitutional issue. And our position is that the
8 section 7443A(b)(4) is not unconstitutional --

9 QUESTION: May I back up just a second? You're
10 saying because -- that they don't have standing to
11 challenge the status of the officer because, even if
12 duties under (1), (2) and (3) would have been required --
13 were performed by an officer of the United States, but if
14 this assistant judge is performing those duties, the
15 appointment would be invalid, wouldn't it? Unless there
16 -- I mean -- the constitutional issue would be presented
17 as to -- I don't quite understand why you're saying they
18 don't have standing to make that argument.

19 MR. ROBERTS: Because the duties that are
20 required -- that require an officer of the United States
21 -- an officer of the United States can perform duties that
22 do not require an officer that may be performed by a mere
23 employee.. And that is the case certainly we think with
24 respect to (b)(4) --

25 QUESTION: Oh, I see your -- I see what you're

1 saying.

2 MR. ROBERTS: -- does not require an officer --
3 and therefore, that he may do other things which he did
4 not do in this case that require an officer -- don't give
5 them standing to complain about those.

6 If the Court does reach the constitutional
7 question, and I would urge the Court not to because there
8 are available certainly the waiver point and the
9 employee's point -- and the constitutional question is a
10 very sensitive one that goes to the core of our structure
11 of Government, and would be a peculiarly inappropriate
12 case for the Court to reach out and decide that issue.
13 But if the Court does go ahead and do that, we believe
14 that the appointment can be sustained because the chief
15 judge of the tax court is the head of a department in the
16 executive branch.

17 In Buckley v. Valeo, to cite the case again, the
18 court, referring to the appointments clause, said that the
19 departments referred to are themselves in the executive
20 branch or at least have some connection with that branch.
21 As the Second Circuit recently held unanimously in the
22 Samuels, Kramer case, the tax court fits within that
23 definition. We know it's not in the legislative branch.
24 We know that it's not an article III court.

25 QUESTION: Now the Government take -- now take

1 the same position with respect to all these other courts
2 that I referred to before? District of Columbia,
3 territorial courts -- all those are in the executive
4 branch?

5 MR. ROBERTS: Your Honor, each case has to be
6 considered on --

7 QUESTION: I understand.

8 MR. ROBERTS: -- on its merits. I think with
9 respect to the territorial courts and the District of
10 Columbia courts, there Congress is acting pursuant to its
11 authority to establish local governments.

12 QUESTION: Right.

13 MR. ROBERTS: So the clause may not apply
14 directly.

15 The claims court is a particularly unique entity
16 because it may well be an adjunct of the court of appeals
17 for the Federal circuit, which has the authority to remove
18 claims court judges.

19 QUESTION: Well, tell me again why the different
20 power of Congress is exercising -- creating the District
21 of Columbia courts and territorial courts -- but why does
22 that make clause issue any different?

23 MR. ROBERTS: Well, because we don't -- because
24 Congress in those instances has the authority to establish
25 a local government, and a local government that need not

1 comply with the tripartite separation of powers in the
2 Federal Government. Those entities -- it may difficult to
3 classify them as either executive --

4 QUESTION: Well, you don't think that Congress
5 could -- or maybe you do -- appoint a territorial
6 governor?

7 MR. ROBERTS: No. I think in that instance the
8 appoint -- when the Federal entity is doing the
9 appointment, the appointments clause applies with full
10 force. The question would be could Congress authorize the
11 territorial court in a territory to then make an
12 appointment. And I think there because the territorial
13 court may well be equivalent of a State court, a local
14 entity, the appointments clause may not apply. But when
15 it's the Federal Government itself making the appointment,
16 it applies in full force. And no, the Congress could not
17 appoint territorial officials.

18 QUESTION: But I don't understand your answer to
19 Justice Kennedy. If the appointment clause doesn't apply,
20 why couldn't Congress appoint the -- a governor of the
21 territory?

22 MR. ROBERTS: Well, I think it does apply in
23 that instance, because it would do violence to the -- to
24 the separation of powers that is at the base of the
25 appointments clause. The question is sort of the --

1 further on down the road, is -- does the appointments
2 clause apply to the appointing activities of the
3 territorial entities. And because I think they may well
4 be creatures that don't fit into the tripartite system,
5 because they partake of the local governing authority,
6 that the clause may not apply.

7 QUESTION: Then Congress could appoint the staff
8 of the governor and the staff of the court.

9 MR. ROBERTS: No, Congress could authorize the
10 court to appoint its staff even though we may have trouble
11 saying that that's an executive department or a court of
12 law. But I think when Congress is doing the appointing,
13 it still must act consistent with the appointments clause.

14 QUESTION: Well, are you resting on the
15 appointments clause or just a concept of congressional
16 power?

17 MR. ROBERTS: Well, it's an -- it's an interplay
18 between the appointments clause and Congress' powers with
19 respect to the territories and the District of Columbia
20 which gives rise to creatures that are hard to fit into
21 the terms of the appointments clause.

22 Now --

23 QUESTION: Well, the appointments clause gives
24 some power of courts of law to make appointments. Do you
25 think, as for the territorial courts, they could have

1 authorized this Court to appoint the clerk of the
2 territorial courts? We're certainly a court of law.

3 MR. ROBERTS: I don't see any objection to that,
4 no. I think they could have.

5 Now, if the tax court is going to exist as a
6 constitutional entity, it must be in the executive branch,
7 because there are only three branches. Petitioners are
8 correct. That is our view. And we know that it is not in
9 the legislative branch, and it is not an article III
10 court. They say that it -- there are reasons to doubt
11 were their words in their reply brief -- that it's in the
12 executive branch because it performs adjudicatory
13 functions. But it adjudicates public rights cases that
14 Congress may leave within the executive under Murry's
15 Lessee, which was itself a tax case.

16 Now, it's easy, of course, to visual what the
17 tax court does as being adjudicatory. It looks, acts like
18 a court. But it's also quite simple, as is the case in
19 all -- in every public rights' case to visualize what the
20 tax court does as being purely executive. There are
21 officials in the Internal Revenue Service who sit down and
22 decide what a taxpayer owes the Government. And the tax
23 court, for its formality and separation, is really another
24 level of that, which --

25 QUESTION: Well, is it absolutely certain and --

1 and have -- has this Court ever decided that the term
2 courts of law in the appointments clause is of necessity
3 the same as an article III court?

4 MR. ROBERTS: No, it is an issue of first
5 impression before --

6 QUESTION: Right.

7 MR. ROBERTS: -- this Court as I understand it.
8 I think it's -- was correctly decided that way by the
9 Second -- Second Circuit recently. It says the Courts of
10 Law -- capital C, capital L -- which strikes me as -- that
11 naturally refers to the courts of law established under
12 the constitution.

13 Now, petitioners as we understand it do not
14 dispute that the tax court was in the executive branch
15 prior to 1969. The question becomes, what happened in
16 1969 that made it any different? Congress took language
17 that said this is an agency in the executive branch and
18 substituted language saying this is a court of record
19 under article I. We agree with the Second Circuits recent
20 decision that what they did was change the label. They
21 didn't purport in the statute to move the tax court
22 outside the executive branch and didn't purport to put it
23 in any other branch.

24 The legislative history did say -- not the
25 statute, the legislative history -- we think that the tax

1 court should be considered an article I court rather than
2 an executive agency. To our way of looking at it, that's
3 like saying something should be considered an orange
4 rather than a fruit. It's both. There -- the article I
5 court -- quite happy to call it that -- but it remains in
6 the executive branch.

7 And we think that's confirmed by the fact that
8 in 1969, Congress continued the incumbent tax court judges
9 in office. If Congress were doing something as dramatic
10 as moving the tax court out of the executive branch and
11 placing it somewhere else, it plainly would have no
12 authority to continue those judges in office. That would
13 be an appointment from one entity to another. But it did
14 not do that. It continued them, and quite properly so
15 because it was not moving it from one branch to another.

16 QUESTION: What are --

17 QUESTION: Is it --

18 QUESTION: What are the consequences of saying
19 it's still in the executive branch? Does that mean the
20 Administrative Procedures Act applies and --

21 MR. ROBERTS: It may --

22 QUESTION: -- the Freedom of Information Act and
23 so forth and so on?

24 MR. ROBERTS: Those --

25 QUESTION: All the things Congress tried very

1 hard to prevent.

2 MR. ROBERTS: Well, they may or may not, Your
3 Honor, and it depends on an evaluation of the statute in
4 '69 and of the Administrative Procedures Act. Congress
5 did not try very hard to prevent that, because they didn't
6 say anything about that in the statute. If they don't
7 want the Administrative Procedures Act to apply, it's an
8 -- there is an easy way to reach that result. The
9 Administrative Procedure Act now defines an agency not to
10 include courts of the United States. It would be a simple
11 -- maybe not simple -- but a pure question of statutory
12 interpretation whether that excluded article I courts, and
13 it may well.

14 QUESTION: May I ask how is the chief judge of
15 this court appointed?

16 MR. ROBERTS: The chief judge is elected by the
17 regular judges on a --

18 QUESTION: And is that -- is that a valid method
19 of appointing a head of a department in the executive
20 branch?

21 MR. ROBERTS: No challenge has been raised to
22 that --

23 QUESTION: Well, I know no challenge has been
24 raised, but under your argument it is clearly invalid, is
25 it not, because the appointment was not made by the head

1 of a department?

2 MR. ROBERTS: Well, it would have to be
3 considered, not only a separate office, but what the chief
4 -- the -- the attributes of the chief judge that are
5 different from --

6 QUESTION: Well, surely the chief judge is an
7 officer of the United States.

8 MR. ROBERTS: The chief judge is an officer of
9 the United States. The question is is the difference
10 between the chief judge and a regular judge, does that
11 require a --

12 QUESTION: Well, it gives him the authority to
13 appoint assistant trial judges.

14 MR. ROBERTS: Yes.

15 QUESTION: That's pretty importance difference,
16 I guess.

17 MR. ROBERTS: Well, it is -- it is a difference.
18 It is not, as I say -- it has not been presented or
19 briefed --

20 QUESTION: But under your argument it is clear
21 that the present appointment of the chief judge of the
22 court is invalid I think?

23 MR. ROBERTS: Well, with respect, Your Honor,
24 I'm not sure that that is clear. It's an issue that has
25 not --

1 QUESTION: I know it hasn't been raised, but I'm
2 trying to think of the implications of accepting your
3 argument.

4 MR. ROBERTS: Well, we would have to look at all
5 the added authority --

6 QUESTION: Can you give me a reason why,
7 consistent with your argument, that the appointment could
8 be valid -- the appointment by his colleagues as chief
9 judge?

10 MR. ROBERTS: Well, one question would be is
11 whether or not his additional authorities are such as
12 require a separate appointment.

13 QUESTION: I see.

14 MR. ROBERTS: And it may be, for example, that
15 the head of a collegial body does not have to have a
16 separate appointment particularly here where the collegial
17 body acts together in electing him. He may be more in the
18 nature of a -- I don't know if it's a chairman or -- or a
19 --

20 QUESTION: But not a head of a department with
21 authority to appoint assistant trial judges?

22 MR. ROBERTS: Well, he is clearly the head of
23 this -- of this department. There's no question about
24 that. He doesn't --

25 QUESTION: He became head by collegial action

1 that did not have to comply with the appointments clause?

2 MR. ROBERTS: Well, it's a complicated question
3 -- answer, but perhaps -- and I'm thinking --

4 QUESTION: A question we can entirely avoid if
5 we assume it's a court of law.

6 MR. ROBERTS: Well, I suppose the question of
7 the chief judge's validity is avoided, but not the
8 question that's before this Court today. It may be that
9 with respect to -- that the tax court as a whole can
10 accept the appointment authority for their chief, but that
11 the chief judge, once appointed, can act as the head of a
12 department.

13 In other words, the tax court as a whole may be
14 the head of a tax court for the purpose of selecting the
15 chief judge. But the chief judge himself then is the head
16 of the department for things that only he can do, such as
17 appoint special trial judges.

18 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
19 Roberts.

20 The case is submitted.

21 (Whereupon, at 12:08 p.m., the case in the
22 above-entitled matter was submitted.)
23
24
25

CERTIFICATION

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THOMAS FREYTAG, ET AL., Petitioners, v. COMMISSIONER OF INTERNAL
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