

Restructuring the U.S. Tax Court: A Reply to Stephanie Hoffer and Christopher Walker's *The Death of Tax Court Exceptionalism*

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INTRODUCTION

The U.S. Tax Court is an unusual adjudicative body. On the one hand, it is a federal court with an enormous volume of cases involving complex issues worth billions of dollars in the aggregate.¹ On the other hand, it originated as an executive agency² and its judges still lack life tenure.³ By statute, it is an Article I court,⁴ but its place in the federal government is sufficiently unclear⁵ that there is significant confusion over which branch it belongs to.⁶

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1. In fiscal year 2010, for example, the Tax Court closed cases with an aggregate tax deficiency in issue of \$4.66 billion. *See* 2000–2010 U.S. TAX CT. ANN. REP., tbl.4 (on file with author).

2. Harold Dubroff, *The United States Tax Court: An Historical Analysis, Part II: Creation of the Board of Tax Appeals—The Revenue Act of 1924*, 40 ALB. L. REV. 53, 95–96 (1975) (“[T]he Board was established as an independent executive agency.”). At the time, it was called the “Board of Tax Appeals.” *Id.* at 56.

3. *See* I.R.C. § 7443(e) (2012) (“The term of office of any judge of the Tax Court shall expire 15 years after he takes office.”).

4. *Id.* § 7441 (“There is hereby established, under article I of the Constitution . . . the United States Tax Court.”).

5. *Compare* COMM. ON HOMELAND SEC. & GOV'T AFFAIRS, U.S. SENATE, POLICY AND SUPPORTING POSITIONS 2 (2008), *available at* <http://www.gpoaccess.gov/plumbook/2008/index.html> (listing the Tax Court in the legislative branch), *and* COMM. ON GOV'T REFORM, U.S. HOUSE OF REPRESENTATIVES, POLICY AND SUPPORTING POSITIONS 2 (2004), *available at* <http://www.gpo.gov/fdsys/pkg/GPO-PLUMBOOK-2004/pdf/GPO-PLUMBOOK-2004.pdf> (same), *with* COMM. ON OVERSIGHT AND GOV'T REFORM, U.S. HOUSE

The Tax Court is an exceptional federal court in many ways. It is a trial court located in Washington, D.C.,⁷ that conducts trials nationwide,⁸ with appeals from its decisions heard around the country by the regional courts of appeals.⁹ Its judges are appointed by the President of the United States, with the advice and consent of the Senate¹⁰—like Article III judges¹¹—but Tax Court judges serve for terms of fifteen

OF REPRESENTATIVES, POLICY AND SUPPORTING POSITIONS (2012), available at <http://www.gpo.gov/fdsys/pkg/GPO-PLUMBOOK-2012/content-detail.html> (not listing the Tax Court at all).

6. See, e.g., *Kuretski v. Comm’r*, 755 F.3d 929 (D.C. Cir. 2014) (finding that the Tax Court is part of the executive branch despite taxpayer’s argument that the Tax Court is in either the judicial branch or the legislative branch and that the President’s right to remove a Tax Court judge violates separation of powers); *Harpole v. United States*, No. A00-176CV (HRH), 2000 U.S. Dist. LEXIS 17697, at *8 (D. Alaska Nov. 3, 2000) (“The Tax Court is an Article I court, which is independent of the executive and legislative branches of the government and is considered part of the judicial branch of the government.”); *Ostheimer v. Chumbley*, 498 F. Supp. 890, 892 (D. Mont. 1980) (“[T]he Tax Court was established as a court under U.S. Const. art. I, and became a part of the legislative branch of government in 1969.”), *aff’d*, 746 F.2d 1487 (9th Cir. 1984); cf. *Freytag v. Comm’r*, 501 U.S. 868 (1991) (finding, in the context of an Appointments Clause challenge to the assignment of a case to a Special Trial Judge, that the Tax Court was not an Executive “Department” but rather was a “Court of Law” within the meaning of Article II, and stating that the “Tax Court remains independent of the Executive and Legislative Branches.”).

The larger question of how legislative courts can be constitutional is beyond the scope of this essay. For an argument that they are constitutional, see Paul M. Bator, *The Constitution As Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 265 (1990) (“[I]n general, I believe it is naïve—as well as undesirable—to think of separation of power rules as capable of creating sealed chambers each of which must contain all there is of the executive, the legislative and the judicial powers. Overlap is inevitable.”).

7. I.R.C. § 7445 (“The principal office of the Tax Court shall be in the District of Columbia . . .”).

8. See *Places of Trial*, U.S. TAX CT., http://ustaxcourt.gov/dpt_cities.htm (last visited Nov. 12, 2014).

9. I.R.C. § 7482(a). By contrast, the Court of Federal Claims, which also has trial-level jurisdiction over certain federal tax cases, has appeals from its cases heard by the Court of Appeals for the Federal Circuit. 28 U.S.C. § 1295(a)(3) (2012).

10. I.R.C. § 7443(b) (“Judges of the Tax Court shall be appointed by the President, by and with the advice and consent of the Senate, solely on the grounds of fitness to perform the duties of the office.”).

11. See U.S. CONST. art. III § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”); U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall have Power, by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court and all other Officers of the United States.”).

years.¹² The court's Chief Judge is elected by the Tax Court judges themselves, not appointed by the President of the United States.¹³ The court's judicial officers, called Special Trial Judges, are hired by the Chief Judge and serve at will,¹⁴ not for eight-year terms as magistrates do.¹⁵ Unlike other federal courts, the Tax Court's budget requests are heard by Congress's tax-writing committees, not the committees on the federal judiciary.¹⁶ And the Tax Court is unusually lacking in accountability. Unlike most other federal courts,¹⁷ it is not subject to the Administrative Office of U.S. Courts,¹⁸ nor is its procedural rulemaking governed by the Rules Enabling Act.¹⁹

12. I.R.C. § 7443(e).

13. *Id.* § 7444(b) ("The Tax Court shall at least biennially designate a judge to act as chief judge.").

14. *Id.* § 7443A(a) ("The chief judge may, from time to time, appoint special trial judges who shall proceed under such rules and regulations as may be promulgated by the Tax Court."); *Ballard v. Comm'r*, 544 U.S. 40, 44 (2005) ("[S]pecial trial judges have no fixed term of office . . .").

15. 28 U.S.C. § 631(e) (2012) ("The appointment of any individual as a full-time magistrate judge shall be for a term of eight years . . .").

16. Harold Dubroff, *The United States Tax Court: An Historical Analysis, Part IV: The Board Becomes a Court*, 41 ALB. L. REV. 1, 51 (1977) ("[T]he court submits its budget requests directly to Congress and has a good deal of flexibility in establishing its internal administrative procedures."); Stephan B. Paul III, *International Conference of Courts with Income Tax Jurisdiction: Responses Provided by Participant Countries to the Discussion Agenda*, 8 VA. TAX REV. 255, 296 (1988) ("The [Tax] Court primarily deals in Congress with the tax writing committees. Appropriations are by subcommittees handling treasury and general government appropriations—not the judiciary.").

17. See Leandra Lederman, *Tax Appeal: A Proposal To Make the U.S. Tax Court More Judicial*, 85 WASH. U. L. REV. 1195, 1198 (2008). Interestingly, "[t]he U.S. Court of Federal Claims, an Article I court that provides a forum for trial-level litigation of claims against the federal government, is treated as part of the judiciary for these purposes." *Id.* (footnote omitted).

18. See Judicial Conference of the United States, *Long Range Plan for the Federal Courts*, reprinted in 166 F.R.D. 49, 145 n.17 (1995) ("[O]ther Article I courts—the United States Tax Court, United States Court of Veterans Appeals, and United States Court of Military Appeals—either exist as independent entities or receive administrative support from the executive branch.").

19. See Federal Courts Study Act of 1988, Pub. L. No. 100-702, 102 Stat. 4644, 4652 § 405 ("The amendments made by this title shall not affect the authority of the Tax Court to prescribe rules under section 7453 of the Internal Revenue Code of 1986."); I.R.C. § 7453 ("[T]he proceedings of the Tax Court and its divisions shall be conducted in accordance with such rules of practice and procedure . . . as the Tax Court may prescribe . . ."); see also Lederman, *supra* note 17, at 1247–48 ("[The Tax Court] seems to have fallen into a gap between the branches of government so that it experiences the disciplining effect of neither the provisions—such as the APA and FOIA—that are applicable to agencies, nor the bodies or provisions—such as the AOUSC, the Judicial Conference, and the Rules Enabling Act—applicable to federal

Tax exceptionalism has been much maligned recently. Several prominent legal scholars have decried it,²⁰ and the U.S. Supreme Court has famously objected to carving out a tax-specific rule for judicial review of agency action.²¹ I have long advocated for the abandonment of tax insularity, including in the specific context of tax procedure.²² Insularity impedes the flow of information, leading to inefficient parallel efforts to solve similar problems. I have argued that tax lawyers and other lawyers can learn from each other.²³ Tax need not automatically be treated as exceptional; instead, tax issues should only be treated differently when there are good reasons to do so.²⁴

courts.”).

20. See, e.g., Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1541 (2006) (“[T]he view that tax is different or special creates, among other problems, a cloistering effect that too often leads practitioners, scholars, and courts considering tax issues to misconstrue or disregard otherwise interesting and relevant developments in non-tax areas, even when the questions involved are not particularly unique to tax.”); Anthony C. Infanti, *Tax Reform Discourse*, 32 VA. TAX REV. 205, 251 (2012) (“[I]t is a serious mistake to start from the premise that tax law is exceptional.”); cf. Paul L. Caron, *Tax Myopia, or Mamas Don’t Let Your Babies Grow Up To Be Tax Lawyers*, 13 VA. TAX REV. 517, 518 (1994) (decriing the “myth . . . that tax lawyers are somehow *different* from other lawyers” and “the related second myth that tax law is somehow *different* from other areas of the law”); Steve R. Johnson, *Intermountain and the Importance of Administrative Law in Tax Law*, 128 TAX NOTES 837, 838 (2010) (“As is true of other specialties in law, there is a tendency toward insularity in tax practice. Because of the ever-growing complexity of the law, this tendency is understandable, but ultimately untenable.” (footnote omitted)); Leandra Lederman, *“Civil”izing Tax Procedure: Applying General Federal Learning to Statutory Notices of Deficiency*, 30 U.C. DAVIS L. REV. 183, 183 (1996) (arguing that tax law’s “insularity has the unfortunate consequence of depriving tax and other fields of cross-fertilization”). *But cf.* Lawrence Zelenak, *Maybe Just a Little Bit Special, After All?*, 63 DUKE L.J. 1897, 1910 (2014) (“[T]here is nothing exceptional about tax exceptionalism. In fact, to the extent the anti-exceptionalists assume subject-matter exceptionalism is a phenomenon peculiar to tax, they are—ironically—engaging in a bit of tax exceptionalism of their own.”).

21. *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 713 (2011) (“In the absence of . . . justification, we are not inclined to carve out an approach to administrative review good for tax law only. To the contrary, we have expressly ‘[r]ecogniz[ed] the importance of maintaining a uniform approach to judicial review of administrative action.’” (quoting *Dickinson v. Zurko*, 527 U.S. 150, 154 (1999))).

22. Lederman, *supra* note 20, at 244–45.

23. *Id.* at 183–84.

24. *Cf.* Zelenak, *supra* note 20, at 1919–20 (“I favor a fairly strong presumption against special rules for tax But . . . tax is still special, and one cannot rule out the possibility that upon occasion the force of that

Because the Tax Court has traditionally been isolated from other courts—lacking membership in the U.S. Judicial Conference,²⁵ for example—it generally has followed its own approach on many issues that confront courts.²⁶ For example, until a Supreme Court decision in 2005 that commented on the Tax Court’s unusually nontransparent approach to procedural rulemaking,²⁷ the Tax Court did not circulate draft rules for public comment.²⁸ It also does not assign judges randomly to cases, probably because it would be very difficult to do so and hear cases in cities around the country without sending numerous judges to the same city.²⁹

Recent scholarship addressing tax exceptionalism has focused primarily on administrative law issues.³⁰ In fact, the

specialness may be enough to overcome the presumption against a special rule for tax.”).

25. 28 U.S.C. § 610 (2012) (“As used in this chapter the word ‘courts’ includes the courts of appeals and district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, the United States Court of Federal Claims, and the Court of International Trade.”); *see also* Lederman, *supra* note 17, at 1209, 1241–42.

26. Sometimes, though, the Tax Court voluntarily adopts procedures applicable to other federal courts. For example, in 2007, the Tax Court adopted the “private seminars disclosure policy established by the Judicial Conference of the United States in September 2006.” Press Release, U.S. Tax Court, The Court Has Adopted the Privately Funded Seminars Disclosure Policy Established by the Judicial Conference of the United States (Apr. 26, 2007), available at <http://www.ustaxcourt.gov/press/042607.pdf>.

27. *Ballard v. Comm’r*, 544 U.S. 40, 59–60 (2005).

28. *See* Press Release, United States Tax Court, Amendment to Rules of Practice and Procedure Adopted (Sept. 21, 2005), available at <http://ustaxcourt.gov/press/092105.pdf> (“In *Ballard v. Commissioner*, the United States Supreme Court commented on the Tax Court’s lack of public rulemaking procedures . . .” (citation omitted)).

29. *See* B. Anthony Billings et al., *Are U.S. Tax Court Decisions Subject to the Bias of the Judge?*, 55 TAX NOTES 1259, 1260 (1992) (“The chief judge assigns a trial judge to a particular city when enough docketed disputes accumulate to justify a full term of the Tax Court. The judges travel among appointed trial venues based on the assignments made by the chief judge.”).

30. *See, e.g.*, Kristin E. Hickman, *IRB Guidance: The No Man’s Land of Tax Code Interpretation*, 2009 MICH. ST. L. REV. 239, 258–59 (2009) (“Meanwhile, as the proper categorization of Treasury regulations for APA purposes remains in dispute, both Treasury regulations and the CB and IRB continue to state, as they have for decades, that IRB guidance documents ‘do not have the force and effect of Treasury Department Regulations.’” (quoting Treas. Reg. § 601.601(d)(2)(v)(d) (as amended in 1987))); Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury’s (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1806 (2007) (“In promulgating regulations interpreting the I.R.C., Treasury does a poor job of following the APA’s procedural requirements. Treasury’s regular use of temporary regulations and occasional promulgation

issue that the U.S. Supreme Court resolved by striking a blow against tax exceptionalism was the question of whether *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*³¹—probably the most famous administrative law case³²—provides the deference standard for tax regulations, or whether a tax-specific precedent applies.³³ *The Death of Tax Court Exceptionalism* brings this administrative law exceptionalism question to the Tax Court.³⁴

The specific issue that *The Death of Tax Court Exceptionalism* focuses on is whether the provisions in the Administrative Procedure Act (APA) for review of agency decisions determine the standard and scope of review the Tax Court applies to Internal Revenue Service (IRS) decisions or whether the Tax Court can apply different standards—typically, “more searching de novo review.”³⁵ The title of their article suggests the answer that Professors Hoffer and Walker espouse: the APA should apply,³⁶ which would result in more across-the-board deference to the IRS than the Tax Court has shown.³⁷

of final regulations without notice and comment is inconsistent with the default requirements of APA section 553.”); Johnson, *supra* note 20, at 839 (“Copious case law and commentaries have examined whether and how *Chevron* applies in the tax arena.” (footnotes omitted)); Zelenak, *supra* note 20, at 1913 (“[E]xceptionalism on the very issue that has been offered as the leading example of tax exceptionalism—deference standards in the aftermath of *Chevron*—turns out to be not exceptional.”).

31. 467 U.S. 837 (1984).

32. See Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1258 (1997) (“[T]he prestige of *Chevron* lingers on. . . . In fact, the understanding that *Chevron* is a leading case on deference has now percolated upwards and finds sporadic, though far from consistent, recognition in the Supreme Court. Thus, in that Court, as elsewhere, jurists periodically speak of ‘*Chevron*’ as shorthand for ‘the principle of deference on questions of statutory interpretation.’”); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 188 (2006) (“[*Chevron*] shows no sign of losing its influence . . . on the contrary, the decision has become foundational, even a quasi-constitutional text . . .”).

33. *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 713 (2011) (“[T]he principles underlying our decision in *Chevron* apply with full force in the tax context”).

34. See Stephanie R. Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. 221 (2014).

35. *Id.* at 228.

36. *Id.* at 245 (“In sum, unless Congress has directed otherwise by statute, the APA’s default provisions apply to a court’s review of agency action.”).

37. See *id.* at 228 (“At first blush, the Tax Court’s current approach of more searching de novo review may appear to best protect the unrepresented taxpayer. In contrast, by confining review to abuse of discretion and prohibiting consideration of evidence outside of the administrative record, the

Whether that is the correct answer as a doctrinal matter is harder to determine than one might expect, as discussed below. From a policy perspective, the issue of Tax Court exceptionalism is larger than a focus on just the APA may suggest. Although it would certainly be possible for the current Tax Court to implement APA procedures without making other structural changes, a piecemeal approach is not particularly efficient. Experience has shown that litigants will continue to raise issues about the Tax Court's structure as long as it is different from other courts.³⁸ Thinking through the Tax Court's structure on a macro level, to conform the structure to those of other courts, will help reduce these attacks.

The broad point of this Reply is therefore that the question of whether the APA applies to the Tax Court is a symptom of a larger problem that is overdue for resolution—the unclear nature of the post-1969 Tax Court. I have shown in previous work how this structural gap makes the Tax Court unusually unaccountable for its actions and susceptible to departures from judicial norms.³⁹ In this Reply, I explore the doctrinal confusion over the question of whether the Tax Court constitutes a “reviewing court” within the meaning of the APA. The next Parts of this Reply delve into the historical development of the APA to try to elucidate the meaning of that term and the phrase “court of the United States.” The Reply concludes that there is no clear doctrinal answer as to whether those terms include the Tax Court. Accordingly, this is yet another area in which the uncertain place of the Tax Court in the federal government's organizational scheme has caused problems.

APA limits a court's ability to grant relief when it feels such relief may be merited.”).

38. *See, e.g.,* Kuretski v. Comm'r, 755 F.3d 929 (D.C. Cir. 2014) (reviewing an argument that the President's right to remove a Tax Court judge violates separation of powers); Megibow v. Clerk of the U.S. Tax Court, No. 04 Civ. 3321 (GEL), 2004 U.S. Dist. LEXIS 17698, at *13, *20 n.8 (S.D.N.Y. Aug. 31, 2004) (addressing Freedom of Information Act request); *see also* Freytag v. Comm'r, 501 U.S. 868 (1991) (addressing a challenge under the Appointments Clause of the Constitution to the assignment of a case to a Special Trial Judge).

39. *See* Lederman, *supra* note 17.

I. “REVIEWING COURTS” AND “COURTS OF THE UNITED STATES”

The APA was enacted in 1946 to provide consistent rules for administrative agencies.⁴⁰ As Professor Diane Fahey has explained, “The APA can be roughly divided into two sections: (1) those specifying the procedures agencies are to use when performing their rulemaking or adjudicatory functions, and (2) those specifying the standards courts are to employ when reviewing agency action.”⁴¹ Decades ago, the Tax Court confused the two functions, holding that “the United States Tax Court is established as a court of record under article I of the Constitution of the United States. Being a court of the United States, it is excluded from the provisions of the Administrative Procedure Act.”⁴² As the Court of Appeals for the Eighth Circuit later explained, that case “focused erroneously on the status of the reviewing court, rather than on the status of the administrative body rendering the decision under review. The Internal Revenue Service, of course, is an agency of the government, and review of its decisions may be governed by the APA.”⁴³

The linchpin of the question of whether the APA’s “scope of review” provision, 5 U.S.C. § 706, applies to the Tax Court, is whether the Tax Court constitutes a “reviewing court” within the meaning of that section. That section makes two major points. First, it addresses the standard of review, stating, in part:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning

40. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (attempting “to improve the administration of justice by prescribing fair administrative procedure”).

41. Diane L. Fahey, *Is the United States Tax Court Exempt from Administrative Law Jurisprudence When Acting As a Reviewing Court?*, 58 CLEV. ST. L. REV. 603, 633–34 (2010).

42. *Nappi v. Comm’r*, 58 T.C. 282, 284 (1972).

43. *Robinette v. Comm’r*, 439 F.3d 455, 461 n.5 (8th Cir. 2006). During a failed attempt to move the Tax Court out of Title 26 into the Judicial Code, members of the House expressed the view that making the Tax Court a “court of record” would make it not subject to the APA. *See* 93 CONG. REC. 8391 (1947) (statement of Rep. Devitt) (“This bill titles the Tax Court a court of record. This relieves the court of the necessity of complying with the Administrative Procedure Act.”). However, context indicates that the reference was to the agency provisions of the APA. *See id.* (“The *Lincoln Electric Co.* case held that the Tax Court is subject to the provisions of the Administrative Procedure Act” and that *Lincoln Electric* “recognize[d] the Tax Court, not as a court, but as an administrative agency of Government”).

or applicability of the terms of an agency action. *The reviewing court shall—*

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law⁴⁴

Then, on the issue of the *scope* of review, the “record rule” in the same statute provides, “In making the foregoing determinations, the *court* shall review the whole record or those parts of it cited by a party”⁴⁵

Thus, to determine whether the APA’s standard of review of “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”⁴⁶ applies, the question is whether the Tax Court is a “reviewing court.” The statute uses the shorter term “court” in the sentence on the record rule. In context, however, the statute appears to be referring to the same court addressed by the “reviewing court” language.⁴⁷

Professors Hoffer and Walker argue that the Tax Court constitutes a “reviewing court,” explaining:

Under the APA, an individual “aggrieved” by an IRS action . . . “is entitled to judicial review . . . in a court of the United States” so long as the IRS action is “reviewable by statute” or is otherwise a “final agency action for which there is no other adequate remedy in a court.” Moreover, the Tax Court is no longer an administrative agency that reviews the actions of another administrative agency. Instead, as discussed in Part I.A, in 1969 Congress transformed the Tax Court into an “[A]rticle I . . . court of record to be known as the United States Tax Court.” For purposes of the APA, it is therefore “a court of the United States,” and, for its review of the IRS’s actions, a “reviewing court” subject to the APA’s judicial review provisions.⁴⁸

44. 5 U.S.C. § 706(1), (2)(A) (2012).

45. *Id.* § 706 (emphasis added).

46. *Id.* § 706(2)(A).

47. *See id.* § 706 (referring to the “reviewing court” throughout, until the flush language that finishes the section and refers to “the foregoing determinations,” which uses simply “court”).

48. Hoffer & Walker, *supra* note 34, at 250 (footnotes omitted). Similarly, in the Introduction to their article, Professors Hoffer and Walker argue:

The APA judicial review standards apply to any “reviewing court” of agency action. The IRS, an executive agency within the Treasury Department, is plainly an “agency” for purposes of the APA. And while the Tax Court used to be an agency before the enactment of the APA, as of 1969 it is an Article I court. For purposes of the APA, it is thus “a court of the United States,” and, for its review of IRS agency actions, a “reviewing court” subject to the APA’s judicial review provisions.

The “court of the United States” point is supported with a citation to section 702 of the APA, and the “reviewing court” issue is supported with a citation to section 706.⁴⁹ However, these sections do not directly address those propositions.⁵⁰

Perhaps surprisingly, neither “court of the United States” nor “reviewing court” is defined anywhere in the APA.⁵¹ While it may seem that any “court of record,” which a section of the Internal Revenue Code says the Tax Court is,⁵² should constitute a “court of the United States”⁵³ and, when reviewing

Id. at 228–29 (footnotes omitted). They cite sections 701(b) and 702 of the APA in support of their point that the Tax Court is a “court of the United States,” *id.* at 227 & n.35, and section 706 of the APA in support of the assertion that it is a “reviewing court,” *id.* at 227 & n.34.

49. *Id.* at 250 & nn.176–77 (citing 5 U.S.C. §§ 702, 706).

50. Neither section addresses the Tax Court or defines any terms. *See* 5 U.S.C. §§ 702, 706. Section 706 is quoted in part above. *See supra* text accompanying notes 43, 45. Section 702 of the APA states:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702.

Interestingly, section 702 does not explicitly say that judicial review must take place in a “court of the United States.” That section provides for judicial review in the first sentence, and in the second goes on to provide that certain actions against agency officials are not barred in “court[s] of the United States” on the specific “ground that it is against the United States or that the United States is an indispensable party.” *Id.* The second sentence therefore seems to be self-contained. And, in fact, as the U.S. Supreme Court has explained, prior to 1976, section 702 contained only the first sentence quoted above. *Bowen v. Massachusetts*, 487 U.S. 879, 892 (1988) (citing S. REP. NO. 94-996, at 19–20 (1976)). “[I]t is undisputed that the 1976 amendment to § 702 was intended to broaden the avenues for judicial review of agency action by eliminating the defense of sovereign immunity in cases covered by the amendment . . .” *Id.* at 891–92. Thus, the inclusion there of the phrase “court of the United States” does not necessarily modify the first sentence, which dates back to 1946. *See* Administrative Procedure Act, Pub. L. No. 79-404, § 10(a), 60 Stat. 237 (1946) (“RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.”).

51. *See* 5 U.S.C. §§ 501 *et seq.*

52. *See* I.R.C. § 7441 (2012).

53. *See* Hoffer & Walker, *supra* note 34, at 250 (“[I]n 1969 Congress transformed the Tax Court into an ‘[A]rticle I . . . court of record to be known as the United States Tax Court.’ For purposes of the APA, it is therefore ‘a court of the United States’ . . .” (footnote omitted)).

agency action, a “reviewing court,” those terms could be narrower. For example, in theory, the phrase “court of the United States” could refer only to Article III courts, and “reviewing court” could be referring only to each court defined as a “court of the United States.” In fact, Professors Hoffer and Walker contemplate that possibility, stating, “Perhaps a stronger argument that the APA does not govern is that only Article III courts—not Article I courts—can be ‘reviewing courts’ for purposes of the APA.”⁵⁴ However, Congress did not refer to “reviewing courts of the United States.” Perhaps “court” is a term that encompasses more judicial bodies than “court of the United States” does, with only the latter limited to Article III tribunals.

A. THE APA AS ENACTED

This analysis may prompt the question as to why Congress referred to “court[s] of the United States” in the sections defining by exclusion the term “agency” but referred to reviewing “court” *tout court*⁵⁵ in the section governing the scope of review. The answer lies in the history of the APA. When the APA was enacted, it did not use the term “court of the United States.”⁵⁶ For example, section 2, a definitional section, states, “‘Agency’ means each authority (whether or not within or subject to review by another agency) or the Government of the United States other than Congress, *the courts*, or the governments of the possessions, Territories, or the District of Columbia.”⁵⁷ Section 10 deals with judicial review, stating in part,

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion . . . Any person suffering legal wrong because of any agency action, or adversely

54. *Id.* at 251. Professors Hoffer and Walker argue that “in *Freytag v. Commissioner*, the Supreme Court rejected such an Article I/Article III court distinction.” *Id.* at 252. Of course, *Freytag* was not only interpreting a different document—the Appointments Clause of the Constitution, rather than the APA—it was interpreting different terminology, as Hoffer and Walker recognize. *See id.* at 252 (“[T]he *Freytag* Court was interpreting the meaning of ‘Courts of Law’ under the Constitution and not the meaning of ‘court of the United States’ and ‘reviewing court’ under the APA . . .”). They argue that “the interpretative reasoning counsels the same result.” *Id.* However, as this argument reflects, the Supreme Court has not spoken on the APA question.

55. Please forgive the rhetorical flourish—the author has trouble resisting plays on words.

56. *See* Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946).

57. *Id.* § 2 (emphasis added).

affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.⁵⁸

The term “reviewing court” first appears later in section 10 of the Public Law. First, the statute authorizes “interim relief” in certain circumstances:

Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every *reviewing court* (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.⁵⁹

The “scope of review” provision follows, reading much as it does today:

So far as necessary to decision and where presented the *reviewing court* shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party⁶⁰

Thus, at the time the APA was enacted, the judicial bodies that were excluded as a definitional matter from the term “agency” were those that constituted “courts.” The term “court” carried throughout the statute, with the section on judicial review clarifying that appellate courts also constituted “reviewing court[s],” at least for purposes of obtaining interim relief from agency action. Because the definition of “agency” excluded “courts,” and the judicial review provisions referred to a “reviewing court,” there was a strong textual argument that a reviewing court could not also be an “agency” within the meaning of the APA.

B. THE APA AS CODIFIED IN THE U.S. CODE

In 1966, Congress codified Title 5 of the U.S. Code, and, in so doing, changed some terms in order “to attain uniformity within the title” and “conform to common contemporary usage.”⁶¹ That was when the term “courts” in the definition of

58. *Id.* § 10(a).

59. *Id.* § 10(d) (emphasis added).

60. *Id.* § 10(e) (emphasis added).

61. S. REP. NO. 89-1380, at 19 (1966) [hereinafter 1966 SENATE REPORT].

the term “agency” was changed to “courts of the United States.”⁶² The amended language appears troublesome because it uses the term “courts of the United States” in the agency definition⁶³ but still uses the term “reviewing court” in the judicial review provisions. In theory, “courts of the United States” could exclude the Tax Court while the term “courts” could include it and all other Article I courts.⁶⁴ The result of this line of reasoning would be to have some courts, such as the Tax Court, constituting *both* an “agency” and a “reviewing court” within the meaning of the APA.⁶⁵ That result would seem odd because it would apparently require the Tax Court to follow all of the procedures applicable to agencies, which are a poor fit for a judicial body.⁶⁶ That result would also be contrary to the

62. See *McQuiston v. Comm’r*, 78 T.C. 807, 811 n.7 (1982) (“On Sept. 6, 1966, Pub. L. 89-554, 80 Stat. 378 (1966), was enacted The act changed the definition of ‘agency’ to exclude ‘the courts of the United States’ rather than simply ‘the courts.’”); cf. 5 U.S.C. § 1001 (1964 & Supp. I 1965–66) (defining “agency” as “each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, *the courts*, or the governments of the possessions, Territories, or the District of Columbia” (emphasis added)).

63. See 5 U.S.C. §§ 551(1)(B); 701(b)(1)(B).

64. As an analogy, 28 U.S.C. § 451 states that “[t]he term ‘court of the United States’ includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the Court of International Trade and any court created by Act of Congress the judges of which are entitled to hold office during good behavior.” That term therefore excludes the Tax Court, for example, which, by statute, is “a court of record,” I.R.C. § 7441 (2012), that is not listed and the judges of which have set terms rather than having life tenure. Cf. *McQuiston*, 78 T.C. at 811 n.7 (“It is clear under 28 U.S.C. sec. 451 that the phrase ‘court of the United States’ refers only to art. III courts. The question thus arises as to whether the phrase has the same meaning in the Administrative Procedure Act, . . . such that the only courts excluded from the definition of ‘agency’ contained therein are art. III courts.”)

65. Professors Hoffer and Walker argue that “if the Tax Court were not a ‘court’ under the APA, then, by statutory definition it would be an ‘agency’—a position that the Tax Court has correctly rejected.” Hoffer & Walker, *supra* note 34, at 251. That was true under the original version of the APA, because the definition of “agency” excluded “courts” but presumably not other types of entities the Tax Court might have qualified as. It should remain true under the current version of the statute, which says “courts of the United States” instead of “courts,” if—as suggested by the legislative history—this was a nonsubstantive semantic change. See *infra* notes 68–71 and accompanying text.

66. See 93 CONG. REC. 8387 (1947) (statement of Rep. Robsion) (“If the Tax Court is required to conform to the [agency provisions of the] Administrative Procedure Act, it is believed that its work would be increased many times and that the court would be unable to function as it now functions.”); *id.* at 8390 (statement of Rep. Devitt) (explaining that the agency provisions of the APA would bog down the Tax Court to an impractical extent

original approach of the APA, which excluded courts from the definition of “agency.”⁶⁷

The legislative history does not explain the wording change.⁶⁸ However, it does plainly state that “[i]n making changes in the language, precautions have been taken against making substantive changes in any statute.”⁶⁹ The legislative history also addresses the concern “that mere changes in terminology and style will result in changes in substance or impair the precedent value of earlier judicial decisions and other interpretations.”⁷⁰ The report assures readers that that is not the case, citing a list of U.S. Supreme Court cases in support of the proposition that “in a codification statute, . . . the courts uphold the contrary presumption: the statute is intended to remain substantively unchanged.”⁷¹ Thus, the legislative

because “under the Administrative Procedure Act a citizen whose case has been heard by a hearing commissioner may, as a matter of right, appeal to the agency as a whole.”).

67. See *supra* text accompanying note 57. If the Tax Court constituted an agency under the APA, the courts of appeals presumably would constitute the Tax Court’s “reviewing courts.” One might argue that the amendment in 1948 of what is now Internal Revenue Code section 7482(a), providing that the courts of appeals must review the decisions of the Tax Court “in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury,” displaced the APA in that respect. See Robert C. Brown, *The Nature of the Tax Court of the United States*, 10 U. PITT. L. REV. 298, 309 (1949) (arguing, while the Tax Court was still an agency, “[t]he Administrative Procedure Act has therefore no effect on the Tax Court. If it had any effect on review of the Tax Court (which is doubtful) that effect is wiped out by the more recent statute [the predecessor of I.R.C. § 7482(a)] abrogating the *Dobson* doctrine.”). However, the APA states that “Subsequent statute may not be held to supersede or modify this subchapter, chapter 7, sections 1305, 3105, 3344, 4301(2)(E), 5372, or 7521 of this title, or the provisions of section 5335(a)(B) of this title that relate to administrative law judges, except to the extent that it does so expressly.” 5 U.S.C. § 559. Section 7482 says nothing about the APA. See I.R.C. § 7482. Yet, debate on the bill that included the predecessor of what is now section 7482—and attempted to make the Tax Court, then technically an agency, into a court—included criticism on the floor of the House of the Sixth Circuit’s decision in *Lincoln Electric*, which had held that the Tax Court was subject to the agency provisions of the APA. See 93 CONG. REC. 8387 (1947) (statement of Rep. Robsion) (“The decisions in the *Dobson* and the *Lincoln Electric Co.* cases have created a great deal of confusion . . .”); *id.* at 8391 (statement of Rep. Devitt) (“The *Lincoln Electric Co.* case held that the Tax Court is subject to the provisions of the Administrative Procedure Act. Immediate action is necessary by the Congress in order to clarify the status of the Tax Court.”).

68. See 1966 SENATE REPORT, *supra* note 61, at 27–28, 32–33 (explaining changes to 5 U.S.C. §§ 551 and 701 but not referencing the addition of the phrase “of the United States”); H.R. REP. NO. 89-901, at 11, 16 (1966) (same).

69. 1966 SENATE REPORT, *supra* note 61, at 19.

70. *Id.* at 20.

71. *Id.* at 21.

history indicates that we should read “court of the United States” as if it still read “court.”

II. THE APA AND THE TAX COURT: A HISTORIC PUZZLE

The fact that the APA originally was consistent in using the term “court” throughout its many sections may enhance the statute’s clarity. However, at the time the APA was enacted, its application to the Tax Court was not self-evident. Recall that, until 1969, the Tax Court was still an executive agency,⁷² though its name had been changed to the “Tax Court of the United States” in 1942.⁷³ The advent of the APA was a major factor in an unsuccessful push in the late 1940s to move the provisions governing the Tax Court out of the Internal Revenue Code and into the Judicial Code—changing the Tax Court from an agency into a court—because, if the agency provisions of the APA applied to the Tax Court, the Tax Court would have to significantly alter its procedures.⁷⁴ The Tax Court did not make those changes, which would have included “publish[ing] in the Federal Register a description of its central and field organization, statements as to its forms and procedures, and its substantive rules,”⁷⁵ and on-demand review by the full court in any case decided by a single judge.⁷⁶

The legislative history of the APA provides conflicting information as to whether Congress intended to include the Tax Court as an agency for purposes of the APA. On the one hand, during a discussion of proposed language providing that “[e]very party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding,”⁷⁷ the issue of an agency disqualifying nonlawyer representation included a discussion of the “Tax

72. See Dubroff, *supra* note 16, at 1 (“In 1942, the name of the Board was changed to the Tax Court of the United States, but despite its new title the court’s status as an agency of the executive branch was not disturbed. Finally, in 1969, the court was established as a legislative court under article I of the Constitution.”).

73. Dubroff, *supra* note 2, at 98 n.237.

74. Dubroff, *supra* note 16, at 26–28 (referring to two significant problems prompting the effort to move the Tax Court provisions into the Judicial Code, one of which was the advent of the APA, which if its agency provisions applied, would require the Tax Court “to make substantial modifications in its procedures”).

75. Sydney R. Rubin, *The Administrative Procedure Act and the Tax Court*, 26 TAXES 255, 258–59 (1948).

76. *Id.* at 259.

77. 79 CONG. REC. 2156 (1946).

Board.”⁷⁸ The senators seemed to assume that the Tax Board was an agency to which that language applied:

Mr. Ferguson: “Let us consider the Tax Board. Could the Board itself determine that certain individuals were qualified to appear and that other persons were not qualified to appear?”

Mr. McCarran: “The answer to that question is ‘No.’ The Board could not do so. The Board would have to accept lawyers or nonlawyers as the case might be”

Mr. Ferguson: Let us take the patent bar.

Mr. McCarran: The same is true in that case. A certified public accountant, for instance, may not be a lawyer, but he could appear. . . . He would have to be permitted by the agency to appear.⁷⁹

It is unclear what the senators meant by “Tax Board.” That phrasing is closer to “Board of Tax Appeals” than to “Bureau of Internal Revenue,” but, of course, the Board of Tax Appeals’s name had been changed to “Tax Court of the United States” four years earlier.⁸⁰ Nonetheless, Sydney Rubin, writing in 1948, observed that, in this exchange, “it seems to have been tacitly assumed that the Tax Court is among the agencies covered.”⁸¹

By contrast, as Professors Hoffer and Walker explain, and as Professor Diane Fahey has stated,⁸² the Tax Court was mentioned in another place in the legislative history in a context that suggests it was a reviewing court. In explaining what is now APA section 706(2)(F), which provides that a reviewing court shall set aside action by an agency that is “unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court,”⁸³ the House Judiciary Committee Report states that “tax assessments not made upon a statutory administrative hearing and record may involve a trial of the facts in The Tax Court or the United States district courts.”⁸⁴ The legislative history thus seems to use the Tax Court as an example of a reviewing court.⁸⁵

78. *Id.*

79. *Id.* The discussion goes on to suggest that agencies cannot prohibit lawyers from appearing before them but can require that nonlawyers have qualifications they deem relevant. *See id.*

80. *See supra* note 72.

81. Rubin, *supra* note 75, at 256.

82. *See Fahey, supra* note 41, at 636 (“[T]he Tax Court of the United States [was] not exempt from the APA but, rather, was used as an example of how section 706[] of the APA was intended to operate.”); Hoffer & Walker, *supra* note 32, at 232–33 (also making this point).

83. 5 U.S.C. § 706(2)(F) (2012).

84. H.R. REP. NO. 79-1980, at 45 (1946) (report of the House Judiciary Committee).

85. This predates the Tax Court’s innocent spouse and collection due

In addition, a letter the Attorney General, Justice Tom C. Clark, sent at the request of the Chair of the Senate Judiciary Committee stated that, in the APA, “Courts’ includes the Tax Court, Court of Customs and Patent Appeals, the Court of Claims, and similar courts,”⁸⁶ which would exclude the Tax Court from the ambit of the “agency” definition. The Attorney General repeated that statement in his Manual on the APA, which was published in 1947, after the APA was enacted.⁸⁷ The Attorney General’s Manual on the APA has been described by the Supreme Court as “a contemporaneous interpretation previously given some deference by this Court because of the role played by the Department of Justice in drafting the legislation”⁸⁸

Despite the Supreme Court’s deference to the Manual, scholars have criticized it as being a partisan document designed to “minimize the impact of the judicial review provisions of the APA”⁸⁹ on agencies.⁹⁰ Professor George

process jurisdiction. The innocent spouse provision was enacted in 1971 and significantly expanded in 1998. *See* Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3106, 112 Stat. 685 (1998); An Act To Amend the Internal Revenue Code of 1954 To Provide That in Certain Cases a Spouse Will Be Relieved of Liability Arising From a Joint Income Tax Return, Pub. L. No. 91-679, § 1, 84 Stat. 2063 (1971). The collection due process provisions were enacted in 1998. *See* Internal Revenue Service Restructuring and Reform Act of 1998 § 3401. Given that innocent spouse and CDP proceedings did not exist at the time the APA was enacted, Professors Hoffer and Walker argue that Congress’s intent was to preserve de novo review in Tax Court *deficiency* cases. *See* Hoffer & Walker, *supra* note 34, at 254. They argue that the newer forms of Tax Court jurisdiction are subject to the APA’s default standard and scope of review. *Id.* at 259–61.

86. S. REP. NO. 79-752 app. B at 38 (1945).

87. UNITED STATES DEPARTMENT OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 10 (1947) (citing S. REP. NO. 79-752, at 38).

88. *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 546 (1978); *see also* Robin J. Arzt, *Recommendations for a New Independent Adjudication Agency To Make the Final Administrative Adjudications of Social Security Act Benefits Claims*, 23 J. NAT’L ASS’N ADMIN. L. JUDGES 267, 330 (2003) (“The Manual is a part of the legislative history of the APA.”); *cf.* George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1663 (1996) (“Because the Senate committee appended [Attorney General] Clark’s letter and appendix to its report, an argument exists that the Senate adopted Clark’s material as its own interpretation. Thus, perhaps, Clark’s interpretation expresses legislative intent.”).

89. John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 195 n.410 (1998).

90. *See id.* at 119 (calling the Manual “a highly political document designed to minimize the impact of the new statute on executive agencies”); Shepherd, *supra* note 88, at 1683 (“The Court’s deference is suspect. No reason

Shepherd has described in detail the negotiations and political compromise that went into crafting the bill that became the APA, as well as both sides' attempts to influence its interpretation.⁹¹ The result was very different interpretations of the bill by the Senate Judiciary Committee, which favored strong regulation of agencies, and the Attorney General, who represented the administration, which sought to limit the regulation of agencies.⁹² The Attorney General's Manual was a result of this attempt to influence courts' interpretation of the APA:

The disagreement over the bill's meaning continued in the House and Senate and in an avalanche of writing that thundered down after the bill's passage. After the APA became law, groups whom the Act would affect sought to present their interpretations quickly, in time to influence courts that would interpret the Act. For example, soon after Truman signed the bill, the attorney general issued a long monograph that interpreted each of the bill's provisions. As before, the attorney general interpreted the act in a manner that suppressed to a minimum the bill's limits on agencies. For example, the monograph again argued that the Act's section 10 did not expand the scope of judicial review, but merely codified courts' existing approach.⁹³

Leading Administrative Law scholar John Duffy has pointed out that "Attorney General Clark had no support in the text of the statute or in its legislative history for the broad thesis that Section 10 was intended generally to be a restatement of current law" and that the Attorney General cited primarily to "passages from . . . letters sent to Congress by Clark himself."⁹⁴ Given this political advocacy context, the Manual should not

exists to give more weight to the Attorney General's Manual than to conservatives' contrasting interpretations. Perhaps courts should credit neither account."); K.M. Lewis, Note, *Text(Plus-Other-Stuff)ualism: Textualists' Perplexing Use of the Attorney General's Manual on the Administrative Procedure Act*, 11 MICH. J. ENVIRON. & ADMIN. LAW 287, 289 (2012) ("[T]here is evidence that the *Manual* may also offer a biased and politicized, and therefore dubious, interpretation of the APA.").

91. Shepherd, *supra* note 88, at 1663 ("The bill had sprung not from public debate in Congress, as other bills had, but from months of private, off-the-record negotiations. Each party sought to create a favorable account of the negotiations.").

92. *See id.* ("The committee would have preferred a stronger bill. . . . In contrast, Attorney General Clark would have preferred a less intrusive bill.").

93. *Id.* at 1665–66 (footnotes omitted); *see also* Duffy, *supra* note 89, at 133 (explaining that the APA "represented a 'bitter compromise' among the warring parties. The Attorney General's Manual was a post-hoc attempt 'to create a record' that would influence future reviewing courts in interpreting that compromise." (quoting Shepherd, *supra* note 88, at 1681)).

94. Duffy, *supra* note 89, at 132.

necessarily be considered an objective interpretation of the law, especially on partisan issues.⁹⁵

Accordingly, it is worth observing that the Manual's assertion that the Tax Court was not subject to the APA is completely consistent with the Attorney General's apparent goal of limiting the effects of the APA on agencies. Nonetheless, relying on the Attorney General's statement, Administrative Law Judge Robin Arzt has argued that the Tax Court and other non-article III courts constitute "courts of the United States" for this purpose:

A close look at the three non-Article III courts cited in the Manual as examples of courts that are excluded from APA coverage clearly shows that Executive Branch Article I tribunals that review final administrative agency adjudications and Article II tribunals that review initial administrative agency adjudications that are labeled "courts" by Congress both are "courts of the United States" that were intended to be excluded from coverage by the APA adjudication procedure under 5 U.S.C. § 551-559.⁹⁶

Judge Arzt's "close look" at the Tax Court is as follows:

[T]he Tax Court has its origin in the Board of Tax Appeals, which was formed in 1924 as an Executive Branch board independent of the Internal Revenue Service to provide taxpayers with an independent administrative review of an IRS tax deficiency determination before the tax had to be paid. . . . Congress did not redefine the Tax Court into an Article I court until 1969. . . . The Supreme Court has held that the Tax Court was an Executive Branch agency until its conversion into an Article I court in 1969. Therefore, the Tax Court was functioning as an Article II "board model" independent agency in the Executive Branch that was doing appellate administrative review of initial decisions by the IRS, not judicial review of final agency decisions, at the time that the Attorney General stated that it was excluded from APA coverage because it is called a court. Thus, bearing the label "court" is enough to exclude an Article II independent agency from APA coverage.⁹⁷

The crux of Judge Arzt's argument with respect to the Tax Court therefore is that because the Attorney General said that the Tax Court, which was not officially a court at the time, constituted a "court" for APA purposes, being named a "court" by Congress must be all a body needed to constitute a court for APA purposes. However, this does not show why the Attorney General's analysis is correct. Mr. Rubin, by contrast, who was

95. See Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 790 (2010) ("[A]lthough the *Attorney General's Manual* should be considered when trying to understand the APA, . . . it may be unreliable when it advances a pro-executive point of view.").

96. Arzt, *supra* note 88, at 331.

97. *Id.* at 333–34 (citations omitted).

writing long before the Tax Court became an Article I court, critiqued the Attorney General's view:

The Attorney General does not indicate how he arrives at this conclusion with respect to the Tax Court. The Court of Customs and Patent Appeals and the Court of Claims are in quite a different category from the Tax Court. They are legislative courts of record provided for in the Judicial Code. They have been so recognized by the Supreme Court. Their judges, like the judges of constitutional courts, hold office during good behavior and retire with full pay. . . .⁹⁸

Rubin also pointed to the Committee reports, which excluded "only legislative, judicial, and territorial authorities."⁹⁹ He noted that the Tax Court was an independent agency, located in the executive branch.¹⁰⁰

Moreover, Mr. Rubin pointed out that the Attorney General's Committee on Administrative Procedure studied almost every executive agency, including the Board of Tax Appeals.¹⁰¹ "Nothing in the Final Report or the monograph indicates that the committee regarded the Board as unique or outside its principal recommendations. The contrary would seem to be clearly true."¹⁰² Accordingly, he concludes, "Viewing the Tax Court against this background of the statute creating it and the history and purposes of the Administrative Procedure Act, it is reasonable to conclude that the Tax Court is among the agencies to which the act applies, and that the Attorney General's 'dictum' to the contrary is wrong."¹⁰³

In addition, the statutory language of the APA itself did not and does not address the status of the Tax Court.¹⁰⁴ Professor Harold Dubroff, who has published a definitive history of the Tax Court, suggested that Congress considered the Attorney General's report sufficient to render a statement in the statute unnecessary.¹⁰⁵ However, James Harte Levenson, a lawyer writing shortly after the APA was enacted, drew the opposite inference, stating, "Significantly, while the Senate committee appended the Attorney General's favorable report to its report, it did not comment thereon."¹⁰⁶ Moreover, Professor

98. Rubin, *supra* note 75, at 256.

99. *Id.* (quoting S. REP. NO. 79-248, at 252 (1946)).

100. *Id.*

101. *Id.* at 257.

102. *Id.*

103. *Id.* at 258.

104. Dubroff, *supra* note 16, at 27.

105. *Id.* ("An opinion of the Attorney General concluded that the Act would be inapplicable to the Tax Court and, apparently on this basis, the statute did not specify that the Tax Court was a court for purposes of the Act.")

106. James Harte Levenson, *Effect of the Administrative Procedure Act on*

Dubroff's view does not entirely line up with the history of the APA. Because the APA reflected a political compromise, it was consciously ambiguous on many points,¹⁰⁷ intentionally leaving unresolved questions for courts to determine.¹⁰⁸ And, in fact, the Court of Appeals for the Sixth Circuit stated several times in 1947, though generally in dicta, that the Tax Court was an agency and must therefore have its decisions reviewed under the standards in the APA (rather than the highly deferential standard articulated by the Supreme Court in its 1943 decision in *Dobson v. Commissioner*).¹⁰⁹

Also, it is interesting to note that the Tax Court published its public documents in the *Federal Register* until the court officially became an Article I court in 1969.¹¹⁰ Board of Tax Appeals documents appeared in the *Federal Register* starting with the Register's second issue,¹¹¹ presumably because the Federal Register Act required "agencies" to publish their rules in the *Federal Register*.¹¹² The APA, once enacted, required

Decisions of the Tax Court, 2 TAX L. REV. 103, 104 n.14 (1946). Levenson also noted, "No reference was given to support that conclusion. It would appear that the Attorney General was misled by the title of the 'court.'" *Id.* at 104.

107. See Shepherd, *supra* note 88, at 1665 ("Ambiguity was essential to reaching agreement. Without it, no agreement could have occurred.")

108. *Id.* ("[T]he parties intentionally included ambiguous provisions that courts would later interpret. Each party then hoped that the courts would resolve the ambiguities in the party's favor.")

109. 320 U.S. 489 (1943); see *Lincoln Elec. Co. v. Comm'r*, 162 F.2d 379, 382 (1947) ("While our conclusion is that review of Tax Court decisions is governed by the Administrative Procedures Act, it does not become necessary . . . to particularize in what respect our power to review has been enlarged, except to say that it doubtless has been broadened and that it will be time enough to consider the precise application of the Act when clear-cut questions of fact or mixed questions of fact and law are brought to us for review."); see also *Lawton v. Comm'r*, 164 F.2d 380, 383 (1947) ("Conceiving the controlling question to be one of law, we are not presently concerned with the question whether review of the Tax Court's decisions is governed by the Administrative Procedures Act . . ."); *Dawson v. Comm'r*, 163 F.2d 664, 667 (1947) ("In this case, the facts are such that we would reach the same conclusion even though our powers of review under the Act, Title 5 U.S.C.A. 1009(e), were as broad as those urged upon us by petitioner, a question we do not decide.")

110. See Deletion of Chapter, 35 Fed. Reg. 12,462 (Aug. 5, 1970) ("[P]ublication in the FEDERAL REGISTER of the Court's public notices, orders, rules, and other public documents is no longer within the purview of the Administrative Procedure Act").

111. Amendments to Rules for Practice Before The United States Board Of Tax Appeals, 1 Fed. Reg. 29 (Mar. 17, 1936). The Tax Court continued to publish documents in the Federal Register after its name change in 1942. See 8 Fed. Reg. 1781 (Feb. 10, 1943) ("Chapter III—The Tax Court of the United States").

112. Federal Register Act, Pub. L. No. 74-220, §§ 4-5, 49 Stat. 500 (1935) (requiring certain types of documents to be published in the *Federal Register*,

agencies to also publish interpretive or policy statements, as well as notices of proposed rulemaking.¹¹³

Once the Tax Court became an Article I court in 1969, it announced that it would no longer publish its public documents in the *Federal Register*, and for that reason:

Whereas the Tax Reform Act of 1969 . . . amending section 7441 of the Internal Revenue Code, *established the U.S. Tax Court as a court of record under article I* of the Constitution of the United States; and

Whereas, publication in the *FEDERAL REGISTER* of the Court's public notices, orders, rules, and other public documents is no longer within the purview of the Administrative Procedure Act:

Now, therefore, the material appearing under Chapter II, Title 26 of the Code of Federal Regulations, is deleted, and the codification determinations assigned to the Court in its former status under the executive branch of the Government are relinquished.¹¹⁴

The italicized language, in particular, suggests that the Tax Court's position was that until it became an Article I court, it was an "agency" subject to the APA's publication requirements applicable to federal agencies.¹¹⁵

including "any order, regulation, rule, certificate, . . . notice, or similar instrument issued, prescribed, or promulgated by a Federal agency"). The definition of "agency" in the Federal Register Act was (and is) "the President of the United States, or any executive department, independent board, establishment, bureau, agency, institution, commission, or separate office of the administrative branch of the Government of the United States but not the legislative or judicial branches of the Government . . ." *Id.* at § 4; *cf.* 44 U.S.C. § 1501 (2012) (referring to "an executive department" instead of "any executive department"). At the time, the Board of Tax Appeals was an "independent board . . . of the administrative branch" of government. *See* Daniel L. Ginsburg, *Is the Tax Court Constitutional?*, 35 *MISS. L.J.* 382, 386 (1964) ("Although the Tax Court is still described as 'an independent agency in the executive branch of government,' its decisions and functions during its entire existence have been wholly judicial . . .").

113. Administrative Procedure Act, Pub. L. No. 79-404, §§ 3(a) & 4(a), 60 Stat. 237 (1946) (requiring agencies to publish "statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public" and "[g]eneral notice of proposed rule making"); *see also* OFFICE OF THE FED. REGISTER, A BRIEF HISTORY COMMEMORATING THE 70TH ANNIVERSARY OF THE PUBLICATION OF THE FIRST ISSUE OF THE *FEDERAL REGISTER* MARCH 14, 1936, at 6 (2006), *available at* <http://www.archives.gov/federal-register/the-federal-register/history.pdf> (noting these requirements and stating, "The APA transformed the *Federal Register* from being merely a source of authoritative information about regulations to being an integral part of the democratic, quasi-legislative process by which those regulations were formed.").

114. Deletion of Chapter, 35 Fed. Reg. 12,462 (emphasis added).

115. *Cf.* Rubin, *supra* note 75, at 256 ("The Tax Court, both before and after its change in name [to the Tax Court of the United States], apparently has regarded itself as an 'agency' rather than as a 'court' within the Federal Register Act, for it has consistently published its rules as 'agencies' under that act are required to do. . . . Yet, in view of the interrelation of the two acts, and particularly in view of their respective definitions of 'agency,' it is hard to see

Thus, at a minimum, there was some confusion as to whether the Tax Court constituted an agency for APA purposes before Congress made it an Article I court in 1969. If the pre-1969 Tax Court constituted a “court” for APA purposes, then presumably the 1969 legislative change did not terminate its status as a court. But if the Tax Court was not a court within the meaning of the APA before the 1969 legislation, did it become one in 1969? The Tax Court’s statement that it was no longer subject to the APA provisions requiring its public documents to appear there¹¹⁶ shows that the court thought it was no longer subject to the APA’s agency provisions. That could suggest that the Tax Court considered itself a “court” for all APA purposes. However, the Tax Court did not say so.¹¹⁷

III. THE NEED FOR DOCTRINAL CLARITY

Assuming that the post-1969 Tax Court constitutes a “court” for APA purposes, is it a “reviewing court”? The APA does not define the term “reviewing court.” However, a look at the context in which section 706 appears is helpful. Chapter 7 of the APA is the chapter that deals with judicial review.¹¹⁸ It begins with a statement that “(a) This chapter applies, according to the provisions thereof, except to the extent that— (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.”¹¹⁹ That section goes on to define “agency” to exclude “courts of the United States,” just as Chapter 5, the chapter governing administrative procedure,¹²⁰ does.¹²¹ As discussed above, Congress apparently intended that phrase to mean the same thing as “courts.”¹²² Moreover, the chapter does not limit judicial review to “the courts of the United States.”¹²³ Instead, Section 703, which

why the Tax Court should be an ‘agency’ for purposes of one act, but a ‘court’ for purposes of the other.”). Of course, “agency” is defined differently in the Federal Register Act than it is in the APA; in particular, the Federal Register Act focuses on the branch where an entity is situated, defining the term to exclude entities in “the legislative or judicial branch of government.” *See supra* note 112; 44 U.S.C. § 1501 (Federal Register Act’s definition).

116. *See* Deletion of Chapter, 35 Fed. Reg. 12,462.

117. In its opinions addressing the APA, the Tax Court generally has said that it is not subject to it at all, not just that the APA’s agency provisions do not apply to it. *See infra* note 130 and accompanying text.

118. *See* 5 U.S.C. §§ 701 *et seq.* (2012).

119. *Id.* § 701(a).

120. *See id.* §§ 551 *et seq.*

121. *Compare id.* § 701(b)(1)(B) *with id.* § 551(1)(B).

122. *See supra* notes 68–71 and accompanying text.

123. Section 702 provides a right of judicial review. *See* 5 U.S.C. § 702 (“A

provides the “[f]orm and venue of proceeding,” states in part, “The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter *in a court specified by statute* or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, *in a court of competent jurisdiction.*”¹²⁴

In addition, the early sections of chapter 7 set up the right of judicial review, and, in section 704, which actions are reviewable.¹²⁵ Only then does Chapter 7 introduce the term “reviewing court.” Section 705 provides:

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, *the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court,* may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.¹²⁶

person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”). Section 704 further provides, “Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.” *Id.* § 704. These sections refer to “the courts of the United States” only once, providing that “[a]n action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.” *Id.* § 702.

124. *Id.* § 703 (emphasis added).

125. Section 704 provides:

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Id. § 704.

126. *Id.* § 705 (emphasis added).

This section therefore seems to treat a court engaging in judicial review as a “reviewing court.”¹²⁷ It does not determine which court can provide such review; section 703 already provided that the appropriate venue is “a court specified by statute or . . . a court of competent jurisdiction.”¹²⁸ Accordingly, if the Tax Court is a “court” within the meaning of the APA, when it has jurisdiction provided by statute to review an agency determination, it is functioning as a “reviewing court” and section 706 applies.¹²⁹

Unfortunately, case law does not provide an answer to the question of whether the Tax Court constitutes a “court” for APA purposes. As *The Death of Tax Court Exceptionalism* explains, in its opinions addressing the APA, the Tax Court generally has said that it is not subject to it.¹³⁰ In rejecting the clear guideposts of the APA, the Tax Court has instead fashioned its own rules and procedures—sometimes broadening its review of particular matters¹³¹ and sometimes vacillating.¹³² Some appellate courts have agreed that the APA does not apply to

127. Cf. Michael Kaminsky, *Judicial Review of Procedures in the Internal Revenue Service*, 36 TAXES 172, 175 (1958) (“The statute is completely absorbed with the adjective ‘reviewing,’ and treats the noun ‘court’ simply as a handy term for identification. There could easily have been substituted ‘tribunal,’ and no violence to the meaning of the statute would have resulted.”).

128. 5 U.S.C. § 703.

129. Cf. *Wilson v. Comm’r*, 705 F.3d 980, 998–99 (9th Cir. 2013) (Bybee, J., dissenting) (“[T]he United States Tax Court is now a court that exercises the judicial authority of the United States, and that puts it on a different plane from where it began. Because the IRS is an ‘agency,’ the Tax Court is a ‘reviewing court’ for purposes of the APA . . .”).

130. See *Porter v. Comm’r*, 130 T.C. 115, 117 (2008) (“Since its enactment in 1946 the APA has generally not governed proceedings in this Court”); *Robinette v. Comm’r*, 123 T.C. 85, 96 (2004) (“The APA has never governed proceedings in the Court (or in the Board of Tax Appeals).”), *rev’d*, 439 F.3d 455 (8th Cir. 2006).

131. See *Robinette*, 123 T.C. at 99 (refusing to apply the “record rule” in the CDP context and stating, “Nothing in the legislative history of section 6330 or 6320 indicates that the APA applies or that the Court’s review is limited to the administrative record.”); see also Hoffer & Walker, *supra* note 34, at 261–62 (explaining that the Tax Court uses the “abuse of discretion” standard in CDP cases, but not because of the APA, and that the court concluded in *Robinette* that its review was not limited to the administrative record).

132. The Tax Court has not been entirely consistent in the standard and scope of review it applies to equitable innocent spouse determinations. See Hoffer & Walker, *supra* note 34, at 257 (explaining how “[t]he Tax Court’s position on its own standard and scope of review for innocent spouse claims for equitable relief has shifted over time.”).

the Tax Court, though not without dissenters.¹³³ Other appellate courts have disagreed, finding that the APA does govern the Tax Court's review of IRS action in various contexts.¹³⁴ This would therefore be a difficult area in which to say that Congress has "acquiesced" to a consistent, longstanding interpretation.¹³⁵

Thus, what the lengthy analysis in this Reply demonstrates most clearly is that there is no simple doctrinal answer to the question of whether the Tax Court is a "reviewing court" or even a "court" for purposes of the APA. Professors Hoffer and Walker's view, if adopted, would answer this basic set of questions, and, fortunately, would do so in a way that combats tax insularity.

It may seem odd that there is no easy, straightforward answer as to whether such an important federal tribunal as the U.S. Tax Court constitutes a "court" for APA purposes. But then, there is no clear answer as to which branch of

133. See *Wilson*, 705 F.3d at 990 (2-1 decision stating, in part, "[t]he extensive legislative history of these provisions demonstrates that the special procedures enacted by Congress displace application of the APA in innocent spouse tax relief cases, and the APA does not apply."); *Comm'r v. Neal*, 557 F.3d 1262, 1275 (11th Cir. 2009) (2-1 decision agreeing with the Tax Court that the APA's "record rule" does not apply and stating, in part, that "[t]he legislative history of the APA contains a clear intent to exempt the Tax Court."); cf. *O'Dwyer v. Comm'r*, 266 F.2d 575, 580 (4th Cir. 1959) (stating, in the era when the Tax Court was an administrative agency and before it had innocent spouse and collection due process jurisdiction, "The Tax Court, rather than being a 'reviewing court' . . . reviewing the 'record', is a court in which the facts are triable de novo."), *aff'g* 28 T.C. 698 (1957).

134. See, e.g., *Murphy v. Comm'r*, 469 F.3d 27, 31 (1st Cir. 2006) ("The reasons supporting application of the administrative record rule in district court CDP hearing appeals have equal force where the appeal takes place in the Tax Court."); *Robinette v. Comm'r*, 439 F.3d 455, 459-60 (8th Cir. 2006) ("Robinette's contention . . . is that the review of decisions by an IRS appeals officer under § 6330 should be exempt from both the statutory framework of the APA and from general principles of administrative law that limit the scope of judicial review to the administrative record. We are not persuaded that Congress endorsed such a departure when it authorized pre-deprivation judicial review of IRS levy activity in the Tax Court and the United States District Courts."); cf. *Mitchell v. Comm'r*, 292 F.3d 800, 807 (D.C. Cir. 2002) ("As the decision whether to grant this equitable relief is committed by its terms to the discretion of the Secretary, the Tax Court and this Court review such a decision for abuse of discretion.").

135. See William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 554-55 (1992) ("Also controversial in the 1980s has been the Court's legislative acquiescence doctrine. Under this doctrine of statutory interpretation, the Court will often presume that Congress 'acquiesces' in settled interpretations of the statute by the Supreme Court, lower court consensus, or administrative agencies.").

government the Tax Court belongs to.¹³⁶ Currently, the Tax Court is exceptional—it is exempt from many of the rules and institutions that govern the Article III courts and the Article I Court of Federal Claims.¹³⁷

A Supreme Court decision holding that the APA applies to the Tax Court in the same way it applies to other reviewing courts would be very helpful, but that would just be a start. To truly end Tax Court exceptionalism would require the federal government to treat the Tax Court like other federal courts. A straightforward approach I previously proposed would be to make the Tax Court subject to the Administrative Office of U.S. Courts, the U.S. Judicial Conference, and the Rules Enabling Act.¹³⁸ Those steps would strike a critical blow against Tax Court exceptionalism, making the court much more transparent and accountable. At the same time, Congress could define the term “court of the United States” in the APA and expressly include the Tax Court. In other words, the more the Tax Court can be brought into the judicial fold, the fewer problems its Article I status and agency history will cause.

CONCLUSION

Professors Hoffer and Walker have done a tremendous service by combining their tax and administrative law expertise with a focused look at the Tax Court. The question of whether the Tax Court is exempt from the judicial review provisions that apply to other courts reviewing agency action is an important and recurring one.¹³⁹ This Reply argues that although the policy goal of reducing Tax Court exceptionalism is laudatory, the doctrinal answer regarding whether the APA applies to the Tax Court is much less clear than Professors Hoffer and Walker suggest. Instead, what a close look at the history of the APA and the Tax Court’s actions shows is that

136. See *supra* note 6 and accompanying text.

137. See *supra* notes 17–19, 25 and accompanying text.

138. See Lederman, *supra* note 17, at 1199 (“Congress should recognize the entirely judicial nature of the Tax Court by making it subject to the AOUSC; the Rules Enabling Act; and, with respect to its rulemaking, the Judicial Conference. These straightforward but important structural changes should decrease the Tax Court’s insularity, increase its accountability, and help reduce inefficiencies.”).

139. For cases addressing this issue, see, e.g., *Murphy*, 469 F.3d at 31; *O’Dwyer v. Comm’r*, 266 F.2d 575, 580 (4th Cir. 1959); *Robinette v. Comm’r*, 123 T.C. 85, 96 (2004), *rev’d*, 439 F.3d 455 (8th Cir. 2006); *Porter v. Comm’r*, 130 T.C. 115, 117 (2008). For a discussion of the split in the circuits on the standard and scope of review of innocent spouse decisions, see Hoffer & Walker, *supra* note 34, at 257–58.

there is conflicting evidence regarding Congress's intent. Yet, it makes little sense for the Tax Court to apply different standards in its review of IRS actions than other courts do, without justification.¹⁴⁰ That creates opportunities for forum shopping that are more available to wealthy taxpayers, who can afford to pay the tax up front.¹⁴¹

Ultimately, what *The Death of Tax Court Exceptionalism* shows is that there is an urgent need to classify the Tax Court in the federal scheme. The question of the APA's application to the Tax Court is just one important symptom of a much larger problem. The time to make the Tax Court more judicial is upon us.

140. See Hoffer & Walker, *supra* note 34, at 225 (“[L]ittle has been done to conform the Tax Court’s standards and procedures to those of its sister courts—the Article III federal district courts and the Article I United States Court of Federal Claims”); cf. Leandra Lederman, *(Un)Appealing Deference to the Tax Court*, 63 DUKE L.J. 1835 (2014) (arguing for application of the same standards to apply to review of Tax Court decisions as apply to district court decisions).

141. Full payment of the tax in issue is a prerequisite to litigation in the district courts and Court of Federal Claims. See *Flora v. United States*, 362 U.S. 145, 177 (1960) (“Reargument has but fortified our view that § 1346 (a)(1), correctly construed, requires full payment of the assessment before an income tax refund suit can be maintained in a Federal District Court.”); *Shore v. United States*, 9 F.3d 1524, 1527 (Fed. Cir. 1993) (“The *Flora* full payment rule requires that taxpayers prepay the tax principal before the Court of Federal Claims will have subject matter jurisdiction over their tax refund action”). By contrast, in the Tax Court, the taxpayer need not pay any tax found to be due until the conclusion of the litigation. See Lederman, *supra* note 140, at 1836–37 & n.2.