with respect to inferior officers in order to promote accountability. "The Framers understood . . . that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people. . . . The Appointments Clause prevents Congress from distributing power too widely by limiting the actors in whom Congress may vest the power to appoint. The Clause reflects our Framers' conclusion that widely distributed appointment power subverts democratic government. Given the inexorable presence of the administrative state, a holding that every organ in the executive Branch is a department would multiply the number of actors eligible to appoint."[516]

Yet, even agreed on the principle, the *Freytag* Court split 5-to-4 on the reason for the permissibility of the Chief Judge of the Tax Court to appoint special trial judges. The entire Court agreed that the Tax Court had to be either a "department" or a "court of law" in order for the authority to be exercised by the Chief Judge, and it unanimously agreed that the statutory provision was constitutional. But there agreement ended. The majority was of the opinion that the Tax Court could not be a department, but it was unclear what those Justices thought a department comprehended. Seemingly, it started from the premise that departments were those parts of the executive establishment called departments and headed by a cabinet officer.[517] Yet, the Court continued immediately to say: "Confining the term 'Heads of Departments' in the Appointments Clause to executive divisions *like* the Cabinet-level departments constrains the distribution of the appointment power just as the [IRS] Commissioner's interpretation, in contrast, would diffuse it. The Cabinet-level departments are limited in number and easily identified. The heads are subject to the exercise of political oversight and share the President's accountability to the people."[518] The use of the word "like" in this passage suggests that it is not just Cabinet-headed departments that are departments but also entities that are similar to them in some way, and its reservation of the validity of investing appointing power in the heads of some unnamed entities, as well as its observation that the term "Heads of Departments" does not embrace "inferior commissioners and bureau officers" all contribute to an amorphous conception of the term.[519] In the end, the Court sustained the challenged provision by holding that the

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[516] Freytag v. Commissioner, 501 U.S. 868, 884–85 (1991).

[517] 501 U.S. at 886 (citing *Germaine* and *Burnap*, the Opinion Clause (Article II, § 2), and the 25th Amendment, which, in its § 4, referred to "executive departments" in a manner that reached only cabinet-level entities). *But compare* id. at 915–22 (Justice Scalia concurring).

[518] 501 U.S. at 886 (emphasis added).

[519] 501 U.S. at 886–88. *Compare* id. at 915–19 (Justice Scalia concurring).