Tax Court as an Article I court was a "Court of Law" within the meaning of the Appointments Clause.[520] The other four Justices concluded that the Tax Court, as an independent establishment in the executive branch, was a "department" for purposes of the Appointments Clause. In their view, in the context of text and practice, the term meant, not Cabinet-level departments, but "all independent executive establishments," so that "'Heads of Departments' includes the heads of all agencies immediately below the President in the organizational structure of the Executive Branch."[521]

The *Freytag* decision must be considered a tentative rather than a settled construction.[522]

As noted, the Appointments Clause also authorizes Congress to vest the power in "Courts of Law." Must the power to appoint when lodged in courts be limited to those officers acting in the judicial branch, as the Court first suggested?[523] No, the Court said subsequently. In *Ex parte Siebold*,[524] the Court sustained Congress's decision to vest in courts the appointment of federal election supervisors, charged with preventing fraud and rights violations in congressional elections in the South, and disavowed any thought that interbranch appointments could not be authorized under the clause. A special judicial division was authorized to appoint independent counsels to investigate and, if necessary, prosecute charges of corruption in the executive, and the Court, in near unanimity, sustained the law, denying that interbranch appointments, in and of themselves, and leaving aside more precise separation-of-powers claims, were improper under the clause.[525]

Congressional Regulation of Conduct in Office.—Congress has very broad powers in regulating the conduct in office of officers and employees of the United States, and this authority extends to regulation of political activities. By an act passed in 1876, it prohibited "all executive officers or employees of the United States not appointed by the President, with the advice and consent of the Sen-

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[520] 501 U.S. at 888–92. This holding was vigorously controverted by the other four Justices. Id. at 901–14 (Justice Scalia concurring).

[521] 501 U.S. at 918, 919 (Justice Scalia concurring).

[522] As the text suggested, *Freytag* seemed to be a tentative decision, and Edmond v. United States, 520 U.S. 651 (1997), a unanimous decision written by Justice Scalia, whose concurring opinion in *Freytag* challenged the Court's analysis, may easily be read as retreating considerably from it.

[523] *In re* Hennen, 38 U.S. (13 Pet.) 230 (1839). The suggestion was that inferior officers are intended to be subordinate to those in whom their appointment is vested. Id. at 257–58; United States v. Germaine, 99 U.S. 508, 509 (1879).

[524] 100 U.S. 371 (1880).

[525] Morrison v. Olson, 487 U.S. 654, 673–77 (1988). *See also* Young v. United States ex rel. Vuitton, 481 U.S. 787 (1987) (appointment of private attorneys to act as prosecutors for judicial contempt judgments); Freytag v. Commissioner, 501 U.S. 868, 888–92 (1991) (appointment of special judges by Chief Judge of Tax Court).