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COMMENT

Interbranch Removal and the Court of Federal Claims: "Agencies in Drag"

Last summer, the D.C. Circuit upheld a statute that gives the President the power to remove judges of the United States Tax Court.[1] Kathleen and Peter Kuretski, a taxpayer couple, had challenged the constitutionality of that provision, alleging that it granted an executive official the impermissible interbranch power to remove officials of the judicial branch. Resolving decades of tension about the constitutional status of these Article I courts, the D.C. Circuit held that the Tax Court is an *executive* branch entity, and thus the President may constitutionally exercise *intra*branch removal power over its judges.

But when one door closes, another opens. This Comment demonstrates that what seems like a straightforward attempt to save the Tax Court from constitutional peril has dangerous implications elsewhere in the federal system. Courts should apply *Kuretski* with a careful eye toward these collateral effects—in particular, *Kuretski*'s effects on the United States Court of Federal Claims (CFC). Unlike the Tax Court judges, judges of the CFC are removable not by the President but rather by the judges of the Court of Appeals for the Federal Circuit. This Comment argues that under the Supreme Court's removal jurisprudence and *Kuretski*'s analysis, that removal provision is invalid.

In Part I, I examine the relevant historical doctrine leading up to and including *Kuretski*. In Part II, I argue that *Kuretski*'s reasoning applies to the CFC and that, as a result, the CFC is an executive branch entity. In Part III, I conclude that the interbranch removal of CFC judges by the Federal Circuit violates separation-of-powers principles: it is both unconstitutional and normatively undesirable.

1. Kuretski v. Comm'r, 755 F.3d 929, 943 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 2309 (2015).

I. *KURETSKI* AND COMPANY

The Tax Court and the CFC are similar in many ways: both are congressionally designated as Article I courts[2] with judges appointed by the President,[3] confirmed by the Senate,[4] and removable for cause.[5] But the two courts differ in an important way: Tax Court judges are removable by the President,[6] whereas CFC judges are removable by the Federal Circuit.[7] The causes for which a CFC judge can be removed are broad: "incompetency, misconduct, neglect of duty, engaging in the practice of law, or physical or mental disability."[8] Removal of a CFC judge requires "a full specification of the charges,"[9] "an opportunity to be heard,"[10] and a majority vote by the judges of the Federal Circuit.[11]

In their challenge to the Tax Court removal provision, the taxpayers in *Kuretski* relied primarily on two Supreme Court decisions, *Bowsher v. Synar*[12] and *Freytag v. Commissioner*.[13] In *Bowsher*, the Court held that Congress could not reserve itself interbranch removal power over a then-executive official, the Comptroller General.[14] Then, in *Freytag*, the Court upheld the Chief Judge of the Tax Court's power to appoint special trial judges, finding that the Tax Court exercises "a portion of the judicial power of the United States."[15] Taking as premises that interbranch removal violates the separation of powers and that the President and Tax Court reside in separate branches, the Kuretskis urged

2. I.R.C. § 7441 (2012) (Tax Court); 28 U.S.C. § 171(a) (2012) (CFC).

3. I.R.C. § 7443(b) (Tax Court); 28 U.S.C. § 171(a) (CFC).

4. I.R.C. § 7443(b) (Tax Court); 28 U.S.C. § 171(a) (CFC).

5. I.R.C. § 7443(f) (Tax Court); 28 U.S.C. § 176(a) (CFC).

6. I.R.C. § 7443(f).

7. 28 U.S.C. § 176(a).

8. *Id.*; *see also infra* text accompanying note 65.

9. 28 U.S.C. § 176(b).

10. *Id.*

11. *Id.* § 176(a).

12. 478 U.S. 714 (1986).

13. 501 U.S. 868 (1991).

14. *Bowsher*, 478 U.S. at 732. Rather than sever the removal provision from the statute that created the office of the Comptroller General, the Court followed the statute's fallback provision and stripped the Comptroller General of his executive duties. *Id.* at 734-36.

15. *Freytag*, 501 U.S. at 891.

the D.C. Circuit to find that these holdings combined to render § 7443(f) an impermissible grant of interbranch removal power.[16]

Not so, said Judge Srinivasan of the D.C. Circuit, in an opinion for a unanimous panel.[17] Judge Srinivasan saved the President's § 7443(f) removal power by reading the Court's holding in *Freytag* quite narrowly, avoiding a potential parade of horribles.[18] Cabining *Freytag* to the Appointments Clause[19] context, the D.C. Circuit determined that though the Tax Court is a "Court[] of Law" for appointments purposes, it is nevertheless an executive branch entity.[20] So situated, § 7443(f) provides for "*intra*—not inter—branch removal" by the President.[21]

It is not my endeavor to critique the reasoning or result in *Kuretski*.[22] Rather, I take *Kuretski*'s holding at face value and explore the grave dangers it raises for the removal provision that governs the Court of Federal Claims.[23] In their briefing, the Kuretskis held the CFC out as a constitutional exemplar and a counterpoint to the Tax Court.[24] Neither the government nor the court responded to this argument. Indeed, none of the actors took seriously the idea that it might be the CFC, *not* the Tax Court, that is subject to the kind of interbranch removal that causes constitutional concern.

16. Brief for Appellants at 28-45, Kuretski v. Comm'r, 755 F.3d 929 (D.C. Cir. 2014) (No. 13-1090), *cert. denied*, 135 S. Ct. 2309 (2015).

17. *Kuretski*, 755 F.3d at 931-32.

18. Though the Kuretskis asked only for severance of § 7443(f), Brief for Appellants, *supra* note 16, at 45-48, remedies as severe as dismantling the entire Tax Court were raised at oral argument, Oral Argument at 11:40, *Kuretski*, 755 F.3d 929 (No. 13-1090).

19. U.S. CONST. art. II, § 2, cl. 2 (permitting Congress to vest the power to appoint inferior officers "in the President alone, in the Courts of Law, or in the Heads of Departments").

20. *Kuretski*, 755 F.3d at 940-43.

21. *Id.* at 932 (emphasis added).

22. It is worth emphasizing, however, that the D.C. Circuit's decision cast a single governmental body as a *legislative* court, residing in the *executive* branch, exercising *judicial* power. Such strenuous constitutional gymnastics are worthy of further analysis.

23. A lawyer for the Kuretskis later indicated as much, suggesting that an analogous "taxpayer in the Court of Federal Claims will raise the interbranch removal power problem." Carlton Smith, *Reflections on* Kuretski*'s Holding that the Tax Court Is Part of the Executive Branch*, TAXPROF BLOG (June 22, 2014), http://taxprof.typepad.com/taxprof_blog/2014/06/smith.html [http://perma.cc/MV8X-Q44W].

24. Brief for Appellants, *supra* note 16, at 41 ("Thus, the Court of Federal Claims does not suffer from a similar cross-branch removal problem . . . .").

II. BRANCHING OUT

In this Part, I apply *Kuretski*'s analysis to the Court of Federal Claims to argue that the CFC, like the Tax Court, is an executive branch entity. The constitutional architecture behind the CFC has long been the subject of debate and legislation.[25] The present incarnation of the CFC, as an Article I trial court, resulted from the merger of the United States Court of Customs and Patent Appeals and the United States Court of Claims.[26] Congress expressed no strong constitutional or normative reasons for linking the two courts. One CFC judge has even indicated that the inclusion of the Court of Claims in the merger was "in part a reflection of a serendipity: both courts were housed in the same building."[27] Focused as it was on the simultaneous creation of the Federal Circuit, "Congress did not give sufficient attention to constitutional requirements in structuring the new Claims Court."[28] Beyond declaring the CFC to be "established under [A]rticle I,"[29] Congress has given no indication of the Court of Claims's position among the branches.

Some scholars declare all Article I courts to be executive agencies outright,[30] and so too Justice Scalia would have held in *Freytag*.[31] Others are more

25. Others have extensively catalogued the history of the CFC and its relationship to constitutional structure. *See, e.g.*, Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 575 n.204 (2003) (chronicling the CFC's historical shifts from Article I status to Article III status and back again). For an in-depth legislative history of the most recent Article I iteration of the CFC, see generally Richard H. Seamon, *The Provenance of the Federal Courts Improvement Act of 1982*, 71 GEO. WASH. L. REV. 543 (2003).

26. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified as amended in scattered sections of 28 U.S.C.).

27. Eric G. Bruggink, *"Unfinished Business,"* 71 GEO. WASH. L. REV. 879, 879 n.2 (2003).

28. Joan E. Baker, *Is the United States Claims Court Constitutional?*, 32 CLEV. ST. L. REV. 55, 55-56 (1983) (questioning the CFC's constitutionality on grounds other than removal); *accord id.* at 95-97; Seamon, *supra* note 25, at 575.

29. 28 U.S.C. § 171 (2012). *But cf.* Mistretta v. United States, 488 U.S. 361, 420 (1989) (Scalia, J., dissenting) ("I doubt whether Congress can 'locate' an entity within one Branch or another for constitutional purposes by merely saying so . . . .").

30. *E.g.*, Akhil Reed Amar, Marbury, *Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 451 n.43 (1989) ("[S]trictly speaking, 'legislative courts' are neither legislative nor courts; rather, they are executive agencies. Nonetheless they may function somewhat like courts."). *But cf.* Susan Sommer, *Independent Agencies as Article One Tribunals: Foundations of a Theory of Agency Independence*, 39 ADMIN. L. REV. 83, 84 (1987) (asserting the converse theory, arguably foreclosed by *Kuretski*, that "[i]ndependent agencies . . . can be considered legislative courts").

31. Freytag v. Comm'r, 501 U.S. 868, 909 (1991) (Scalia, J., concurring in part and concurring in the judgment) ("Such tribunals, like any other administrative board, exercise the

circumspect, venturing only that the line between Article I courts and executive agencies is blurry or spectral.[32] Both these courts and agencies are created under the Article I powers of Congress,[33] and their functions are often interchangeable.[34] More poetically, Professor Kenneth Karst explained this constitutional conundrum in haiku: "Legislative courts / Are but agencies in drag; / *Glidden* is but paint."[35] Indeed, Article I judges come with costumes: "They may even don robes and sit behind large desks. They may call their decisions 'orders.' They may, in fact, mimic federal courts to a great extent."[36] But despite their titles and trappings, the functions these officials serve remain executive in nature.[37]

Even short of Justice Scalia's blanket recategorization, a functional, case-by-case analysis likewise reveals that the Court of Federal Claims is an executive branch agency. All cases before the CFC involve the government's determination of which of its claims will be paid.[38] "Every debtor must decide what claims to pay. Doing so is not an exercise of judicial power, even when

executive power, not the judicial power of the United States."); *id.* at 915 ("In fact, however, the Tax Court is a free-standing, self-contained entity in the Executive Branch . . . .").

32. *See, e.g.*, Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 264 (1990); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV 915, 948 n.195 (1988); Wilber Griffith Katz, *Federal Legislative Courts*, 43 HARV. L. REV. 894, 920 (1930); David A. Strauss, *Article III Courts and the Constitutional Structure*, 65 IND. L.J. 307, 310 (1990); A. Michael Froomkin, Note, *In Defense of Administrative Agency Autonomy*, 96 YALE L.J. 787, 788 n.2, 791 n.13 (1987). *But see* Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 345 (1991) ("There is a fundamental difference between agencies and Article I courts.").

33. Kuretski v. Comm'r, 755 F.3d 929, 943 (D.C. Cir. 2014) ("[T]he Tax Court's Article I origins do not distinguish it from the mine run of Executive Branch agencies whose officers may be removed by the President. After all, every Executive Branch entity, from the Postal Service to the Patent Office, is established pursuant to Article I."), *cert. denied*, 135 S. Ct. 2309 (2015).

34. *See* Fallon, *supra* note 32, at 948 n.195; Katz, *supra* note 32, at 920; Strauss, *supra* note 32, at 310.

35. *Federal Jurisdiction Haiku*, 32 STAN. L. REV. 229, 230 (1979) (quoting a haiku by Kenneth Karst and alluding to Glidden Co. v. Zdanok, 370 U.S. 530 (1962)). *Glidden* purported to elevate judges of the former Court of Claims to Article III status. *See* Jackson, *supra* note 25, at 575 n.204.

36. Craig A. Stern, *What's a Constitution Among Friends?—Unbalancing Article III*, 146 U. PA. L. REV. 1043, 1063 n.81 (1998).

37. *Cf.* City of Arlington v. FCC, 133 S. Ct. 1863, 1873 n.4 (2013) ("[Agencies'] activities take 'legislative' and 'judicial' forms, but they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power.'" (citing U.S. CONST. art. II, § 1, cl. 1)).

38. *See* 28 U.S.C. §§ 1491-1509 (2012).

the debtor takes account of the law and applies it to the claim."[39] Judicial robes cannot change the fact that the CFC's primary function is executive, akin to the role of a corporate treasurer: determining which debts to pay, when, and how.

The CFC's origin story is telling on this point. Though Congress did not pay attention to the CFC's structure,[40] the Department of Justice, which drafted the plan, certainly did. The Assistant Attorney General in charge of devising the reorganization has stated that the Department "looked around for models elsewhere in the federal system, and [it] rather easily came upon the United Sstates [sic] Tax Court . . . . So the Tax Court was the model for the Claims Court."[41] The CFC was consciously designed to mirror structurally the Tax Court, which, as *Kuretski* held, is an executive branch entity.

III. JUDGES JUDGING JUDGES

Not all interbranch removal provisions are invalid, as the Supreme Court made clear in *Mistretta*.[42] But the Supreme Court has consistently identified several classes of cases where "the encroachment or aggrandizement of one branch at the expense of the other" must be curtailed.[43] The CFC removal provision performs two reciprocal incursions.[44] By granting removal powers over executive officers to Article III judges, it strips the President of his constitutionally mandated power to remove executive officers. The removal provision also jeopardizes the integrity of the judicial branch by aggrandizing its power and by entangling it in supervision of the execution of the laws, an area outside the judiciary's expertise and core function.[45] In this Part, I argue

39. Craig A. Stern, *Article III and Expanding the Power of the United States Court of Federal Claims*, 71 GEO. WASH. L. REV. 818, 819 (2003); *accord id.* at 822 ("Functionally and analytically, [the CFC] acts for the executive branch. . . . [I]t decides for the government what claims it should pay.").

40. *See* sources cited *supra* note 28.

41. Daniel J. Meador, *Origin of the "Claims Court,"* 71 GEO. WASH. L. REV. 599, 599 (2003).

42. Mistretta v. United States, 488 U.S. 361, 412 n.35 (1989) ("Nothing in *Bowsher*, however, suggests that one Branch may never exercise removal power, however limited, over members of another Branch.").

43. Buckley v. Valeo, 424 U.S. 1, 122 (1976) (per curiam).

44. *Cf.* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 500 (2010) ("[O]ne branch's handicap is another's strength.").

45. This is also arguably an aggrandizement of congressional power at the President's expense. *See In re* Sealed Case, 838 F.2d 476, 508 (D.C. Cir. 1988) ("If the President's authority is diminished . . . Congress' political power must necessarily increase vis-a-vis the President."), *rev'd sub nom.* Morrison v. Olson, 487 U.S. 654 (1988).

that these separation-of-powers violations are both unconstitutional and normatively objectionable.

A. Encroachment on the Executive

As regards the executive branch, the encroachment inquiry is said to "focus[] on the extent to which [the act in question] prevents the Executive Branch from accomplishing its constitutionally assigned functions."[46] Supervision and removal of executive officials are the quintessential examples of these constitutionally assigned functions.[47] Since the early days of removal jurisprudence, courts have recognized that the President's power to remove executive officers is exclusive.[48] This power can be limited to cases where good cause is shown,[49] but those limitations cannot be so broad as to swallow the power itself.

In *Free Enterprise Fund*, the Court struck down a provision insulating members of the Public Company Accounting Oversight Board (PCAOB) from presidential removal.[50] Members of the PCAOB were removable only for cause by members of the Securities and Exchange Commission, who themselves were subject to for-cause removal by the President.[51] The Court explained that this dual for-cause standard impermissibly vested removal power not in the President but in "other tenured officers—the Commissioners—none of whom is subject to the President's direct control"[52] and worked a "diffusion of accountability."[53] "By granting the Board executive power without the Executive's oversight," the Court concluded, "this Act subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts. The Act's restrictions are incompatible

46. Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977).

47. *See* Bowsher v. Synar, 478 U.S. 714, 726-27 (1986).

48. *See, e.g.*, Myers v. United States, 272 U.S. 52, 106, 176 (1926). *Myers*'s fortification of presidential powers came in an opinion written by former President and then-Chief Justice William Howard Taft in a case on appeal, coincidentally, from the Court of Claims. *See* WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 64-66 (1995). Though *Myers* explicitly avoided the question of whether its rule applies to Article I judges, 272 U.S. at 157-58, one dissent insisted that it was a "mere smoke screen" to say the Court's holding would not apply with full force, *id.* at 182 n.* (McReynolds, J., dissenting).

49. *E.g.*, Humphrey's Ex'r v. United States, 295 U.S. 602, 628-29 (1935).

50. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 514 (2010).

51. *Id.* at 3148-49 (citing 15 U.S.C. §§ 7211(e)(6), 7217(d)(3) (2012)).

52. *Id.* at 3153.

53. *Id.* at 3155.

with the Constitution's separation of powers."[54] Under *Kuretski*, CFC judges are executive officials,[55] and § 176 unquestionably vests removal power over these executive officials in tenured officers not subject to the President's control (the judges of the Federal Circuit). Indeed, this structure—transferring power to another branch entirely—is more clearly in violation of the separation of powers than the one at issue in *Free Enterprise Fund*, where a chain of removal, though attenuated, still connected the President to the PCAOB.

Once the Court identifies encroachment, it then considers "whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress."[56] But as discussed above, Congress offered no conceivable, much less overriding, need to justify the Federal Circuit's removal powers.[57] Though perhaps geographically or procedurally expeditious, the encroaching CFC removal provision cannot be saved simply by being "efficient, convenient, and useful in facilitating functions of government."[58]

Indeed, we should question whether the provision enhances the efficient work of the government at all. The removal provision is not just formally unconstitutional; it also frustrates political accountability, disrupts political control over the execution of the laws, and compromises the CFC's ability to provide a neutral forum. As Chief Justice Roberts noted in *Free Enterprise Fund*, inventive removal provisions can impede political accountability.[59] In a recent dissent, he expanded on this line of thought, explaining that "liberty and accountability" are values underlying the separation of powers.[60]

In the course of performing their executive functions, CFC judges are constrained by an improper set of incentives as they find themselves subject to review and removal by the same court.[61] Professor Judith Resnik suggests, by

54. *Id.*

55. *See supra* Part II.

56. Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977).

57. *See supra* notes 25-29 and accompanying text.

58. *Free Enter. Fund*, 561 U.S. at 499 (quoting Bowsher v. Synar, 478 U.S. 714, 736 (1986)).

59. *Id.* at 3155.

60. Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1955 (2015) (Roberts, C.J., dissenting).

61. *Cf.* Note, *Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View*, 88 YALE L.J. 1023, 1056 & n.184 (1979) (citing Irving R. Kaufman, Chief Judge, U.S. Court of Appeals for the Second Circuit, Benjamin Cardozo Lecture at the Association of the Bar of the City of New York: Chilling Judicial Independence (Nov. 1, 1978), *in* IRVING R. KAUFMAN, CHILLING JUDICIAL INDEPENDENCE 9, 38 (1979)) (raising these concerns in the context of federal magistrates). Magistrate and bankruptcy judges are similarly situated in some regards but, as adjuncts within the judicial branch, do not raise

reference to studies of European career judiciaries, that judges subject to review and removal by the same court could have "incentives to conform and defer"[62] and "to search for supporters, publish little, and keep low profiles."[63] In other tribunals throughout the executive branch, administrative law judges are protected by a bifurcation of these powers: removal actions are conducted by the Merit Systems Protection Board,[64] independently of any agency or judicial review of a judge's substantive decisions. For CFC judges, there are no such assurances. On the contrary, the CFC removal provision is, like the one at issue in *Bowsher*, "very broad and . . . could sustain removal . . . for any number of actual or perceived transgressions."[65]

Even unutilized formal removal power should nonetheless be concerning given the potential for informal pressures. The late Chief Judge of the Second Circuit, Irving Kaufman, once praised the ability of federal judges to police other judges informally as an alternative to formal removal, citing examples of judges forcing such informal ousters.[66] But what Kaufman saw as a benefit of judicial peer pressure can be reframed here as inadvisable interbranch intrusion. "Few judges," he explained, "would long withstand the united importunings of their peers. . . . Peer pressure is a potent tool."[67] Kaufman hints at the power appellate judges have over trial judges housed in the same building,[68] highly reminiscent of the CFC and its officemate, the Federal Circuit. Wielding these tools—peer pressure, statutory removal authority, and appellate review—the Federal Circuit's opportunity for improper influence impinges upon the President's control of executive officials and functions.[69]

Kaufman and I agree on at least one point: these informal maneuverings are "neither exposed to public view nor enshrined in law."[70] No matter which branch is charged with the task of removal, there is always the risk that the

the interbranch concerns present for the CFC. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 79 & n.30 (1982) (plurality opinion) (citing United States v. Raddatz, 447 U.S. 667, 685 (1980) (Blackmun, J., concurring)).

62. Judith Resnik, *"Uncle Sam Modernizes His Justice": Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607, 673 (2002).

63. *Id.* at 677.

64. 5 U.S.C. § 7521 (2012).

65. Bowsher v. Synar, 478 U.S. 714, 729 (1986).

66. Irving R. Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681, 708-09 (1979).

67. *Id.* at 709.

68. *See id.* at 711.

69. I do not mean to suggest for a moment that improper behavior has in fact occurred. Rather, as Chief Justice Burger explained in *Bowsher*, the structural threat of such influence is sufficient to raise a constitutional objection. *See Bowsher*, 478 U.S. at 730.

70. Kaufman, *supra* note 66, at 709.

threat of for-cause removal—even the threat of an accusation—can result in "in terrorem 'voluntary' resignations [that] function as removals-in-fact but without the attendant transparency and political accountability."[71] Political accountability is stretched thinnest when this power is assigned to life-tenured judges, like the judges of the Federal Circuit here, rather than to executive officials subject to reelection, like the President in *Kuretski*. Even if the removal provision is never exercised, it obscures accountability, takes executive functions out of the President's chain of command, and renders the CFC structurally "subservient"[72] to the Federal Circuit.

B. Aggrandizement of the Judiciary

The Court's separation-of-powers jurisprudence is acutely concerned with the effects of challenged legislation on the constitutionally limited scope of the judicial power. In *Mistretta*, the Court rejected several challenges to the constitutionality of the United States Sentencing Commission, sustaining the President's power to remove the Commission's three Article III judges.[73] In doing so, the Court described the dangers, absent in *Mistretta* but very much present for the CFC, that amount to a violation of the separation of powers. In addition to denouncing "aggrandizement or encroachment" between the branches,[74] the Court requires that the judicial branch "neither be assigned nor allowed 'tasks that are more properly accomplished by [other] branches'"[75] and "that no provision of law 'impermissibly threatens the institutional integrity of the Judicial Branch.'"[76] In the case of the Court of Federal Claims, I argue that these dangers reach historically unprecedented levels.

The Court took pains to minimize judicial aggrandizement in *Morrison* by sharply limiting one of the provisions at issue there, which permitted a Special Division comprising three court of appeals judges to terminate an independent counsel.[77] The D.C. Circuit below had read that termination provision broadly, warning that it "implicated [the judiciary] directly in Executive Branch policy judgments" and "undermine[d] the status of the judiciary as a neutral

71. Tuan Samahon, *Blackmun (and Scalia) at the Bat: The Court's Separation-of-Powers Strike Out in* Freytag, 12 NEV. L.J. 691, 698 (2012).

72. *Bowsher*, 478 U.S. at 730.

73. Mistretta v. United States, 488 U.S. 361, 408-11 (1989).

74. *Id.* at 382.

75. *Id.* at 383 (alteration in original) (quoting Morrison v. Olson, 487 U.S. 654, 680-81 (1988)).

76. *Id.* (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986)).

77. *Morrison*, 487 U.S. at 682 (citing 28 U.S.C. § 596(b)(2) (Supp. V 1987)).

forum."[78] By invoking the canon of constitutional avoidance, the Supreme Court's reversal implicitly confirmed those fears and instead narrowly construed the statute "in order to save it from constitutional infirmities."[79] Thus, the *Morrison* Court avoided the issue squarely presented by the CFC's removal provision, in which Article III judges are directly involved in the supervision and termination of executive officials.

Mistretta warns against the danger of this mismatch between the province of the courts and the tasks assigned to them. For example, the Court in *Mistretta* found the appointment of Article III judges to the Sentencing Commission constitutional only because sentencing is "clearly attendant to a central element of the historically acknowledged mission of the Judicial Branch."[80] But there is no comparable alignment of mission when Federal Circuit judges are given removal power over the executive officials of the CFC. As observed by the D.C. Circuit in the case that would become *Morrison*, "when an Article III court is called upon to supervise and administer the executive office, constitutional bounds are transgressed."[81] The power to remove presupposes the "administrative" task of "monitor[ing]" the executive official in advance of removal[82]—a task outside the "historically acknowledged mission" of judges.[83] Article III judges are simply not in the business of regularly overseeing officers charged with the execution of the laws. Moreover, judges' powers and expertise are ill-suited to such sua sponte investigations, and the Constitution insists that this power be retained by the President.[84]

Finally, *Mistretta* warns of intrusion upon the integrity and independence of the judicial branch. In *Morrison*, the D.C. Circuit judges wielding termination power over the independent counsel were statutorily barred from reviewing any related cases. That partitioning of powers was central to saving

78. *In re* Sealed Case, 838 F.2d 476, 516 (D.C. Cir. 1988), *rev'd sub nom.* Morrison v. Olson, 487 U.S. 654 (1988).

79. *Morrison*, 487 U.S. at 682; *see also id.* at 683 ("*So construed*, the Special Division's power to terminate does not pose a sufficient threat of judicial intrusion into matters that are more properly within the Executive's authority . . . ." (emphasis added)).

80. *Mistretta*, 488 U.S. at 391; *see also* Lewis J. Liman, Note, *The Constitutional Infirmities of the United States Sentencing Commission*, 96 YALE L.J. 1363, 1377-78, 1380-81 (1987).

81. *In re Sealed Case*, 838 F.2d at 512.

82. *Morrison*, 487 U.S. at 682.

83. *Mistretta*, 488 U.S. at 391.

84. *Compare* U.S. CONST. art. II, § 3, cl. 5 (providing that the President "shall take Care that the Laws be faithfully executed"), *with id.* art. III, § 2, cl. 1 (establishing the scope of the judicial power).

the statute from constitutional challenge.[85] But in the case of the CFC, the very same Federal Circuit judges are tasked with removal of the executive officials whose actions they review. As the Supreme Court warned, such a regime threatens a "taint of the independence of the Judiciary such as would render the Act invalid under Article III."[86]

Litigants also suffer when this integrity is jeopardized. Acknowledging the difficulty litigants face in such situations, the D.C. Circuit warned of the "subtle calculations" that must be made when the reviewing judge and the terminating judges are peers from the same circuit court.[87] For litigants appealing CFC decisions to the Federal Circuit, that distinction between peers is collapsed—reviewer *is* remover—and the calculations are compounded.[88] Consider also a possible constitutional challenge to the removal provision, § 176. The only conceivable route for such a challenge would be on appeal from the CFC to the Federal Circuit, where the circuit judges would then be faced with assessing their own possibly conflicting interests and powers. For CFC litigants seeking to challenge the statute, no truly neutral Article III venue is available save a writ of certiorari from the Supreme Court.

CONCLUSION

In the narrow context of the Tax Court, *Kuretski* works a compromise by reimagining constitutional doctrine to preserve the status quo. But the D.C. Circuit's novel constitutional holding is not so easily cabined. When we reenvision Article I courts as executive branch entities, as Judge Srinivasan did in *Kuretski*, a new question of constitutional powers arises like whack-a-mole. Less than two miles away from the Tax Court sit the CFC judges, executive officials subject to interbranch removal by the judiciary.

Under *Kuretski*, this constitutional infirmity must be cured by invalidating § 176. Congress could then respond with an amendment vesting that removal power in the President rather than Article III judges. The judges of the Court of Federal Claims can serve their terms subject to presidential removal, but

85. *Morrison*, 487 U.S. at 683-84 (citing 28 U.S.C. § 49(f) (Supp. V 1987)); *cf.* Edmond v. United States, 520 U.S. 651, 664 (1997) (emphasizing the partitioning of powers—review and removal—over the military courts of criminal appeals and the judges thereof).

86. *Morrison*, 487 U.S. at 684.

87. *In re* Sealed Case, 838 F.2d 476, 517 (D.C. Cir. 1988), *rev'd sub nom.* Morrison v. Olson, 487 U.S. 654 (1988).

88. Elizabeth I. Winston, *Differentiating the Federal Circuit*, 76 MO. L. REV. 813, 835 (2011) ("Fear of removal, however unjustified, impacts that separation [between trial and appellate tribunals] to the detriment of litigants.").

they constitutionally cannot and normatively should not remain subject to interbranch removal by the federal judiciary.

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