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I. Introduction: The Need For Reform

The existing system for resolving disputes over federal taxes is "the result of history rather than logic."[1] Jurisdiction over tax cases is handled less rationally and more haphazardly than any other class of cases—with significant consequences for tax administration. As a result, reform of federal tax jurisdiction is a matter of considerable importance, even though the potential for caseload relief is modest.[2]

Under existing law, a taxpayer who wishes to dispute his income, gift, or estate tax liability may choose one of three different forums, each with different procedures and different routes for appeal. Before paying an alleged tax deficiency, the taxpayer may challenge the tax in the tax court, an administrative court created under Article I. Although the tax court is located in Washington, D.C., its nineteen judges "ride circuit," hearing cases in approximately eighty cities. After a hearing before a single tax judge, the case may be reviewed by the full court in the District of Columbia, and an appeal can be taken from the tax court to the court of appeals for the circuit in which the taxpayer resides (or, if the taxpayer is a corporation, where it has its principal place of business). There is no right to

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1. H. Friendly, Federal Jurisdiction: A General View 161 (1973).

2. In 1988 the 2,555 civil tax cases commenced in federal district courts accounted for only 1.1% of new filings. 1988 Director Admin. Off. U.S. Cts. Ann. Rep., table C-2, at 189 [hereinafter 1988 AO Report]. In 1987, the 2,784 such cases had constituted 1.2% of the district courts' civil caseload. 1987 Director Admin. Off. U.S. Cts. Ann. Rep., table C-2, at 180 [hereinafter 1987 AO Report]. At the appellate level in 1988, 336 appeals from district courts and 512 appeals from the Tax Court represented 2.1% of the courts of appeals' docket, while in 1987, 390 appeals from district courts and 436 appeals from the Tax Court had accounted for the same percentage. 1988 AO Report, *supra*, tables B-1A, B-3, at 145, 150; 1987 AO Report, *supra*, tables B1A, B-3, at 142, 147.

a jury in the tax court and only limited discovery. Approximately 95% of tax cases are brought in this court.[3]

Alternatively, the taxpayer can pay the tax and file a refund suit in the claims court, also an Article I court. There is no right to a jury in the claims court, but, unlike the tax court, the claims court permits discovery pursuant to the Federal Rules of Civil Procedure.[4] Appeals from the claims court are to the Court of Appeals for the Federal Circuit. A disadvantage of suing in the claims court is that the taxpayer must travel to Washington for both the trial and the appeal. Only 1% of tax cases are brought in this court.[5]

Finally, the taxpayer may pay the disputed tax and file a refund suit in the federal district court where the taxpayer resides or has her principal place of business; 3.5% of tax cases are brought in federal district courts.[6] The Federal Rules of Civil Procedure govern such suits, and the taxpayer is entitled to a jury trial.[7] Appeals from decisions of the district court go to the appropriate regional court of appeals.

This rather complicated litigation system creates at least three problems for tax administration: it fosters uncertainty in the tax law, it encourages forum shopping, and it leaves many complex tax decisions in the hands of inexpert, generalist judges. These problems are described in greater detail below. The remainder of the article then recommends a solution based on vesting exclusive jurisdiction over civil tax cases in a single court of limited jurisdiction.

A. The Problem of Uncertainty

This trifurcated jurisdiction fosters uncertainty in the administration of the tax system. As one commentator has complained, "[i]f we were seeking to secure a state of complete uncertainty in tax jurisprudence, we could hardly do better than to

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3. *See* COMMISSIONER I.R.S. ANN. REP. 35 [hereinafter 1988 I.R.S. REPORT] (70,815 of 74,323 pending cases).

4. 28 U.S.C. § 2503 (1982) authorizes the claims court to adopt rules of procedure; and the court has incorporated Rules 26-37 of the Federal Rules of Civil Procedure.

5. 1988 I.R.S. REPORT, *supra* note 3, at 35, 38 (829 of 74,323 pending cases).

6. *Id.* (2,679 of 74,323 cases).

7. As with other civil actions, only a small percentage of the cases go to trial, and of these only a small percentage are jury trials. In 1988 only 175 tax trials were held in the district courts, 43 of which were jury trials. 1988 AO REPORT, *supra* note 2, table C-8 at 230. These figures are somewhat misleading, however, in that the mere threat of a jury affects the parties' litigation and settlement strategies.

provide for ninety-six courts with original jurisprudence, thirteen appellate bodies of coordinate rank, and only a discretionary review of relatively few cases by the Supreme Court."[8] There is no place to obtain an authoritative interpretation of the Tax Code short of the Supreme Court, and that overburdened Court can resolve only a handful of the conflicts that develop in tax law.[9] As it is, the Supreme Court already hears three to four cases each year involving circuit splits over tax issues.[10] Many more conflicts go unresolved, often for years or even decades.[11] The Department of Justice, for example, reported finding twenty-eight intercircuit conflicts in 1987 and 1988.[12] And a study by students at the University of Virginia Law School found fifty-six intercircuit conflicts on income tax issues alone during the five-year period from 1983-1988, only twelve of which were resolved by the Supreme Court.[13] Given the pressure on the Court to deal with other business, such numbers cannot be regarded as insignificant.

Why should conflicts, disuniformity and uncertainty concern us more in tax law than in other fields? Most issues of federal law can be litigated in ninety-four district courts and reviewed in twelve regional courts of appeals. Indeed, most federal questions are subject to the concurrent jurisdiction of the state courts, adding another fifty possible forums and making uniformity even less likely. Yet there seems to be a fairly broad consensus that tax law is different. Some commentators, for example, argue that uniformity is critical because tax law involves

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8. R. MAGILL, THE IMPACT OF FEDERAL TAXES 209 (1943).

9. H. FRIENDLY, *supra* note 1, at 161-63.

10. Advocates of the status quo suggest that this figure demonstrates that lack of uniformity is a minor problem. However, the Supreme Court faces enormous pressure to hear cases in a wide variety of areas, and the Court actually addresses only a fraction of the circuit splits in any particular field. Moreover, the current Court seems rather uninterested in commercial litigation generally and tax cases in particular; it sees itself increasingly as a constitutional court.

11. *See* A.B.A. STANDING COMM. ON FED. JUD. IMPROVEMENTS REP., THE UNITED STATES COURTS OF APPEALS: REEXAMINING STRUCTURE AND PROCESS AFTER A CENTURY OF GROWTH 15 (1989) [hereinafter A.B.A. REPORT] ("some conflicts on significant issues have remained unresolved . . . for one or two decades."); Saltzman, *Should There be a National Court of Tax Appeals?*, 8 A.B.A. SEC. TAX. NEWSL. 61 (1989); H. FRIENDLY, *supra* note 1, at 162-63 (conflicts took from three years and one month to thirty years to resolve).

12. Memorandum from Edward Dennis to Dick Thornburgh at 5 (Oct. 16, 1989).

13. Special Project, *An Empirical Study of Intercircuit Conflicts on Federal Income Tax Issues*, 9 VA. TAX REV. 125, 138-39, 142 (1989).

the collecting of revenue.[14] Because tax law determines how much revenue is collected for the nation as a whole, incorrect decisions affect the whole nation. Revenues may not be collected or citizens in one part of the country may pay a disproportionate share of the costs of government.

But there are better reasons for special concern with uniformity in the tax field. Ordinarily, decisions in one circuit do not affect persons or businesses in another. But the uncertainty created by conflicting tax law decisions has "spillover" effects that encourage costly strategic behavior by both the government and taxpayers. On the one hand, the power of the Internal Revenue Service (IRS) to choose when and where to challenge an adverse decision puts taxpayers in a vulnerable position because the IRS is encouraged to oppose even reasonable decisions that are adverse to the government in the hope that raising an issue elsewhere may generate a conflict that eventually leads to a favorable decision from the Supreme Court.[15] On the other hand, the existence of conflicting precedents enables taxpayers to "whipsaw" the government in choosing a reporting position. Assume, for example, that a conflict arises over whether a particular transaction qualifies as a like-kind exchange (the gain or loss from which is currently not recognized). If the transaction yields a gain, the taxpayer can treat it as a like-kind exchange, while if the same transaction yields a loss the taxpayer can treat it as a taxable exchange. The specific facts and adverse precedent need not be disclosed on the tax return, and the existence of favorable precedent should insulate the taxpayer from penalty. Conflicting precedents thus encourage taxpayers to play the "audit lottery," and may leave the government worse off than an authoritative resolution of the issue either way.

B. The Problem of Forum-Shopping

The trifurcated jurisdiction over tax cases also encourages forum shopping. As a result, factors that ought to be irrelevant in administering the tax laws become important because of how they influence taxpayers' choice of forum and how this in turn influences outcomes. Most obviously, the taxpayer can sue in the court with the most favorable precedents. This is especially im-

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14. *See, e.g.*, H. FRIENDLY, *supra* note 1, at 162-63.

15. *See* Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153, 1155-56 (1944).

portant with respect to the jurisdiction of the claims court, since once that court decides a point in favor of a taxpayer, other similarly situated taxpayers can bring their suits there (if they are able to pay the tax assessment up front).

There are, however, a variety of other ways in which taxpayers can exploit the choice of forum options provided under the present system. If the taxpayer has a weak case, he can sue in district court and try to convince a confused jury to return a favorable verdict. If the taxpayer wants to delay the disposition of a case, perhaps to obtain a more favorable settlement, he can sue in the district court, which takes longer than the tax court to resolve most cases and provides numerous procedural mechanisms for delay.[16] Or if the taxpayer wants to limit the government's discovery or avoid facing Justice Department lawyers he can sue in the tax court, which provides only limited discovery and in which the IRS represents the United States.

Furthermore, the present system operates inequitably because not all taxpayers can afford to avail themselves of these forum shopping opportunities.[17] Taxpayers who can pay an alleged deficiency up front can buy access to the district court or the claims court, with whatever advantages this may offer, while taxpayers who are relatively poor or illiquid often have no choice but to sue in the tax court. Forum shopping in the tax area is thus to some extent a special privilege of wealth. As Judge Dawson of the tax court observed, "[i]t is obviously inequitable to have a procedure where the doors of certain courts are open to those with the financial resources to pay their putative tax liability in advance and closed to those who cannot raise the money required."[18]

C. *The Need for Expertise*

Perhaps the most important reason to change the existing allocation of tax jurisdiction is the need to have tax cases heard

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16. That lawyers are aware of and exploit these forum shopping opportunities is suggested by a table in the inside back cover of J.K. LASSER'S YOUR 1990 INCOME TAX (1989) which records differences in the likelihood of settling a tax dispute in different forums. (Incidentally, the table shows that the number of settlements favorable to the taxpayer is three times higher in the district courts than it is in the tax court, and seven times higher than it is in the claims court.

17. *See generally* Crampton, *Forum Shopping*, 31 TAX LAW. 321 (1978).

18. Dawson, *Should the Federal Civil Tax Litigation System Be Restructured?*, TAX NOTES 1427, 1427 (Sept. 26, 1988).

by judges with special expertise. The Tax Code is among the most complex and technical pieces of federal legislation. Just to understand its language requires familiarity with a rich historical and legislative background. The code is long and confusing, and its provisions reflect a mix of principle and political compromise that is often difficult to follow. Yet the number of tax cases is sufficiently small that most judges (other than those on the tax court) hear only a few in any given year.[19] Consequently, these judges have little opportunity to develop expertise in handling tax cases, and most of them admit finding tax somewhat bewildering. Consider Judge Learned Hand's confession:

> In my own case the words of such an act as the Income Tax . . . merely dance before my eyes in a meaningless procession: cross-reference to cross-reference, exception upon exception—couched in abstract terms that offer no handle to seize hold of—leave in my mind only a confused sense of some vitally important, but successfully concealed, purport, which it is my duty to extract, but which is within my power, if at all, only after the most inordinate expenditure of time.[20]

Only tax lawyers pretend that the tax field is anything other than extraordinarily intricate and difficult, and in private conversation even they criticize the courts of general jurisdiction for having a weak understanding of tax law. The tax bar likes the present system only for the litigating advantages it provides.

A recent article suggests that "the velocity of fundamental changes in the tax law" since 1976 makes "a quaint relic" of the notion of a tax specialist because even full time tax attorneys have difficulty keeping up with new developments.[21] But rather than weakening the argument for a specialized court, the frequent changes in tax law make the need for such a court all the more pressing. Understanding the most recent version of the Tax Code often depends on understanding earlier versions—something the specialist is much more likely to do. Moreover, many tax cases involve liabilities from past years under different versions of the Code, again requiring a decisionmaker who is familiar with the law's evolution. If frequent changes in

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19. In 1988, for example, most districts had fewer than 100 tax cases, and a total of only 175 tax cases went to trial across the nation: 1988 AO REPORT, *supra* note 2, table C-3, at 187-93, table C-8, at 230. Similarly, the Ninth Circuit received 61 tax appeals, while no other circuit had more than 34 such cases. *Id.*, table B-7, at 168.

20. Hand, *Thomas Walter Swan*, 57 YALE L.J. 167, 169 (1947).

21. Saltzman, *supra* note 11, at 77.

tax law make this field difficult even for specialists, the solution is not to leave decisionmaking in the hands of less well-informed generalists.

II. RECOMMENDATION

Congress should vest exclusive jurisdiction over all civil tax cases concerning the income, estate, and gift taxes (including civil penalties under these taxes) in a single court of limited jurisdiction.[22] This will increase certainty in tax law, eliminate forum shopping and improve the quality of tax decisions. It will also reduce the number of cases (albeit only modestly), since the same legal issue will not be relitigated in multiple forums.

As the discussion below elaborates, this recommendation requires changing both existing trial and appellate structures. Congress could do this by expanding the present tax court and dividing it into a trial division and an appeals division. The two parts of this proposal, however, are severable: Congress could consolidate trial level jurisdiction without changing existing appellate structures, or Congress could leave trial jurisdiction as it is but consolidate appeals in a national court of tax appeals. I believe that both steps are necessary.

A. Conferring Exclusive Jurisdiction Over Civil Tax Cases on the Tax Court

The first step of the proposal calls for Congress to reduce the available trial forums from three to one. Of the courts that presently exercise jurisdiction over tax cases, the tax court is the logical choice to be given exclusive jurisdiction. The tax court presently handles more than 95% of all civil tax cases and its judges are well-respected experts in tax matters. The quality of the tax court's opinions and its fairness are widely recognized; that such a huge percentage of cases is brought in the tax court suggests taxpayers may prefer it to the other two forums even apart from the advantage of not having to pay the tax before suing. Moreover, because the tax court already hears most tax cases, it can most easily assume the additional burden of cases now brought in the other two courts. Assigning exclusive juris-

22. Federal district courts would retain their present jurisdiction over other tax matters, including criminal trials, IRS enforcement procedures (such as tax liens), and other taxes (such as employment taxes).

diction to the tax court would thus be least disruptive of existing practice.

While channeling primary litigation into the tax court partially solves the problems discussed above, it is not enough. Many of the benefits of having trials conducted by judges with a sophisticated understanding of the tax code will be lost if their decisions are reviewed by judges lacking this expertise in twelve different courts of appeals. Uncertainty would still be a problem, and some taxpayers would continue to forum shop by filing their cases in different venues in order to appeal to different courts of appeals.

Solving the problems identified in section I thus requires vesting exclusive appellate jurisdiction in a specialized court as well. This, of course, is not a new idea; reformers have advocated it for more than half a century.[23] The easiest way to accomplish this objective would be to create an appellate division in the tax court with exclusive jurisdiction to review the decisions of the trial judges.[24]

B. Questions Raised by the Proposal

One must answer a number of questions to evaluate the feasibility of this proposal. The most important of these are addressed below.

1. The status of tax court judges

The tax court is an Article I court whose members are appointed for 15-year terms. If Congress expands the tax court's responsibilities, however, it should give the reconstituted court's

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23. *See, e.g.*, Traynor, *Administrative and Judicial Procedure for Federal Income, Estate, and Gift Taxes—A Criticism and a Proposal*, 38 COLUM. L. REV. 1393 (1938); Surrey, *The Traynor Plan—What It Is*, 17 Tax. Mag. 393 (1939); Griswold, *supra* note 15. Most recently, the ABA's Standing Committee on Federal Judicial Improvements reviewed this proposal favorably, although the Committee's Report stopped just short of an outright recommendation. *See* A.B.A. REPORT, *supra* note 11, at 13-18.

24. In her discussion of specialized adjudication, Professor Dreyfuss discusses the importance of finding the proper level for specialization. Dreyfuss, *Specialized Adjudication*, 1990 B.Y.U. L. REV. 377-83, 407-49. She suggests that legal complexity usually requires a specialized appellate bench, in contrast to factual complexity which justifies creating a specialized trial bench. *Id.* at 425-28. But tax is one field where specialization is appropriate at both levels. Much of the tax code's complexity comes in determining how it applies to a myriad of closely related transactions. An expert trial judge is necessary to characterize the facts properly in light of the law, but the internal complexity of the code also requires specialization at the appellate level.

judges Article III status. As Dean Griswold observed, the notion that the tax court is an agency is just "a polite fiction," since the tax court "is in organization, tradition, and function a judicial body. . . ."[25] In addition, because a reconstituted tax court will have exclusive jurisdiction over an important segment of tax cases, it will be a powerful and important court; its judges should therefore have all the privileges of constitutional judges, including life tenure, salary protection, and the ability to sit by designation on other Article III courts. Finally, making the tax court an Article III court will reduce the likelihood of government "capture" and enhance the court's prestige.[26]

Opposition to conferring Article III status on tax court judges comes chiefly from judges who already have this status. Certainly preserving the prestige of serving on an Article III court is important, but the proposal would give Article III status to fewer than thirty judges on a special court of limited jurisdiction. So modest an addition to the Article III judiciary will not diminish the prestige of the powerful federal courts of general jurisdiction.

2. *The size of the court*

The tax court handles 95% of the civil tax cases with only nineteen members.[27] Consequently, the addition of two or three judges would suffice to manage the court's expanded trial responsibilities. In addition, the courts of appeals presently decide between 750 and 800 tax appeals a year.[28] According to the administrative office, these courts also averaged 722 new filings per panel in 1988.[29] Thus, even assuming that the average tax case is above average in difficulty, no more than five judges, presumably sitting in panels of three but occasionally convening *en banc*, should be needed to handle the tax court's appellate responsibilities. Enlarging the present tax court to twenty-six or twenty-seven members should suffice to enable this court to handle the nation's entire federal tax business.[30]

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25. Griswold, *supra* note 15, at 1154.

26. It also seems unlikely that the amount of tax business will decrease to such an extent that there will be too little work for these judges.

27. *See supra* text accompanying notes 2-3.

28. *See supra* note 2 and accompanying text.

29. 1988 AO REPORT, *supra* note 2, table 1, at 2.

30. With the minor exceptions noted at *supra* text accompanying note 25.

3. Selecting judges to serve as appellate or trial judges

A third question concerns the choice of judges to serve as appellate judges. This is only a transition problem: once the initial appointments and division are made, vacancies would be filled in the same way vacancies are filled in federal district courts and courts of appeals. As for the initial appointments and assignments to the trial or appellate division, if the new tax court is an Article III court, these decisions must be made by the President, subject to Senate confirmation.[31]

Presumably all or most of the current members of the court would be appointed to the successor entity. Perhaps one could argue that elevating five tax judges to review decisions of their former colleagues will create friction. In reality, however, this risk is largely illusory and is no greater than the same risk inherent when district court judges are appointed to the courts of appeals.

4. Location of the court

The tax court is headquartered in Washington, D.C., but rides circuit to try cases. There would be value in allowing taxpayers to make their appeals close to home, but whether it is feasible to have appellate panels roaming the country in search of appeals remains to be decided.

With respect to the trial division, the relatively modest increase in the number of cases makes it feasible to continue the current practice of circuit riding. Alternatively, as Judge Friendly suggested, Congress could establish regional headquarters each with its own chief judge and clerk's office.[32] This would allow tax judges to ride a much smaller circuit and to develop greater familiarity with the non-tax law of the states under their jurisdiction. Either way, litigants will retain the ability to bring their cases in local courts.

5. The right to trial by jury

If exclusive jurisdiction is vested in the tax court, taxpayers will no longer be able to demand a jury trial.[33] Congress could

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31. Reconstituting the Tax Court as an Article III court would require nomination from the President and approval by the Senate in accordance with the Appointments Clause of the Constitution.

32. H. FRIENDLY, *supra* note 1, at 171.

33. *See supra* text preceding note 3.

authorize a reconstituted tax court to conduct jury trials, but I recommend leaving this feature of tax court procedure undisturbed. There is no constitutional right to trial by jury in tax cases, and the right to a jury in a refund action is a special statutory exception to the general rule in suits against the Government.[34] Reliance on juries in civil tax cases is generally undesirable given the need for special expertise in this highly technical area of law. For similar reasons, Congress provides no right to a jury in the Court of International Trade, which hears custom and import tax cases.

This is not to say juries are incapable of handling all tax cases. Some tax disputes resemble ordinary contract or property cases, but there is no reason to expect these tax cases to be the ones heard by a jury. Lawyers often decide to demand a jury on tactical grounds that have nothing to do with judicial administration. Thus, a lawyer might demand a jury if his client's case is weak and the lawyer believes that he can sway the jury's sympathies. This is a perfectly rational litigation strategy—which is why Congress should eliminate the right to a jury. Retaining this right simply preserves a tactical weapon for the parties to exploit at the expense of developing a rational tax system.

Although most of the tax court's rules of procedure will serve adequately, a few modifications may be needed. For example, in refund suits where there was no audit, the government may require more discovery than is presently available in the tax court in order to develop a defense. Such details should be easy to work out, however.

6. *Refund actions and the public fisc*

A further consideration in expanding the trial jurisdiction of the tax court is the potential effect on the public fisc. At present, the government benefits from the payment of disputed tax liabilities in refund actions brought in district courts or the claims court. The tax court has no jurisdiction over refund actions, and this would have to be changed. Even so, fewer taxpayers will pay before trial if there is nothing to be gained. Of course, under the present system only 5% of the cases are refund actions, so the

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34. H. FRIENDLY, *supra* note 1, at 171. *See, e.g., Atlas Roofing Co. v. Occupational Safety Comm'n*, 430 U.S. 442, 450 (1977); *Helvering v. Mitchell*, 303 U.S. 391, 402 (1938).

impact on the public fisc would be small, indeed minuscule.[35] Moreover, the government's interests are adequately protected by the requirement that the taxpayer pay interest on unpaid liabilities that are ultimately upheld. Indeed, some taxpayers pay before trial and sue for a refund in order to prevent the accrual of such interest charges.

7. The government's lawyers

At present, the IRS has jurisdiction over cases in the tax court while the Justice Department handles refund suits brought in district courts or the claims court. The same reasons that justify consolidating jurisdiction over tax cases in the tax court justify giving exclusive prosecutorial responsibility at the trial level to the IRS.[36] IRS personnel already handle 95% of the cases and are familiar with tax court procedures. Moreover, while the Justice Department's lawyers are among the best in the country, IRS personnel are likely to be more familiar with how the government's litigation strategy coincides with general tax policy since the Service implements this policy on a daily basis.

The situation on appeal is different. The Tax Division of the Department of Justice currently handles all appeals in tax cases. Since procedures in the appellate division of the new tax court probably would not differ from procedures in the regional courts of appeals, the advantage of experience supports leaving these cases with the Justice Department. Concern for coordinating litigation strategy with tax policy has little force in the appellate context since the issues will already have been shaped at the trial level. It is not unusual for the government to transfer cases to different departments as they move through the judicial system, and the IRS and Justice Department have successfully coordinated this transition in the past. Consequently, Congress could leave responsibility over appeals with the Justice Department.

8. Other administrative issues

A number of other administrative loose ends must be resolved before this proposal could be implemented. For example, the tax court's budget is presently not part of the judiciary

35. The total amount in dispute in refund actions commenced in 1987 was only $254,788,000. *See* 1988 I.R.S. REPORT, *supra* note 3, at 35.

36. *See* section II.A. *supra*.

budget, but is instead included within the budget of the Treasury Department. Would this change if the court is converted into an Article III court? What committees in Congress will have jurisdiction over legislation affecting the new tax court? What should be done with the tax court's "Special Trial Judges," who handle small tax cases and many of the shelter cases? (I would consolidate all administrative matters regarding the reconstituted tax court with the rest of the Article III judiciary and would treat the special trial judges as magistrates, which would not disrupt present procedures.) Although these details must be resolved, none of them poses a particularly serious obstacle.

III. Objections to a National Tax Court

One aspect of this proposal—the creation of a national court of tax appeals—has been discussed for years, and while respected commentators have supported it, equally knowledgeable experts have raised objections. Opponents of a national tax court defend the availability of multiple forums on the ground that "successive consideration by several courts constitutes a leavening process which in the long run improves the quality of adjudication."[37] In other words periods of uncertainty are worth enduring because additional consideration by other judges increases the likelihood that the eventual decision is "right."

Perhaps it is true that several courts of general jurisdiction are more likely than one such court to reach the correct resolution of a tax problem. But a better approach is to make the first court to consider the issue one that has special expertise in the field of tax. To say that the present system has the blind leading the blind may put matters somewhat too strongly, but the metaphor is nonetheless appropriate. As explained above, tax cases are more complex than average, and the small number of such cases denies judges the opportunity to develop any expertise in handling them.[38] Having more judges consider tax issues thus provides no assurance of improved decisionmaking. A specialized court may also make mistakes, but probably fewer than courts of general jurisdiction—while at the same time—providing the advantages of certainty and uniformity of results.

Some commentators object that specialist judges will be un-

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37. Letter from fourteen Tax Court judges to Assistant Attorney General Daniel J. Meador (Oct. 13, 1978). *See also* Saltzman, *supra* note 11, at 61, 77.

38. *See supra* text accompanying note 20.

duly parochial: "A decision from a generalist judge makes sense because he may be informed by a breadth of experience in dealing with other federal agencies and their rulemaking, as well as a consideration of local law, and local or regional experience."[39] Even if this is true, the benefits of the generalist's experience probably do not outweigh the value of the specialist's knowledge in the tax field. Few tax cases turn on questions of general law, and those issues typically are straightforward.[40] Moreover, while general law may be relevant to some tax controversies, it is seldom more important than the tax code itself. What the generalist brings to the tax case is less valuable than what he fails to bring.[41]

More important, while tax judges would be "specialists" in that they work only on tax cases, tax law is unique in the extent to which it "deal[s] with problems touching every phase of life and, consequently, of law."[42] The caricature of a specialist as a bespeckled recluse with no practical experience and little grasp of matters outside his area of expertise is inappropriate in the tax context. As Dean Griswold observed:

> [A] tax lawyer must deal constantly not only with statutes and committee reports and regulations but also with questions of property, contracts, agency, partnerships, corporations, equity, trusts, insurance, procedure, accounting, economics. . . . He must be broad in his background and . . . outlook, if he is to deal effectively with the manifold problems which make up the modern field of tax law. There is no reason to expect that a judge in this field should become narrow and technical and specialized.[43]

An experienced tax lawyer or judge will be able to combine a broad understanding of the affairs and transactions to which the tax laws are applied with the special knowledge necessary to identify nuances that have implications for tax policy. Finally, the experience of tax judges can be enhanced by having them sit by designation on the federal courts of general jurisdiction.

Opponents of a national tax court also fear that the court will become an "instrument of the government."[44] This fear is

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39. Saltzman, *supra* note 11, at 77.
40. *See* Griswold, *supra* note 15, at 1188-89.
41. *See* A.B.A. REPORT, *supra* note 11, at 15.
42. H. FRIENDLY, *supra* note 1, at 165.
43. Griswold, *supra* note 15, at 1184.
44. A.B.A. REPORT, *supra* note 11, at 45 (dissenting statement).

based at least in part on the assumption that the tax court will remain an Article I court, since the examples most often cited to prove that specialized courts are easily captured are independent agencies or Article I courts.[45] Thus, the risk of government capture should be reduced by making the tax court an Article III court. Even apart from this, there is little evidence to support the spectre of a court controlled by the IRS or Justice Department. Certainly the present tax court is not unduly pro-government—otherwise 95% of the taxpayers probably would not bring their cases to this court. Moreover, the percentage of dispositions favoring the government in the tax court (89.4%) is nearly identical to the percentage in the district courts and the claims court (88.3%).[46] Finally, the fear that the new court's judges will be drawn disproportionately from the government can be counteracted in the confirmation process. "Taxation is a highly visible subject on which diverse interest groups, independent of the government, regularly exert political pressure."[47] It is even possible (though probably not necessary) to provide in the statute creating the new court that some proportion of its members not come from the IRS, the Treasury Department, or the Tax Division of the Justice Department.[48] It is worth noting in this connection that eleven of the eighteen judges presently sitting on the tax court (there is one vacancy) came from the private sector.

Opponents of consolidating tax jurisdiction sometimes argue that taxpayers should be able to bring their cases before local judges familiar with local law.[49] James P. Holden of the American Bar Association's Section on Taxation explained:

> Many [tax] cases involve commonplace issues having their origins in local law concepts of marriage, divorce, probate, trusts, business, organizations, charitable pursuits, property, etc. Although the application of tax law may [be] a common thread among them, the underlying sets of relationships [are] individually unique and [are] akin to those likely to be found in any personal or commercial undertaking. . . . Tax litigants, like

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45. *See id.* at 44-45 (dissenting statement).

46. Tannenwald, *The Tax Litigation Process—Where It Is and Where It Is Going* 4 (10th Herman Goldman Mem. Lect., Ass'n. of the Bar of New York City, Sept. 12, 1989). *See* 1988 I.R.S. REPORT, *supra* note 3, at 38-39.

47. A.B.A. REPORT, *supra* note 11, at 16.

48. *See* H. FRIENDLY, *supra* note 1, at 166.

49. *See. e.g.*, Letter to Assistant Attorney General Daniel Meador, *supra* note 36, at 16; Saltzman, *supra* note 11, at 77-78.

> other litigants, require assurance that . . . their appeals at least will be heard by generalist judges who will decide tax cases . . . in the context of the law as a whole.[50]

This argument reflects two concerns: (1) the taxpayer's convenience in being able to challenge the government without having to go to Washington; and (2) the judge's familiarity with non-tax law that might be relevant to the disposition of tax cases. With respect to the first concern, my proposal retains the existing practice of having tax judges hear cases in cities around the country at the trial level and, if necessary, a similar practice can be instituted at the appellate level. Indeed, the new tax court should be able to hear cases in more places than the courts of appeals. The argument about knowledge of general law has largely been addressed above,[51] but to the extent it is based on the judges' knowledge of local law rather than on their supposedly better "feel" for general law, the argument is exaggerated. Federal judges deal primarily with federal law and are seldom experts in local law.

Finally, advocates of the present system warn that creating a specialized tax court may "leave the American taxpayer with the impression that the judicial system is unresponsive, an attitude which, in the end, could profoundly undermine the voluntary compliance that all concede is the cornerstone of the most effective system of taxation in the world."[52] To begin with, the vast majority of taxpayers never have any contact with the tax litigation system and will almost certainly be unaware of, and unaffected by, these changes. More important, 95% of taxpayers who do become involved in tax litigation already choose to bring their cases in the specialized tax court. Nor will it do to argue that the opportunity to seek review in generalist courts also is necessary to preserve confidence in the tax system, for in reality most taxpayers do not have this opportunity. It is seldom feasible for the taxpayers of modest means to pay their taxes and seek a refund, and the typical case in the district court therefore involves either a corporation or a wealthy individual. Eliminat-

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50. Letter from James P. Holden to Richard A. Posner (Aug. 29, 1989). The organized bar appears divided with respect to the proposal to reform jurisdiction over tax cases. While the ABA's section on taxation is opposed to any change limiting the available choice of forums, the ABA's standing committee on federal judicial improvements favors the proposal. *See* A.B.A. REPORT, *supra* note 11, at 13-18.

51. *See supra* text accompanying notes 42-43.

52. Memorandum from Edward Dennis to Dick Thornburgh, *supra* note 12, at 14.

ing the glaring inequity that, under present law, gives a special privilege to the wealthy surely will not decrease taxpayer confidence. On the contrary, this proposal would for the first time put all taxpayers on an equal footing, allowing everyone to obtain review in an independent Article III tribunal.

IV. Conclusion

Specialized courts are neither always good nor always bad. The need to create a specialized court depends on a variety of particular circumstances. In the area of tax law the case for specialization is clear. There are, indeed, few contexts in which the argument for specialization is stronger. The tax field is complex at both the trial and appellate levels, but the small number of cases makes it unlikely that general jurisdiction judges will develop the expertise necessary to understand these cases. There is a strong need for uniformity because uncertainty in tax law has intercircuit effects. Moreover, while tax cases are generally segregable from other parts of the federal docket, they offer a breadth of other issues sufficient to protect the judges from intellectual isolation. Finally, unlike the commerce court or the foreign intelligence surveillance courts, there is a consensus regarding the policy objectives of tax law. All the relevant factors thus support the creation of a special tax court of limited jurisdiction.