No.

In the Supreme Court of the United States

ESTATE OF BURTON W. KANTER, ET AL.,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Tax Court keeps secret, even from the reviewing courts of appeals, the findings of fact and credibility judgments of its special trial judges. By law, these trial judges are required to file reports containing findings of fact and opinion with the Tax Court. Tax Ct. R. 183(b). By law, these findings of fact "shall be presumed to be correct" and the Tax Court is required to give "due regard" to the circumstance that the trial judge "had the opportunity to evaluate the credibility of witnesses." Tax Ct. R. 183(c). Nonetheless, the Tax Court overturns the factual findings, including the credibility findings, of its trial judges without the record revealing those findings or that the Tax Court has overturned them. Secret trial judge reports preclude the courts of appeals from determining whether the Tax Court has complied with the legal constraints described above. Secret trial judge reports also preclude the courts of appeals from reviewing a Tax Court decision on the basis of the entire record on which that decision in fact rests. Federal statutes require that "all reports of the Tax Court * * * shall be public records." 26 U.S.C. § 7461(a). The questions presented are:

1. Whether the due process clause or the governing federal statutes require that the courts of appeals be able to review Tax Court decisions on the basis of the complete record, including the trial judge's findings of fact that, by law, the Tax Court must presume to be correct.

2. Whether Tax Court Rule 183 requires judges of the Tax Court to uphold findings of fact and credibility judgments made by their trial judges unless those findings are "clearly erroneous," as the D.C. Circuit has held, or are those findings and credibility judgments entitled to no deference at all, as the Seventh Circuit held in this case.

RULE 14.1(b) STATEMENT

The following are the parties to the proceeding in the Court of Appeals for the Seventh Circuit:

1. Estate of Burton W. Kanter, Deceased
2. Joshua S. Kanter
3. Naomi Kanter

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a to 97a) is reported at 337 F.3d 833 (7th Cir. 2003). The opinion of the Tax Court (App. 98a) is reported at 78 T.C.M. (CCH) 951 (1999). The orders of the United States Tax Court (App. 99a-112a) denying access to the Special Trial Judge's Rule 183 Report are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 2003. A timely petition for rehearing was denied on October 21, 2003. App. 115a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTES AND RULES INVOLVED

Relevant constitutional provisions, statutes, and rules are set forth at App. 116a to 121a.

INTRODUCTION

The question presented here concerns the constitutionality of procedures now routinely used by the Tax Court to impose massive liability, including judgments of tax fraud, in the most serious class of tax cases it assigns its special trial judges. In upholding the Tax Court, the divided court below endorsed a procedure, unheard of in American law, in which the Tax Court keeps *legally binding* findings of fact completely secret, including from the Article III appellate courts required to review the Tax Court's judgments. At the same time, the majority below put itself into direct conflict with the D.C. Circuit on the legal relationship of the Tax Court to its special trial judges. There are no factual issues in dispute: the government defends, in principle, the position that the Tax Court may deny the courts of appeals and taxpayers ac-

cess to the findings and credibility judgments of special trial judges who preside over some of the Tax Court's lengthiest and most complex trials.

STATEMENT

1. Structure of the Tax Court. Congress established the United States Tax Court as an Article I "court of record." 26 U.S.C. § 7441. Congress has also given the Tax Court many of the same powers as the federal district courts. Just as the District Courts may appoint magistrates, the Chief Judge of the Tax Court "may, from time to time, appoint special trial judges * * *." 26 U.S.C. § 7443A(a). Special trial judges (STJs) are at-will employees appointed at the discretion of the Chief Judge. They have no statutory term of office and serve at the pleasure of the Tax Court. See 26 U.S.C. § 7443A.

Nonetheless, STJs wield considerable substantive powers and, unlike law clerks or secretaries, are far from mere employees. STJs exercise "significant governmental authority" and for that reason are "inferior officers" of the United States whose appointment must comply with the requirements of Article II of the Constitution. *Freytag v. Comm'r*, 501 U.S. 868, 880-882 (1991). Special trial judges exercise "judicial, rather than executive, legislative, or administrative, power," *Freytag,* 501 U.S. at 890-891, because the Tax Court "exercises judicial power to the exclusion of any other function." *Freytag,* 501 U.S. at 868. The Chief Judge of the Tax Court may assign any proceeding to a STJ for trial. 26 U.S.C. § 7443A(b). Currently, there are 19 Tax Court judges and 10 special trial judges.

In several classes of trials, Congress has authorized STJs to issue the final decision of the Tax Court. 26 U.S.C. § 7443A(c). But in financially significant cases, such as this one, where the claimed deficiency exceeds $50,000, trials before an STJ are governed by the special procedures set forth in Tax Court Rule 183. That Rule makes the STJ the

original finder of fact. After trial, the STJ is legally required to "submit a report, including findings of fact and opinion" to the Chief Judge of the Tax Court. Tax Ct. R. 183(b). As this Court has observed, the special trial judge "hear[s] the case and prepare[s] proposed findings and an opinion." *Freytag,* 501 U.S. at 873.

The Chief Judge then assigns a Tax Court Judge to review this Rule 183 report. *Id.* Critically, Rule 183 expressly requires that, in reaching its final decision, the Tax Court must give appropriate deference to the fact that the special trial judge has seen the witnesses, is in the best position to judge their credibility, and has presided over the entire trial. Rule 183(c) therefore mandates that "[d]ue regard shall be given to the circumstance that the Special Trial Judge had the opportunity to evaluate the credibility of witnesses, and the findings of fact recommended by the Special Trial Judge shall be presumed to be correct." Before this case, the lower courts and the Tax Court bar had understood this provision to mean that the special trial judge's findings of fact are to be overturned only if clearly erroneous. See, *e.g.*, *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000); *Stone v. Comm'r*, 865 F.2d 342 (D.C. Cir. 1989); 35 AM. JUR. 2d *Fed. Tax Enforcement* § 905 (2002) ("The Tax Court is required to review a special trial judge's factual findings according to the clearly erroneous standard."); 20A FEDERAL PROCEDURE, L. ED., INTERNAL REVENUE § 48:1274 (2000) (same).

A Tax Court judge reviews the trial judge's Rule 183 report. Rule 183(c) provides: "The Judge to whom or the Division to which the case is assigned may adopt the Special Trial Judge's report or may modify it or may reject it in whole or in part, or may direct the filing of additional briefs or may receive further evidence or may direct oral argument, or may recommit the report with instructions." Tax Ct. R. 183(c). That power to modify, of course, is subject to the constraints of the Rule that require respect for the crediblity

judgments of the STJ and that the STJ's findings "shall be presumed to be correct."

2. The Tax Court's Secret Process of Decisionmaking. The Tax Court treats the STJ's legally required Rule 183 report as a secret document not to be disclosed under any circumstance, including to the courts of appeals. That is so even though the Tax Court itself is expressly bound to treat the factual findings of the trial judge, including credibility findings, as presumptively correct. In this tax fraud case, issues of intent, and hence trial-judge findings on credibility, were critical. Yet even though the actual (but secret) record of decisionmaking in the Tax Court legally depended upon the Rule 183 report, the record upon which the court of appeals was permitted to review the Tax Court decision did not include that report or the trial judge's original findings.

The Tax Court, in a reversal of earlier policy, now takes the position that, as a per se matter, it will refuse to make the trial judge's report part of the record. Even in a civil tax fraud case where credibility findings are critical, neither the taxpayer, nor the government, nor the courts of appeals — even *in camera* — are permitted to see the trial judge's Rule 183 report or to review the full record underlying the Tax Court's decision. As Judge Cudahy observed below, the Tax Court is "unique among all the institutions in the law" in claiming the power to refuse to disclose the "presumed correct" findings of fact of a trial judge or hearing officer. App. 71a.

But the Tax Court process is even more remarkable than the "mere" non-disclosure of the trial judge's original findings. For the Tax Court then may choose to alter the public record of decision. After the trial judge files the legally binding Rule 183 report, the Tax Court permits the reviewing judge and the trial judge to discuss the findings of fact and credibility judgments. If the reviewing judge disagrees with the trial judge's findings, the reviewing judge can privately

"persuade" the trial judge (employed at the will of the Tax Court) to sign a new opinion with completely modified findings. Only that new opinion is ever made part of the record.

Any reversal the Tax Court makes of the "presumed correct" and legally binding factual findings recorded in the Rule 183 report is therefore never reflected in the record. If any changes have been made, there is no way for the courts of appeals or the taxpayer to know. Whether the Tax Court has properly followed the requirements of Rule 183 is impossible to review. Whether the findings of fact in the newly minted Tax Court opinion are clearly erroneous is impossible properly to judge. Absent the Rule 183 report, it is impossible for the courts of appeals to evaluate the Tax Court's decision in the appellate manner prescribed by law.

In contrast to this current process, before 1983 the Tax Court's rules *required* the disclosure in every case of the STJ's report. See Tax Ct. R. 182(b), 60 T.C. 1149 (1973). But in that year, the Tax Court amended the rule to eliminate mandatory, routine disclosure of the trial judge's report. See 81 T.C. 1069 (1983) (amending the Rule and renumbering it as Rule 183). The Tax Court offered no explanation at the time for this change. The powers of the STJ and the reviewing judge remained exactly the same as before. But the Tax Court simply dropped, without explanation, the provision mandating public disclosure of the STJ report.

There is yet one further remarkable feature to this process: the entire process is itself shrouded in secrecy. Nowhere does the Tax Court make public or describe the fact that its judges claim the power to modify *outside the record* legally binding and "presumed correct" original findings of fact, including credibility judgments. Neither Rule 183 nor any document of the Tax Court indicates that the final decision of the Tax Court — the only document disclosed — might contain dramatically altered findings of fact.

To the contrary, the Tax Court gives the appearance in every case that no such modifications have been made. The final decision of the Tax Court always begins with a boilerplate statement that the Tax Court judge "agrees with and adopts the *opinion* of the Special Trial Judge." See App. 3a, 98a (emphasis added). Following that statement is an opinion issued in the name of the STJ. But as the government concedes, that "opinion" is not necessarily the Rule 183 report with its original findings of fact. See Gov't Brief in Opposition, *Ballard v. Comm'r* ("*Ballard* Opp."), No. 03-184, at 13 n.3 (filed Oct. 6, 2003) (acknowledging that the boilerplate language in Tax Court opinions might reflect the current "views" of the STJ, not the original findings, and that those original findings might have been "revised"). As Judge Cudahy concluded, "I do not believe that the concealment behind that [boilerplate] verbal formula allows this court to conduct meaningful appellate review." App. 96a-97a.

As became clear in the proceedings below, this boilerplate "adoption" of the STJ's "opinion" is language found in *every reported Tax Court opinion in a case tried by a Special Trial Judge* since repeal in 1983 of the Rule requiring publication of the trial judge's report. See App. 73a. "[T]here exists not a single Tax Court decision since the adoption of current Rule 183 where a Tax Court Judge has purported to modify or reverse a finding of a Special Trial Judge." *Id*. Before 1983, Tax Court decisions would expressly state that "we disagree with the Special Trial Judge,"[1] or that the Tax Court had made "some modifications" to the trial judge's report.[2] But once the Tax Court closed off access to the trial judge's report, the Tax Court never again manifested public disagreement with its STJs. As Judge Cuhady concluded, and the government does

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[1] See, *e.g.*, *Rosenbaum v. Comm'r*, 45 T.C.M. (CCH) 825 (1983), *rev'd sub nom. Stone v. Comm'r*, 865 F.2d 342 (D.C. Cir. 1989).

[2] See, *e.g.*, *Taylor v. Comm'r*, 41 T.C.M. (CCH) 539 (1980).

not dispute, that public show of unanimity on every factual finding in every case over two decades reflects either unique agreement among judges or, more realistically, that the Tax Court is modifying original findings of fact through an unreviewable process that leaves no trace in the public record. App. 74a. As commentators have learned of this practice, they have urged that it violates due process.[3]

3. Tax Court Proceedings in This Case. Burton W. Kanter was one of the leading estate-tax lawyers in the country, a prolific writer on tax planning, and an adjunct professor of law for nearly 15 years at the University of Chicago Law School. Kanter and others sought review in the Tax Court of notices of deficiency that, with interest and penalties, totalled more than $30 million. The notices did not determine fraud, but the Commissioner later amended his answer to allege fraud.

The Chief Judge of the Tax Court assigned the trial to Special Trial Judge Couvillion. That trial before Judge Couvillion consumed five weeks and "generated almost 5000 pages of transcript, more than 4600 pages of briefs and thousands of exhibits consuming hundreds of thousands of pages." App. 3a.

As required by law, Judge Couvillion prepared and filed a Rule 183 report. Filed more than four years after trial, that report, by law, included findings of fact, critical judgments of credibility, and legal conclusions on the issue of fraud. The Chief Judge then assigned the report for review to Tax Court Judge Dawson. App. 113a-114a. The report was under review by Judge Dawson for one year and three months. After

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[3] See, *e.g.*, Cornish F. Hitchcock, *Public Access to Special Trial Judge Reports*, 2001 Tax Notes Today 199-41 (Oct. 15, 2001); Gerald A. Kafka & Jonathan Z. Ackerman, *Fact-Finding in the Tax Court: Access to Special Trial Judge Reports*, 91 Tax Notes 639, 642 (April 23, 2001).

that lengthy period, Judge Dawson issued the Tax Court's decision, in which Kanter was found liable for tax fraud.

Two judges of the Tax Court later came forward to inform Tax Court counsel that Judge Dawson's decision had completely reversed the critical findings of credibility and the ultimate judgment of tax fraud of the trial judge in his Rule 183 report. These declarations are reflected in uncontradicted testimony in the record.[4] These two Tax Court judges (one a regular Tax Court judge, the other the Chief Special Trial judge) informed counsel:

> ¶4 * * * [I]n his original report submitted to the Chief Judge pursuant to Rule 183(b), Special Trial Judge Couvillion concluded that payments made by the [taxpayers] were not taxable to the individual Petitioners and that the fraud penalty was not applicable.
>
> ¶5 * * * That substantial sections of the opinion were not written by Judge Couvillion, and that those sections containing findings related to the credibility of witnesses and findings related to fraud were wholly contrary to the findings made by Judge Couvillion in his report. The changes to Judge Couvillion's findings relating to credibility and fraud were made by Judge Dawson.

A third judge of the Tax Court confirmed that Judge Dawson "had made an outright rejection of credibility findings made by a Special Trial Judge." *Id.* ¶7.

Thus, the trial judge had found Kanter credible and not guilty of tax fraud. The reviewing judge reversed those findings. But the record does not reflect that reversal, nor does it

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[4] See *Declaration of Attorney Randall G. Dick*, Seventh Cir. App. 250-252; see also App. 73a n.1 (*Declaration* cited in Judge Cudahy's dissent). Tax Court counsel did not raise these statements in the first two motions seeking the trial judge's report. Only after the Tax Court denied these motions did counsel, in a final motion, believe himself ethically required to file an affidavit testifying to these statements.

explain or justify (under any standard of review) the reversal of these critical findings. Instead, the final decision simply concludes: "Kanter's testimony at trial was implausible, unreliable, and sometimes contradictory. We did not find it credible." *Inv. Research Assocs., Ltd. v. Comm'r*, 78 T.C.M. (CCH) 951, 1085 (1999). But the court of appeals could not review this dispositive finding of Judge Dawson with the knowledge that he had *reversed* critical credibility judgments by the trial judge who had seen the witnesses. The court also could not evaluate and review any basis Judge Dawson might have had for reversing these findings.

Instead, Judge Dawson's opinion began with the standard boiler-plate statement that he "agrees with and adopts the *opinion* of the Special Trial Judge." App. 98a (emphasis added). But this misleading language does *not* mean that Judge Dawson adopted the original Rule 183 Report that STJ Couvillion submitted. The government, before this Court, concedes as much. See *Ballard* Opp. at 13 n.3. In the 15 months the Rule 183 Report was before Judge Dawson, he and the trial judge could have "agreed" to any number of changes in findings, none of which are reflected in the record. Judge Dawson's boiler-plate statement indicates no more than that he adopted the final views of the trial judge, as those views were modified from the original Rule 183 findings by whatever discussion Judge Dawson and the trial judge had subsequent to the filing of that report.

The Tax Court refused, in response to three separate motions, to have the special trial judge's report released or made part of the record, even for *in camera* appellate review. App. 99a, 104a, 107a. As Judge Cudahy put it dissenting below, "[t]he Tax Court has not denied that a document containing the original findings of the STJ exists, yet it refuses to include this document in the record on appeal." App. 71a.

4. The Seventh Circuit's decision. A divided panel of the court of appeals affirmed.[5] The majority upheld the Tax Court on two grounds. First, the court concluded that "the Tax Court's opinion is the STJ's report" and hence that petitioner's constitutional claims were "moot" and "immaterial." App. 7a. But this conclusion reflected understandable confusion, due to the Tax Court's opaque and hidden process, about the now acknowledged fact that the Tax Court's opinion is *not* necessarily the STJ's report. Even the Government no longer defends the Tax Court's actions on this basis, see *Ballard* Opp. at 13 n.3, and given this concession, this ground can no longer properly sustain the judgment below. The government acknowledges that the Tax Court's decision might have dramatically changed the findings and credibility judgments in the original trial judge report.[6]

Alternatively, the court of appeals held that "even if * * * the phrase 'agrees with and adopts' masks what is in fact a quasi-collaborative judicial deliberation in which an STJ's initial findings are malleable," App. 7a, neither due

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[5] Appeals from the Tax Court are taken to the Circuit in which the taxpayer legally resides. The parties before the Tax Court resided in three different Circuits. In *Estate of Lisle v. Comm'r*, 341 F.3d 364 (5th Cir. 2003), the Fifth Circuit reversed as clearly erroneous the finding of fraudulent intent with respect to one of the taxpayers. The Eleventh Circuit affirmed the judgment of the Tax Court in *Ballard v. Commissioner*, 321 F.3d 1037 (11th Cir. 2003). A petition for certiorari in that case is now pending. See 72 U.S.L.W. 3129 (U.S. Aug. 4, 2003) (No. 03-184).

[6] This was the only ground relied upon by the Eleventh Circuit for its judgment in the *Ballard* case in which certiorari is now pending. There the court said "Petitioners-Appellants' arguments are premised upon the assertion that the underlying report adopted by the Tax Court is not, in fact, Special Trial Judge Couvillion's report. Were that to be the case, we, too, would have significant concerns over the propriety of the process employed in this case." 321 F.3d at 1042. The candid refusal of the government now to claim that the Tax Court *has* adopted Judge Couvillion's report without modification leaves the *Ballard* decision without any support.

process nor applicable federal statutes are violated when the Tax Court changes "malleable" trial-judge findings without the record reflecting or justifying those changes.

The foundation of this conclusion was the court's view that Rule 183 imposes virtually no constraint on the reviewing powers of the Tax Court judge. In direct conflict with the D.C. Circuit's view that the Rule imposes a "clearly erroneous" internal standard of review, the court below concluded that the Tax Court Rules do not "prescribe any particular level of deference due the STJ's report." App. 8a. Moreover, the court noted that the final decision is signed by both the Tax Court judge and the STJ. Thus, both judges must have "agree[d]" on whatever secret revisions to findings were made. App. 7a. The court acknowledged that this Court's due process precedents would not permit a District Court to overturn a magistrate's original credibility findings in a suppression-hearing context through a similar, private, collaborative, non-record process. But the court concluded that the multi-million dollar property and liberty interests at stake in a tax fraud trial were not weighty enough to warrant constitutional concern about off the record modifications to critical credibility findings.

Judge Cudahy dissented at length. He concluded that any changes a reviewing judge makes to original findings of the trial judge must be reflected in the record to preserve the review function of the courts of appeals and the due process rights of taxpayers. By law, the courts of appeals are required to review Tax Court decisions, including findings of fact for clear error. The courts of appeals must therefore be able to evaluate the basis for the Tax Court's findings.

Judge Cudahy relied on this Court's analysis of the "clear error" standard of review in cases such as *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-575 (1985) (clear error standard requires significant deference to factfinder's findings and "even greater deference" when credibility is in-

volved). App. 89a-90a. Without access to the original report, Judge Cudahy concluded, it is impossible for the reviewing court properly to assess critical elements of the Tax Court's decision. As Judge Cudahy summarized, "[i]f we are to give 'even greater deference' to the findings of a judge who has heard the witness whose credibility is at stake, we must inevitably give less deference to the judge who subsequently reverses those findings." App. 90a. Yet without the trial judge's original report, it is impossible to identify which findings he has made and which have been reversed by the Tax Court judge. The Tax Court's practice therefore destroys "meaningful" appellate review. App. 89 n.10. Judge Cudahy concluded that the Tax Court's reliance on secret STJ reports violated due process.

REASONS FOR GRANTING THE PETITION

This case involves a circuit split implicating recurring issues of immense practical and national importance. In cases from the Tax Court tried to a Special Trial Judge, the courts of appeals must review the Tax Court decision on a record that *omits* the single item of most significance. Over the last decade, Special Trial Judges have tried as many as 89 cases per year and, on average, at least 50 cases per year through the extraordinary, secretive process at issue here. These cases often involve enormous financial consequences. In *Freytag*, the amount at stake was $1.5 billion. 501 U.S. at 871 n.1. The present case involves a judgment in excess of $30 million in liabilities, penalties, and interest, as well as the additional consequences that attend a judgment of tax fraud.

The issues presented take on particular urgency following this Court's delineation of the powers of Tax Court special trial judges in *Freytag*. By holding that the Tax Court may assign any trial, "regardless of complexity and amount," to a STJ, *Freytag* spawned an expansion in the use of Special

Trial Judges in the Tax Court's largest cases.[7] The courts of appeals are now reviewing these judgments on the basis of incomplete records and secret trial judge reports, without being aware of that fact.

This Court should ensure that the regular practice of the Tax Court meets the minimal standards of due process, including proper appellate review, required of every other lower court. This Court's review is also justified to enforce Congress's mandate, expressed in the strongest terms in several statutes, that Tax Court proceedings must be fully transparent. At the same time, the decision below also creates a conflict among the circuits that warrants this Court's resolution.

I. SECRET TRIAL JUDGE FINDINGS OF FACT VIOLATE DUE PROCESS AND THE FEDERAL STATUTES THAT GOVERN THE TAX COURT.

The decision below holds it constitutional for a court to employ initial factfinders at trial, but then to keep secret the findings those judges officially make. That position conflicts with this Court's decisions on the minimal due process requirements of proper adjudicative process and on the deference owed to initial finders of fact on matters of credibility. In addition, the Tax Court practice contradicts the plain language of congressional statutes enacted to ensure full transparency of Tax Court decisionmaking.

A. Kanter's Due Process Rights Were Violated.

Secret trial judge reports violate this Court's central precedents on the constitutional role of credibility judgments, factfinding, and appellate review in judicial and administra-

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[7] In the 5 years before *Freytag,* the Tax Court used special trial judges an average of at least 41 times per year in cases of the type at issue here. In the 10 years after, this increased to at least 75 times per year. The cases involved are financially the largest the Tax Court decides through the use of STJs. See 26 U.S.C. § 7443A(b)(4); Tax Ct. R. 183.

tive processes. See *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985); *United States v. Raddatz*, 447 U.S. 667, 677 (1980); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). The final decision of the Tax Court depends by law on an undisclosed trial judge's report that has legally operative effect under the "due regard" standard of Rule 183. Failure to include that report in the record violates a taxpayer's due process rights to a fair initial trial and proper appellate review. See *Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (applying due process to rights on appeal); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 n.5 (1982) (once access to courts is a legislative entitlement, government "may not deprive someone of that access unless the balance of state and private interests favors the government scheme"); *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 618 (1993) (due process requires "a[n] * * * adjudicat[ion]").

To prove fraud, the government was required to establish by clear and convincing evidence an intent of the taxpayer to defraud the government. App. 19a. Judgments of witness credibility are exceptionally important when fraudulent intent is at issue. Sixty witnesses testified at this lengthy trial; the trial judge directly questioned 40 of them. Particularly in such a context, as Judge Cudahy observed, "[t]he detailed interconnection of the credibility of different witnesses on different factual issues makes the accumulated impressions of the presiding officer irreplaceable." App. 93a. Indeed, Judge Cudahy concluded that the report the Tax Court keeps secret would be the single most important element in a proper review process by the appellate courts: "I can think of no single item of more significance in evaluating a Tax Court's decision on fraud than the unfiltered findings of the STJ who stood watch over the trial." *Id.*

The failure to include in the record these findings, the item of greatest significance to appellate review, constitutes an immediate and obvious violation of due process. A con-

stitutionally proper appeal must be based on a record that contains all the relevant information, including, in cases like this, the trial judge's findings of fact upon which the decision under review was required to be based and to which the reviewing court owes deference. Certain elements of a judicial process are so central to fair adjudication that their absence compromises fair process without the need for any further balancing of costs and benefits. A "neutral and detached judge in the first instance" is one. *Ward v. Village of Monroeville*, 409 U.S. 57, 62 (1972). The right to "some form of hearing" before the government infringes property rights is another. *Bd. of Regents v. Roth*, 408 U.S. 564, 570-571 n.8 (1972). The state's extinguishment of a cause of action without "the opportunity to present [the] case and have its merits fairly judged" is another. *Logan*, 455 U.S. at 433-434. When constitutionally protected property and liberty interests are at stake, as here, failure of the record on review to include those initial findings on which a lower court's final decision must, by law, depend is similarly a per se violation of due process. Otherwise, a reviewing court required to engage in "clearly erroneous" review cannot, as Judge Cudahy confessed, perform its adjudicative function. Taxpayers cannot be deprived of the right to adequate appellate review because, through no actions of their own, the Tax Court refuses to provide the full record of its decision to the appellate courts.

This common-sense conclusion is reinforced if one analyzes the question under the more formal due process framework of *Mathews v. Eldridge*, 424 U.S. 319 (1976), as Judge Cudahy did below. App. 83a-84a. *Mathews* requires the Court to weigh (1) the private interests at stake; (2) the effect on decisionmaking accuracy of the procedure at issue; and (3) the public interests implicated. *Mathews*, 424 U.S. at 335. Parts (1) and (3) are straightforward here. The private interests in a civil tax fraud trial for massive liability are substantial; only a criminal trial would involve weightier private interests. Conversely, the public costs of requiring the Tax

Court to disclose to the appellate courts the Rule 183 report are obviously minimal. This report must already be prepared and filed with the Tax Court; for years, the Tax Court routinely disclosed the report.

The effect of disclosure on enhancing decisionmaking accuracy is self-evident. Indeed, the importance of disclosure of the findings of the judge who held the trial, heard the witnesses, and was required by law to make findings of fact is emphasized repeatedly in this Court's decisions on the legal role of factfinding and credibility judgments, as well as by long-established judicial practice. See, *e.g.*, *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994); cf. *Burnham v. Superior Court*, 495 U.S. 604, 609 (1990) (plurality opinion of Scalia, J., joined by Rehnquist, C.J., and Kennedy and White, JJ) ("due process 'mean[s] a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights'") (quoting *Pennoyer v. Neff*, 95 U.S. 714, 733 (1878)).

Disclosure of the findings of a trial judge, hearing officer, or analogous initial factfinder is indeed such a fundamental premise of proper judicial (and even administrative) process that petitioner has been unable to find *any* area in modern federal law where such disclosure is not routine. Nor has the government identified any area where secrecy of this kind is accepted. Just as the Tax Court can assign special trial judges to try cases, the district courts can employ magistrates as adjunct factfinders. Congress has required that the report of a magistrate judge be served on the parties and be part of the record. 28 U.S.C. § 636(b)(1)(C). That is so even though the district court has greater authority on review than does the Tax Court. A district court can make de novo findings when objection is taken to magistrate findings. 28 U.S.C. § 636(b)(1). Similarly, a bankruptcy judge's initial findings of fact are part of the record and cannot be set aside in the district court unless clearly erroneous; the district

court, like the Tax Court, must also give "due regard" to the opportunity of the bankruptcy court to judge the credibility of the witnesses." Fed. R. Bankr. P. 8013. The reports of Special Masters must be filed with the clerk of the court and the parties notified of these reports. Fed. R. Civ. P. 53(e)(1).

Though administrative agencies are typically held to lesser standards of formal process than courts, such as the Tax Court, even federal agencies are required always to disclose original findings of fact. The Administrative Procedure Act (APA) requires that the record on review include any preliminary findings from a hearing officer or administrative law judge, regardless whether the agency has de novo power over facts. 5 U.S.C. §§ 557(b), 706. The framers of the APA considered this a critical requirement of properly structured decisionmaking, particularly "on matters which the hearing commissioner, having heard the evidence and seen the witnesses, is best qualified to decide * * *."[8] With respect to state administrative agencies, state courts have regularly held non-disclosure of a hearing officer's report to violate due process; as the leading case put it, without disclosure review "is like a performance of *Hamlet* without the Prince of Denmark." *Mazza v. Cavicchia,* 105 A.2d 545, 560 (N.J. 1954).[9] Judge Cudahy noted below that, "[w]hen a reviewing court reviews agency findings on credibility for substantial evidence, it is strongly influenced by the preliminary findings of

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[8] REPORT OF THE COMMITTEE ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES 51 (1941).

[9] *Mazza* was written by Arthur T. Vanderbilt, Chief Justice of the New Jersey Supreme Court. See BERNARD SCHWARTZ, ADMINISTRATIVE LAW 437 n.13 & n.14 (3d ed. 1991) (collecting cases following *Mazza* and state legislative provisions incorporating *Mazza*'s ruling). There a licensing board refused to disclose to the parties its hearing officer's report with proposed findings and conclusions. The court held due process violated, a holding endorsed by Professor Louis Jaffe. *See* Louis L. Jaffe, *Administrative Law Treatise*, 73 HARV. L. REV. 1638, 1640 n.4 (1960) (book review).

the ALJ who actually heard the witnesses — influence that becomes even more significant when an agency has reversed those preliminary credibility findings." App. 91a. Even for routine agency decisions, in which constitutionally-protected liberty and property interests are not at stake — and even when an agency has de novo factfinding power — Congress has concluded that accurate process requires the record to include initial findings of administrative officers and judges.

The facts in dispute here are not routine matters of historical or documentary record. They involve judgments of intent and credibility. This case highlights how essential the trial judge's original findings are to appellate review when credibility is at stake. The Fifth Circuit, in an opinion by Judge Higginbotham, has already held clearly erroneous the Tax Court's fraud judgment in this very case with respect to one of the purported "co-conspirators." *Estate of Lisle v. Comm'r*, 341 F.3d 364 (5th Cir. 2003). The Seventh Circuit likewise overturned as clearly erroneous one of the Tax Court's findings of fraud with respect to Kanter. App. 69a. In upholding the Tax Court's other findings, the Seventh Circuit *at least eight times* gave central importance to the Tax Court's purported judgments regarding Kanter's credibility or his "intent." Indeed, the divided panel held that "the lack of credibility of Kanter's testimony," which the Tax Court purportedly found, was a central justification for upholding the judgment of fraud. App. 18a. Yet the actual trial judge found that Kanter was in fact credible and had no intent to defraud.

Of all the findings that trial judges may make, this Court has recognized that special constitutional considerations apply when credibility judgments are at issue. *United States v. Raddatz*, 447 U.S. 667 (1980), involved suppression-hearings in which a magistrate had conducted the hearing and made credibility judgments. In that context, this Court suggested, and the lower courts consistently have concluded, that due process is violated if a district court overturns a magistrate's

findings on credibility without the district court itself hearing the witnesses. *Id.* at 681 n.7; see, *e.g.*, *Hill v. Beyer*, 62 F.3d 474, 482 (3d Cir. 1995); *In re Hipp, Inc.,* 895 F.2d 1503, 1519-1521 (5th Cir. 1990). Petitioner does not argue that the Tax Court should similarly be required to hear witnesses. But the constitutional interests at stake in a tax-fraud proceeding are sufficiently weighty that due process must, at a minimum, require that the record accurately reflect that the Tax Court has overturned findings of fact and credibility judgments of its trial judges.

In numerous other contexts, both judicial and administrative, this Court has also stressed the connection between accurate decisionmaking and deference to the credibility judgments of initial factfinders. See, *e.g.*, *Bessemer City*, 470 U.S. at 575 ("When findings are based on determinations regarding the credibility of witnesses, [the clearly erroneous standard] demands even greater deference to the trial court's findings * * *."); *Universal Camera Corp*., 340 U.S. at 496 ("[E]vidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion. * * * The significance of [the presiding judge's or examiner's] report, of course, depends largely on the importance of credibility in the particular case."); *Concrete Pipe*, 508 U.S. at 623 ("the factfinder is in a better position to make judgments about the reliability of some forms of evidence than a reviewing body acting solely on the basis of a written record of that evidence. Evaluation of the credibility of a live witness is the most obvious example."). This Court's consistent emphasis on the special significance of credibility judgments highlights the constitutional infirmity in the Tax Court's practice of keeping the trial judge's report secret. Only with that report can the reviewing court assess any conflicts between the trial judge

and the reviewing Tax Court judge on credibility, where only the former has actually heard the witnesses.

In its related filing in the *Ballard* litigation, the government misconstrues the constitutional arguments in this case in three respects. First, citing *Morgan v. United States*, 298 U.S. 468 (1936), the government argues that the Tax Court need not personally observe the witnesses before making findings of fact contrary to those of the trial judge. But petitioner does not claim to the contrary. Petitioner's argument is that when, as here, the Tax Court's own rules *require* it to base its final decision, in part, on the trial judge's original findings, and to presume those findings correct, due process must then require that those findings *be part of the record* on review.

Second, the government argues that "there is nothing unusual about judges conferring with one another about cases assigned to them." Again, this is not what petitioners object to. But the Tax Court's own rules, like that of most judicial systems, differentiate between the role of initial factfinder and reviewing judge. Those rules require the trial judge to file a report of factual findings. The reviewing judge is to review that report. To be sure, the reviewing judge can modify those findings. If the reviewing judge is troubled about specific findings, he can direct the filing of additional briefs, receive further evidence, order oral argument, or recommit the report with instructions. Tax Ct. R. 183(c). But he is legally obligated to treat the trial judge findings as "presumed correct" and to give them "due regard," particularly on credibility. The record must therefore reflect any modification or rejection of these initial findings, if the appellate courts are to be able to determine whether the Tax Court has complied with its legal obligations. Discussion among Tax Court judges concerning pending cases is not the issue. The issue is the failure of the record to reflect whether the Tax Court has modified or reversed its trial judges' findings and, if so, on what basis.

Finally, the government notes that when a case has been tried by one judge of the Tax Court and is then reviewed by the full Tax Court, Congress has specified that the original decision shall not be part of the record. But in that context, the original decision has no legal effect at all on the final decision. By contrast, here the Tax Court's own rules accord the STJ report a specific legal role in the final decision. If the Tax Court must give that report deferential review when rendering a final decision, the court of appeals must have access to the report to properly perform its function and the parties must have access to protect their rights.

B. The Tax Court's Practice Violates Federal Statutes.

Section 7461(a) of the Revenue Code requires that "all reports of the Tax Court and all evidence received by the Tax Court * * * shall be public records." 26 U.S.C. § 7461(a). The STJ's Rule 183 report is such a report, as the plain language of Rule 183 itself recognizes. See Tax Ct. R. 183(b) (requiring filing of the "Special Trial Judge's Report"). Section 7461 permits the Tax Court to exempt from disclosure trade secrets or other confidential information. 26 U.S.C. § 7461(b). But the statute makes no similar exception for STJ reports. The Tax Court's regular practice of secret STJ reports thus violates the plain language of § 7461 and creates an additional exception where Congress chose to provide none. Similarly, § 7459(b) requires that "[t]he Tax Court shall report in writing *all* its findings of fact, opinions, and memorandum opinions." 26 U.S.C. § 7459(b) (emphasis added). Non-disclosure of the trial judge's original report violates this statute as well.

The history of § 7461 makes clear that Congress' strong textual insistence on full disclosure was no casual commitment. The entire motivation for this provision was to eliminate precisely the type of secrecy at issue here. Similar secrecy had been the hallmark of the Treasury Department's

adminstration of the tax law before prior versions of § 7461 were enacted. Congress acted specifically to transform the adjudication of tax disputes so that the government's decisionmaking would be transparent and accountable.

The publicity requirement in current § 7461 originated in the Revenue Act of 1924, which established the Board of Tax Appeals (the "Board"), predecessor to the Tax Court. Since then, the statute's requirement that all hearings and reports by the Board are public records has been largely unchanged. The original bill reported by the Senate Committee on Finance did not contain any publicity requirement. That absence provoked the dissenting minority on the committee, through Senator Jones, to demand an amendment:

> Controversies between the Government and the taxpayers extending into many thousands and involving revenue of many hundreds of million of dollars are required to be annually adjudicated. * * * Under the present practice all of these adjudications are made in secret. An opportunity is afforded for favoritism, arbitrary action, fraud, and collusion. * * * The majority proposes that all records and proceedings of the Internal Revenue Bureau shall remain secret as in the past. To the minority it seems inconceivable that any controversy existing between the Government and a taxpayer should be adjudicated and finally determined in a star chamber proceeding. The minority will, therefore, propose an amendment to the bill which will provide that *all such proceedings, records, and evidence in connection therewith shall be public.*

S. REP. NO. 68-398, pt. 2, at 12 (1924) (emphasis added). The amendment adopted contained the publicity requirement in essentially the same terms as in § 7461. The single purpose behind that amendment, as stated by Senator Jones, was to ensure that adjudication of tax disputes, in all phases, be made fully open to public and taxpayer scrutiny. This history

makes no distinctions among the kinds of hearings, proceedings, or records required to be open. Recognizing the special sensitivity of tax proceedings, Congress expressly required transparency for "*all* such proceedings, records, and evidence." *Id.* (emphasis added). The publicity requirement was designed to include not just the final determinations of the Board, but also all "records * * * in connection therewith." *Id.*

The congressional debates reiterated the aim of wholly eliminating secrecy in tax proceedings. "[T]he publicity placed upon [the Board's] activities are the result of the vicious secrecy system which has grown up in the Treasury Department under the present law." 65 CONG. REC. 9549 (1924) (statement of Rep. LaGuardia). The statute was designed to enhance the judicial character of tax proceedings, precisely to avoid the problems associated with secret executive decisionmaking in revenue disputes. See, *e.g.*, 65 CONG. REC. 7690 (1924) (statement of Sen. Reed). This was the congressional view long before Congress transformed the Tax Court into a formal Article I court in 1969.

There is no doubt that, were the Tax Court today an administrative agency, the report of the STJ would be both required to part of the record under the APA and to be disclosed under FOIA.[10] It would be perverse to conclude that, by creating the Tax Court as an Article I court, Congress permitted the Tax Court to refuse to disclose trial judge findings of fact that any agency would routinely be required to disclose — especially when Congress has long legislated to require more transparency of tax proceedings than other administrative proceedings. That national policy was further enhanced by the enactment in 1988 of the Taxpayer Bill of Rights. See Omnibus Taxpayer Bill of Rights, Pub. L. No.

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[10] See *Dep't of Justice v. Tax Analysts,* 492 U.S. 136, 147 (1989); see also *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 157 (1980).

100-647, §§ 6226-35, 102 Stat. 3342, 3731 (1988). The purpose of this Act was to "ensure that we maintain basic due process rights [in tax disputes], which have eroded slowly but surely over these past two and one-half-decades." 134 CONG. REC. S4134-07 (April 15, 1988) (statement of Sen. Pryor).

That the Tax Court *is* an Article I court, not an administrative agency, is further reason for this Court to make clear that the Tax Court's regular practice of secret findings flaunts traditional, deeply established legal principle. American law has long recognized a common-law right of access to judicial records and documents. See, *e.g.*, *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978). This right creates a strong presumption in favor of disclosure of all such records, a principle justified in light of "the citizen's desire to keep a watchful eye on the workings of public agencies." *Id.* at 598. Lower-courts also emphasize the common-law right of access to judicial documents that shed light on the bases for judicial decisions. See, *e.g.*, *Brown & Williamson v. FTC*, 710 F.2d 1165, 1181 (6th Cir. 1983) (noting public interest "in ascertaining what evidence and records the District Court and this Court have relied upon in reaching our decisions"); *Joy v. North*, 692 F.2d 880, 894 (2d Cir. 1982) (requiring that "a report" used in rendering judgment be revealed: "[s]ince it is the basis for the adjudication, only the most compelling reasons can justify the total foreclosure of public and professional scrutiny."). The STJ's report is more significant than documents that "might" merely have affected a judicial decision. That report contains findings required by law to be "presumed correct." If the press has a common-law right to judicial documents in general, the litigants most directly affected by the fairness of the Tax Court's adjudicative process must have a common-law right to the legally binding STJ report.

Given the number and significance of cases affected, this Court should clarify that the congressional statutes that gov-

ern the Tax Court must be construed against this longstanding historical "presumption" in favor of public access to judicial records. See *Nixon,* 435 U.S. at 602. The scope of the authority Congress delegated to the Tax Court to adopt rules of procedure, 26 U.S.C. §§ 7443A(a), 7453, must be interpreted against Congress's foundational rule that "all reports" of the Tax Court are "public records."

In addition, Congress has assigned the courts of appeals the duty to review "decisions" of the Tax Court "in the same manner and to the same extent" as decisions of the district courts in non-jury civil actions. See 26 U.S.C. § 7482. That appellate function must entail review of the record as a whole. The government notes that only "decisions" of the Tax Court are reviewed and the STJ's report is not itself such a "decision." *Ballard* Op. at 12-13. But this misunderstands the appellate review statute. To fulfill its statutory obligation to review the "decision" of the Tax Court, the court of appeals must be able to evaluate the complete record, including the STJ report, which provides the basis for that decision.

As the dissent below concluded, the Tax Court is regularly violating due process. This is another compelling reason for this Court to clarify that the governing statutes must be construed to mandate disclosure of the trial judge's report. See *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

II. THIS CASE CREATES A CONFLICT AMONG THE COURTS OF APPEALS CONCERNING TAX COURT RULE 183(C).

The decision below rests squarely on a determination that Rule 183(c) does not require "any particular level of deference" on the part of the Tax Court to the findings and credibility judgments of the trial judge who presided over this five-week trial. App. 8a. That holding directly conflicts with the holding of the D.C. Circuit in *Stone v. Commissioner*, 865 F.2d 342 (D.C. Cir. 1989).

Stone decided the exact legal issue presented here: "the critical legal issue is the deference that the Tax Court owed the Special Trial Judge, to whom the matter was referred for fact-finding [on a certain date]." *Id.* at 344. *Stone* also addressed the exact same language at issue here, which at the relevant time was contained in Rule 182(d): "'Due regard shall be given to the circumstance that the commissioner [since re-named the special trial judge] had the opportunity to evaluate the credibility of witnesses; and the findings of fact recommended by the commissioner *shall be presumed to be correct*.'" *Id.* at 345 (quoting Tax Ct. R. 182(d), 60 T.C. 1150 (1973)) (emphasis in *Stone*).

Writing for the Court, Judge Williams relied on "the natural reading" of the Rule's text, the legislative history of the Rule, and the use of similar language in other areas of federal law. *Id.* at 347. *Stone* concluded that "the language of the Tax Court Rule applicable to this case (and still applicable under a different number) sought to establish the relatively high level of deference that the phrase 'clearly erroneous' entails." *Id.* at 344. Moreover, the D.C. Circuit expressly rejected the very argument put forward here, namely that the Rule requires no deference at all to the trial judge's findings or only a "mild presumption in favor." *Id.* *Stone* instead concluded that the terms "due regard" and "presumed correct" invoke "language with a reasonably well-established meaning." *Id.* at 347. The "natural reading" of the Rule imposes "[a] clearly erroneous standard" for Tax Court review of special trial judge findings of fact. *Id.*

Stone also involved precisely the same factual context as this case. In both cases, the Tax Court judges called no witnesses but nonetheless reversed its special trial judges, after lengthy and complex trials, on critical factual and credibility findings. *Stone* held the Tax Court decision to be clearly erroneous "in light of the deference that the Tax Court owed the Trial Judge." *Id.* at 344. Here the court of appeals *could not reach any conclusion about whether the Tax Court has*

been clearly erroneous in reversing its trial judge because the trial judge's findings are not part of the record.

The Seventh Circuit explicitly rejected the holding of *Stone*. The court below concluded that "to impose the * * * requirement that the Tax Court review an STJ's findings for clear error * * * would all but abdicate the Tax Court's original decisionmaking authority." App 8a. Thus, the Seventh Circuit held that the Rule (now renumbered as Rule 183) does not "prescribe any particular level of deference due the [Special Trial Judge's] report." *Id.* Yet in word-for-word identical terms, the plain language of current Rule 183 is exactly the same as that of its predecessor: "Due regard shall be given to the circumstance that the Special Trial Judge had the opportunity to evaluate the crediblity of witnesses, and the findings of fact recommended by the Special Trial Judge shall be presumed to be correct." Tax Ct. R. 183(c).

In *Freytag,* this Court deferred consideration of the meaning of Rule 183 while noting the significance of this Rule for the entire structure of Tax Court adjudication. 501 U.S. at 874 n.3. That uncertainty should now be resolved, given the conflict among the circuits. As noted commentators have observed, lower-court conflicts concerning administration of the tax laws warrant this Court's resolution even more than most conflicts, see, *e.g.*, HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 161-163 (1973), due to the unique "'spillover effects' [of such conflicts] that encourage costly strategic behavior by both the government and taxpayers." REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 264-265 (July 1, 1990) (Judge Richard A. Posner, Chairman).

The D.C. Circuit's interpretation, not that of the court below, is also correct. Unlike *Stone*, the court below made no reference to the history of the Rule's development, to the "well-established meaning" the legal terms "due regard" and "presumed correct" have in other contexts, or to the practices

of other courts which employ similar rules. Indeed, the court below did not even refer to the "natural reading" of the plain language of the Rule. The court below instead simply asserted that "we believe" Rule 183 does not adopt a "clearly erroneous" standard of review. App. 8a.

The government has acknowledged the direct conflict with *Stone*. In its filing in *Ballard,* the government takes direct issue with *Stone*, arguing that, "[c]ontrary to petitioner's contention, a regular judge of the Tax Court is not to limit his review of recommended findings of a special trial judge through application of a 'clearly erroneous' or other deferential standard of review." *Ballard* Opp. at 10-11. But the government seeks to avoid the claim of a circuit split by asserting that the 1983 procedural changes and renumbering of the Tax Court Rule — which did not change a single operative word in the substantive standard of review — nonetheless somehow dramatically changed that substantive standard. *Id*. at 11 n.2. But the 1983 rule change only addressed one issue of procedure: it eliminated (without explanation) the portion of the rule requiring publication of the STJ's Report. The plain language of the Rule *continues* to impose the exact same "due regard" and "presumed correct" constraints on Tax Court review.

The D.C. Circuit, accordingly, has rejected the argument the government makes here. *Stone* concluded that "[t]he Tax Court has since made minor changes in the rule and renumbered it as Rule 183(c), but the last sentence is unaltered." 865 F.2d at 345. Thus, the D.C. Circuit noted the 1983 procedural change regarding disclosure, but expressly concluded that such a change had no bearing on whether the Rule imposes a "clearly erroneous" standard of review. The D.C. Circuit has also continued to rely on *Stone* in recent cases long after the 1983 changes. See *Landry v. FDIC*, 204 F.3d 1125, 1133 (D.C. Cir. 2000).

Just as significantly, the tax bar for over a generation has, as a result of *Stone,* continued to understand Rule 183 to impose a "clearly erroneous" standard. "[T]here certainly appears to be some consensus in the literature that the Rule still embodies a clear error standard." App. 79a (citing sources). Thus, from the vantage point of the tax bar as well as the D.C. Circuit, there is a clear conflict between the "clearly erroneous" standard of *Stone* and the "no deference at all" standard of the court below. That conflict requires this Court's review.

III. THIS COURT'S SUPERVISORY POWERS SHOULD BE EXERCISED TO MAKE CLEAR THAT SECRET TRIAL JUDGE REPORTS VIOLATE ACCEPTED PROCESSES OF JUDICIAL DECISIONMAKING.

This case also urgently calls for an exercise of this Court's supervisory powers over the federal courts. That exercise is appropriate when the lower courts have "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court * * *." Sup. Ct. R. 10(a). "The authority which Congress has granted this Court to review judgments of the courts of appeals undoubtedly vests us not only with the authority to correct errors of substantive law, but to prescribe the method by which those courts go about deciding the cases before them." *Lehman Brothers v. Schein*, 416 U.S. 386, 393 (1974) (Rehnquist, J., concurring); see also 28 U.S.C. § 2106. These supervisory powers focus on "the need to protect the integrity of the federal courts," see, *e.g.*, *United States v. Payner*, 447 U.S. 727, 736 n.8 (1980), and to secure "the public reputation of judicial proceedings." *Nguyen v. United States*, 123 S. Ct. 2130, 2139 n.17 (2003).

Nguyen addressed congressional statutes embodying a "weighty congressional policy" concerning "the proper administration of judicial business." The Court employed its

supervisory powers to invalidate the judicial practice at issue even without a showing of individual prejudice to the specific defendant. That approach should apply a fortiori to judicial proceedings in which the trial judge's findings of fact are kept secret to the actual prejudice of the ability of the courts of appeals to render a proper judicial decision.

The lower court's endorsement of secret Tax Court trial judge reports so far departs from the "accepted and usual" course of judicial proceedings — indeed, from the proceedings of every other court — as to warrant exercise of this Court's supervisory power. It works a violation of both due process and congressional statutes requiring publicity of all Tax Court proceedings and reports. Those statutes reflect a "weighty policy" concerning the "proper administration of judicial business" that should be enforced, if necessary, through this Court's supervisory powers.

Reversal of the decision below would promote the development of the law in a large category of cases involving some of the Tax Court's most significant proceedings. This Court should make clear that appellate review that lacks access to the findings of fact "presumed to be correct" of the trial judge unacceptably "departs from the accepted and usual course of judicial proceedings" and cannot be permitted.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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