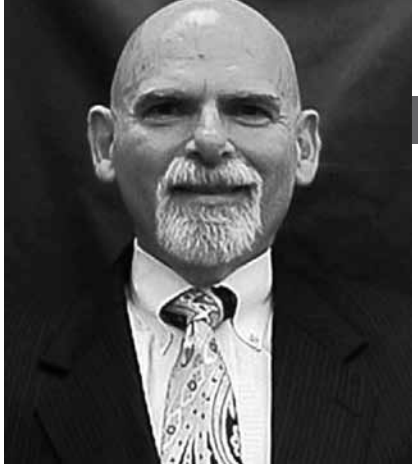

INTERVIEW

Robert R. Di Trolio

By Jasper L. Cummings, Jr.*

Robert Di Trolio is Clerk of the United States Tax Court. He was appointed Clerk in 2005.

Q You are an attorney with a degree in public administration and a background in federal district and bankruptcy court management prior to coming to the Tax Court. How does the Tax Court compare with the federal district courts and the bankruptcy courts in terms of workload, methods of handling cases, and other similarities or differences you find important?

A First, there are the gross differences having to do with structure and operational governance. The district, bankruptcy, appeals, and supreme courts constitute our judicial branch of government, a national system that includes 94 district and bankruptcy courts organized in 13 circuits. The size of that branch, with the hundreds of Article III judges and thousands of judiciary staff, logically requires a large administrative structure to create policy, make and enforce uniform procedure, and generally coordinate budget formulation and administration. For these purposes, the Judicial Conference of the United States exists to establish system-wide policies and procedure, and the Administrative Office of the Courts, since 1939, has been the central administrative office through which budgets are formulated and resources flow to the districts and circuits.

In contrast, the Tax Court, an Article I court, is a single court with a national venue. It does not come under a supervising administrative body. A Conference of Tax Court Judges, which, by law, is comprised of 19 judges, when there are no vacancies, sets the court's governing policies. The Conference is, of course, guided by applicable law and other governmental regulations, specific instructions included in the court's annual appropriation, by the size or constraint of our budget, and anything else Congress may require of us. The court follows some of the guidelines that the Judicial Conference of the United States, through the Administrative Office, promulgates. For example, because we do not fall within the executive branch, we are not subject to the executive branch's federal acquisition regulations. We have, instead, elected to be guided by the Judiciary's procurement guidelines. As you can see, structure is a primary difference.

In terms of operational differences, the Tax Court, a trial court specifically created to adjudicate civil cases exclusively having to do with tax law, does not conduct jury trials, nor are we subject to other requirements that apply to criminal cases. There are also differences in how cases are assigned to a judge and in the method by which the Tax Court and district courts determine a chief judge. Concerning the elevation to chief judge, in the Article III courts, by statute, the most active senior judge in a district or circuit court who has not previously served as chief judge and has not attained the age of 65 becomes chief judge for a term limit of seven years. Also by statute, at least every two years the Tax Court's judges elect from among their peers who are in active status a judge to serve as chief judge. There is no statutory limit on the number of terms a judge can hold the position of chief judge. The term of our most recent chief judge, Chief Judge John Colvin, ended on May 31, 2012, after three consecutive terms, or a total of six years, as chief judge. The Court Conference, in February 2012, elected Judge Michael Thornton to succeed Judge Colvin beginning on June 1.

Concerning a comparison of the business between these courts, a district judge has jurisdiction within the border of the district to which he or she is appointed; as mentioned there are 94 districts. The Tax Court is a national court and by statute can sit any place within the United States to conduct its business. It is the Chief Judge's responsibility to establish places of holding trial sessions with a view to providing a reasonable opportunity to taxpayers to appear before the court with as little inconvenience and expense as practicable. Consequently, there are currently 74 cities across the country where we hold trials, and our judges travel to every one of the 74 cities at least once a year.

Every district and bankruptcy case is very judge-specific. That is, every case filed is specifically assigned to a judge from the time of filing for case management and to handle all proceedings. So an attorney knows upon bringing a case to a district or bankruptcy court and filing it with the clerk, which of that court's judges will handle the case to disposition. All cases filed in the Tax Court are first assigned to the court's general docket, and it is not known at that point who the trial judge will be. We will not know the assigned judge until after the case is at issue, is put on the trial eligibility list to be set for a trial session, and the Chief Judge assigns the session to a judge.

Three times a year—winter, spring and fall terms—I put together a session trial calendar for the Chief Judge's consideration. A session trial calendar is

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literally a calendar displaying which of the 74 trial cities a one- or two-week session will be scheduled during that term of court. Once the Chief Judge has finalized the trial session configuration, he or she assigns each trial session, identified by trial city, to a judge. With the assignment of a session the judge takes on a whole trial calendar of cases, rather than individual case assignments. By the way, a one week trial session may include up to 100 regular or 125 small tax cases. The trial judge for each session is generally known once the term session calendar is publicly released, approximately five to six months ahead of the start of a session. The assigned judge prepares a pretrial order which my office sends to the affected parties along with a trial notice specifying time and place.

Q Six months after you became Clerk, the Tax Court announced its pilot program for electronic filing. Four years later electronic filing was adopted generally. How did the pilot program come about; what was the court's experience with the pilot program; were you surprised at the interest of the bar in the pilot and the proposal; and how has permanent electronic filing worked out?

A Electronic filing is now ubiquitous in state and federal courts throughout the country and its evolution is an interesting subject. The Tax Court's interest in adopting electronic filing predated my coming here as Clerk of the Court. It was, in fact, one of the priorities identified to me by the court upon my appointment seven years ago. Going back in history a little bit, the Tax Court and the Article III courts started using automated case management at approximately the same time in the mid-1980s. Parenthetically, the Tax Court's impetus for jumping into an automated case management system was a sudden spike in filings which resulted in the court's receiving 48,000 filings in 1986 and ending that year with 83,686 pending cases. The district and bankruptcy courts used what they called the Integrated Case Management System (ICMS). This court's automated case management system then and now is called Blackstone. These automated docketing systems worked fine to a point. Coincidently, state courts early took the lead on electronic filing, especially in paper intensive jurisdictions like traffic courts. Such courts needed a better way to quickly record the voluminous information they were gathering locally and reporting to their state administrative offices to be used, in aggregate, in support of receiving additional resources. Filing statistics then and now translate into budget dollars. Large state jurisdictions began to find ways to gather that data electronically. If I recall correctly, New Mexico was an early leader in electronic filing development.

I also recall attending in the late 1990s a National Center for State Courts-sponsored Court Technology Conference, an international conference the National Center holds bi-annually which is dedicated to court technology needs. The theme of that particular conference focused entirely on electronic filing, which created quite a buzz among the technical and court management people in attendance. The Conference's keynote speaker was, I believe, a professor whose job it was to run the supercomputer center at MIT. His talk explored the parameters of this concept of electronic filing. What struck me in his speech was the question he asked: "Just because we technically can, should we?" To place it in a context, he said, "Well think about this: I have to travel a toll road every day to get from my home to my office at MIT. The toll attendant punches my pass ticket when I get on the toll road and it is collected by another attendant when I exit the toll road. The ticket tells the fee collector how far I have traveled and how much to charge based on that distance. The data on that ticket also, however, enables anyone interested to track how much time it took me to get from point of entry to point of exit. Obviously, computers can calculate both time and distance pretty rapidly. Consequently, the toll operators and traffic police could give me a speeding ticket every day, just by quickly calculating how fast I drove from the point of entering the toll road to the point of exit. Just because we can collect that information, should we?" The larger question he was asking is how should we use the vast quantities of data our courts are quickly and easily able to gather? And, given the public's right to know, just how much unfettered access should they be afforded? He was saying this to state and federal court administrators who, again, were looking at means of electronically collecting all manner of case data and storing it in databases to make it accessible worldwide through the internet and private computer networks, the growth of which was exploding exponentially at that time.

I have to confess that at that time the pendulum had pretty much swung all the way to the side saying why don't we make all we collect publicly electronically available? After all, we are courts of record and the information we capture is public information. So, unless a judge specifically seals case information, it should be available to anyone capable of gaining access. Then, as a clerk of a district court, I was told that for me not to provide the public unfettered and unlimited access to the court's database was to frustrate the public's right to know and to make our public records effectively obscured to anyone unable or unwilling to travel to my office to review a file.

But is the intent of that argument to suggest "the public" has a right to know everything in every case file? Some of the early efiling state and federal courts concluded it was their obligation to make everything available. Public access in the federal judiciary is provided through their PACER system, PACER being an acronym for Public Access to Court Electronic Records. So, all of the case data collected in the district and bankruptcy courts were initially put online through PACER, and the public was enabled to gain access to this

national database by signing up for subscription access. As time progressed, identity theft, data mining, the ability of an incarcerated federal prisoner to learn via an online probation report who snitched, and other negative effects of unbridled public access gave pause and cause to reconsider reasonable limits on the public's right to know. The question then became how much information is the right amount of public information? In other words, do the courts have any responsibility to protect certain "personal" data typically found in a case file? More judges and court administrators began to conclude there ought to be reasonable limits, and the pendulum started swinging toward more moderated access, recognizing the need for some strictures on what should be allowed to be publicly accessed. We began seeing policies come out of the Judicial Conference of the United States requiring redaction of personal information, such as birthdates, Social Security information, names of minor children, etc., types of information about which most people hold a reasonable expectation of privacy and decidedly would not want to have internationally broadcast.

Given the nature of data typically found in our tax cases, I am personally very satisfied with the Tax Court's very deliberate process for determining the public access issue. The judges of this court were circumspect about what information should be accessible online. As they decided to develop an efiling program and to make the court's records internet accessible, they took their time to find the right balance between the public's right to know and their responsibility as a federal court of record. They have always been very mindful of the individual taxpayer's expectation of privacy with respect to certain personal data routinely filed in a tax case. It is said about the case file documents we make public in our Records Section that it would be a federal offense for an IRS employee to reveal some of the same information. In the Tax Court, once it is in the court's file, and unless it is sealed by a judge, it becomes a public record. Even today, anybody wanting to examine a complete Tax Court case file can come to the Clerk's Office here in Washington, DC, and request it of our Records Section. They will not be shielded from seeing any part of that record, provided the court hasn't sealed some aspect of it.

So as they designed an efiling system the court was very deliberative in determining where the fulcrum should be placed to balance competing interests. The Tax Court first started providing eAccess to its case information in 2008. Then, in 2009, the court progressed to eService by consent of the parties. In May of 2009, the court initiated an efiling pilot program, as many of the Tax Court bar were already experienced efiling in the district and bankruptcy courts and welcomed our initiative, especially practitioners on the West Coast, who expressed appreciation for the convenience and timeliness of being able to electronically deliver documents to the court. The court did not want them or anyone to be disadvantaged by physical distance from the courthouse and the inordinate time, because of a mail irradiation requirement, it sometimes takes for mailed documents to be delivered to the court.

Before any of these efiling progressions were undertaken, the implementation process required publication of a proposed policy or procedural change, and ample opportunity for the public to comment. It was only after the totality of this vetting process was completed that the Tax Court adopted its eProjects policies. The experience the court had with piloting efiling, and the fact that it was pretty widely and without much difficulty accepted by both the government and private bar, encouraged the court to adopt a mandatory efiling policy which became effective for petitions filed on or after July 1, 2010, for parties represented by counsel.

With a few exceptions, any filing submitted by a member of our bar after that date has to be electronically filed. Then, as now, all Tax Court petitions are still filed in paper form, mostly because of the requirement of an original signature on the petition and the fact that many petitioners are pro se and do not have a relationship with the court prior to filing a petition. Pro se petitioners can opt to file electronically after the petition has been filed by registering to efile through the court's web page at www.ustaxcourt.gov. All in all, efiling and electronic documents have proven to be a good thing, especially in terms of the enhanced ability to gain remote access to case documents. This is becoming an increasing benefit to efilers and an invaluable tool to a traveling court like this one.

Historically, efiling in the federal judiciary actually began in the middle of the 1990s, the impetus being the filing of 35,000 maritime asbestos cases in the Northern District of Ohio (Cleveland). These thousands of cases were being handled by five Cleveland law firms and the paper documents they filed in all 35,000 cases simply overwhelmed the court. It required the district court to convert the courthouse loading dock into a document processing center but still the docket clerks were not able to keep pace with the rate and magnitude of the filings. The frustrating part of it was that a document filed in one case was generally applicable to and to be filed in all or most of the cases. The court, in conjunction with the Administrative Office of the United States Courts and the Federal Judicial Center, determined to find a better way to manage this enormous task. In response to this need, the Administrative Office's IT people devised a rudimentary means for the five law firms to electronically file their documents with the court, and upon filing, a document was automatically docketed in all of the docket records to which the document related. As we now recognize, that evolved into an electronic filing program throughout the federal judiciary.

Q Did the heavy emphasis of the Tax Court rules on pretrial stipulations surprise you; does it work out in practice to make as much difference as it presumably was intended to make; and does it result in advantages for the Tax Court's administration in your experience?

A The court has in the last few years received about 30,000 filings a year. We know statistically that of all the cases calendared for trial, 97% will settle, that is, they will not go to trial. These statistics are really not much different than what one finds in a federal district court. Most civil cases settle as a result of being set for trial, for the simple reason that people do not generally begin to focus on their case until they have a trial notice in front of them saying "your case is going to trial and you really need to get ready." Just as settlement conferences are an important case management tool in the district courts, the judges of this court encourage the parties to get together, share information, and try to reach a settlement, to the extent such is attainable. Because the cases in the district courts are assigned individually to a judge from the point of filing, there is much more direct involvement by district judges to bring parties to the table either to personally work them to a settlement, or to delegate that responsibility to another judicial officer or court sanctioned mediator. Settlement conferences and mediation sessions are broadly and proactively used in the district courts, and although there is provision for alternative dispute resolution in the Tax Court's Rules, it has not been used as much here. However, the Tax Court's Rules also contemplate that parties will have informal conferences for the purpose of making good faith efforts to exchange facts, documents, and other information. One of the first questions a Tax Court judge asks the parties on calendar Monday of a trial week is have you had an opportunity to discuss settlement in this case. The prompt and fair disposition of cases is important in both courts and interests are similar in terms of discovery processes and settlement opportunities.

Q The Tax Court, like the Claims Court, is established under Article I rather than Article III. In fact the Tax Court is literally part of the legislative branch and not the executive branch. Having served in both Article I and Article III courts, what differences do you see that are caused by the distinction? I know you already mentioned some. Are there any other differences you notice specifically due to the Tax Court being an Article I court?

A Article III of the Constitution, in addition to outlining the framework of the federal judiciary, mandates life tenure for an Article III judge appointed to the position by the President with the advice and consent of the Senate. Tax Court judges are Article I judges who are also appointed to their position by the President, with the advice and consent of the Senate, but to fifteen year terms. Interestingly, Article III judges receive a hearing by the Senate Judiciary Committee, and Tax Court judges by the Senate Finance Committee. As Clerk of the Court, I see the differences from the perspective of a court administrator. First, I see it in the nature of the Tax Court's appropriation. The judicial branch's budget is aggregated by the Administrative Office of the Court. The Director of the AO and the Chair of the Judicial Conference's Budget Committee are the judiciary's advocates before the congressional appropriation committees. Clearly, their budgetary needs as a large and separate branch of government are exponentially larger than ours; something in the neighborhood of $6 billion annually. As previously mentioned, the Tax Court does not have a central office to formulate or advocate for its budget. We craft and submit our own appropriation request based on prevailing and projected needs.

Second, the federal judiciary's size, and the complexity of having to operate multiple units in each of its 94 districts and 13 circuits, requires varying levels of support. The judiciary has a great need to fund jurors, to support public defender offices, death penalty panels, and various other things their system pays for centrally. The bulk of the judiciary's funds are apportioned among the districts according to formulas which are filing and workload based and locally managed. In contrast, the Tax Court has a single program budget. The appropriations law applicable to the Tax Court funding says simply that the court is authorized $X million dollars for necessary expenses. It is a one program budget intended for and totally dedicated to the speedy and impartial adjudication of tax disputes.

Q Describe the Tax Court's workload and trends you see in the total number of cases and the types of cases.

A Out of a population of 313 million people in the United States, there are, including individuals and businesses, about 160 million taxpayers. It is perhaps surprising that out of that large taxpayer population only 30,000 petitions were filed each of the last three years.

The 30,000 cases filed last year are being handled by a relatively small court with a big national jurisdiction. The Tax Court is statutorily authorized 19 active judgeships (we currently have three vacancies). There are district and bankruptcy courts with more authorized judges—I am thinking of the district courts in the Central District of California, Los Angeles, and in the Southern District of New York, Manhattan, both with 28 authorized judges, and the bankruptcy court in Los Angeles with 21 authorized judges. When I left the Western District of Tennessee seven years ago, the bankruptcy court there, with only four judges, experienced 20,000 case filings that year. The nature of the cases and the type of court determine resources needed. While, seemingly, there are never enough judicial resources to deal with all pending cases in any court, our statistics show that over the past

three years this court's diligence enabled it to close more cases than filed, a demonstration of hard work and an effective use of all of the resources provided.

Q Tax Court judges hold court around the country. Do practitioners and taxpayers find this advantageous? What advantages and challenges does traveling pose for the Tax Court?

A Traveling today is anyone's challenge. But, as discussed, it is the business of this court to travel. The law says that the Tax Court shall be headquartered in Washington, DC, but should set the times and places of trial sessions to give taxpayers reasonable opportunity to appear before the court, with as little inconvenience and expense to the taxpayer as is practicable. It would not be possible for all petitioners, attorneys, and witnesses having business before this court to meet in Washington, DC. Consider the disadvantage to taxpayers on the West Coast and in Alaska and Hawaii if they were compelled to travel to DC for their day in court.

Periodically the court reviews the roster of cities in which we hold sessions to reevaluate if we continue to sit in the right places. The country, over time, changes demographically and we want to make sure to maintain that convenience to taxpayers the law requires. As a result of review, the number of trial cities has increased and decreased over the years.

About three years ago we acquired software that allowed us to plot on a map of the United States the zip code in the address of the residence, business, or corporate headquarters of all 30,000 petitioners who filed that year. When we overlaid a map plotting our trial cities with the cluster map depicting where petitions initiated, the study revealed that, for the most part, the court's selection of trial cities is still very much valid. The trial city list is reviewed periodically and remains an issue about which the court is attentive.

Q Many Tax Court petitions are pro se and many others are presumably filed by taxpayer representatives who are not experienced in the Tax Court. What advice would you give to the first time Tax Court practitioner?

A The best advice that I can offer is that they avail themselves of the educational materials the court offers. We maintain a "frequently asked questions" inventory of questions and answers on our web page. A streaming video is also available from our web page that walks a viewer through the whole process from the point at which a taxpayer is first contacted by the IRS to when the taxpayer's petition is heard in court. In response to the many questions we were receiving, and based on the experiences of our judges, we contracted for the professional development of a DVD which we make available to taxpayers upon their request, and all pro se petitioners are sent a postcard asking their interest in receiving a DVD to explain what this process is. Pro se cases are currently 68% of our caseload and it is in the court's interest to ensure pro se petitioners are as informed as possible about how the court works and what to expect and what is expected of them when they get to court.

We are also aided by the fact that there are a number of pro bono calendar programs and low income tax clinics to help unrepresented petitioners needing legal assistance before the court. The numbers of these legal clinics have grown from just a handful seven years ago to about 90 clinics today. Most are in or near our trial cities, and are a major assist to the court. We also acknowledge that many of the taxpayers who come to court in places like Los Angeles, various Texas cities, and elsewhere along the Border States do not speak English as a first language, so the court is increasingly securing the services of interpreters for its own assistance and for that of petitioners.

There are many things we have tried, are trying, and are projecting to try to assist taxpayers and the general public as they interact with the court. When you think about the number of people who actually have any kind of interaction with or exposure to any kind of federal court, be it a district, bankruptcy, tax, or claims court, it is really a relatively miniscule percentage of the general population and as a consequence, unfortunately, most Americans are poorly informed about the judicial operation of their government's business. It might not be until one receives a juror summons, or takes interest in following a notorious trial, or is a taxpayer seeking redress through the Tax Court, that one is exposed to the judicial system.

The Tax Court sees all types of petitioners in the courtroom, from a senior citizen in Dubuque who has never been in a courtroom in his life but has a $200 dispute with the government, to a high price K Street attorney representing a major corporate client with a $4 billion transfer pricing beef. A case could take as little as a few minutes or months to try, depending on the nature and complexity of the matter.

One really does not know until one walks into the courtroom the demographics of the petitioners at a calendar call. Irrespective of the dollars in dispute, it is important to us that all parties feel they have gotten a fair response from the court, that their day in court has provided an objective opportunity to be heard, and that they have been treated impartially, respectfully, and courteously. It is also important that the majesty of this court of law be protected, projected, and preserved by decorum and fealty to procedure and tradition, beginning with an impartial judge sitting on the bench. That petitioners walk away having had an opportunity to say their piece and having their day in court is a very important thing not only for the Tax Court, but for the system of justice generally in America. ■