No. 03-1034

In the Supreme Court of the United States

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

v.

COMMISSIONER OF INTERNAL REVENUE

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

The IRS's legal arguments all rest on a single, but obviously flawed premise: that the Rule 183 report of the trial judge cannot be disclosed because it is part of the internal "deliberative process" of the Tax Court. But this report communicates the recommended findings of fact from the trial judge following a formal trial in which constitutionally protected property and liberty interests are at stake. The Rule 183 report is the sole record of the unfiltered, independent findings of the only judge who has heard the witnesses; the report must be officially submitted to the Tax Court; and this report forms the foundation for all subsequent Tax Court review of the report's recommended findings. The Tax Court's own rules — consistent with the unique role of a trial judge in a formal adjudication — require that court to give special deference to the Rule 183 findings. Indeed, as Judge Cudahy concluded, there is "no single item of more significance in evaluating a Tax Court's decision on fraud than the unfiltered findings of the STJ." Pet. App. 93a. There is no conceivable basis on which such a report, which has such direct and substantial legal consequences, can be suppressed as a matter of internal "deliberative process."

The IRS obscures this central reality by attacking straw man arguments that petitioners have never raised — such as the argument that Tax Court personnel must be deposed or that their honesty may be impeached. Petitioners, of course, have never asked for anything of the sort. Petitioners simply argue that the Rule 183 report must be disclosed to the litigants and be part of the record to ensure legally proper appellate review. The Tax Court cannot frustrate the right to proper Article III judicial review that Congress has conferred in 26 U.S.C. 7482(a)(1). To a busy appellate court, dramatic conflicts between the independent and unfiltered findings of the trial judge and those of the reviewing Tax Court judge would immediately become the central focal point for appellate review. The Tax Court has made sure the appellate courts are never even aware of any such conflicts.

The IRS disputes none of the critical facts. Over $30,000,000 in tax liabilities are at issue here, most of which consists of quasi-criminal penalties for alleged fraud. Nor has the IRS denied the ruinous reputational consequences the finding of fraud had for a businessman such as Ballard or a tax attorney such as Kanter and the special need for procedural fairness that these consequences create. The IRS does not deny that it must establish fraud by clear and convincing evidence. Nor does it deny that an experienced trial judge originally found that there was no fraud. The IRS does not deny that the Tax Court completely rewrote the report of STJ Couvillion, overturning all his original, independent findings of credibility and reversing his conclusion that there was no underpayment of taxes and no evidence of fraud. Kanter Br. App. 6a. Nor has the Commissioner denied that the Tax Court concealed this situation from the reviewing courts by reciting that the STJ and Tax Court judge were in agreement, without revealing this remarkable *volte-face* or offering the slightest explanation for it. As the Dick affidavit testifies, three judges of the Tax Court came forward to report these facts, including Chief Special Trial Judge Panuthos, perhaps speaking on behalf of all the STJs, who serve at-will. Kanter Br. App. 6a. Even in this Court the IRS plays a game of cat and mouse by referring to the original STJ report as "abandoned" without "conceding" that the Rule 183 report contained findings and conclusions that overwhelmingly supported the taxpayers. Br. 15-16, 22-23.

The D.C. Circuit's decision in *Stone* illustrates the value the STJ report has for appellate courts discharging their Article III responsibilities. Based on credibility determinations in the STJ's original report, *Stone* found "clear error" in the Tax Court's decision to reject those determinations. *Stone* v. *Comm'r*, 865 F.2d at 347-352. It is no surprise that the Tax Court changed its rule in the midst of that litigation hoping to insulate from subsequent appellate review those decisions in which it reversed, as here, the STJ findings. Already in this case, another participant in the very same transactions has

been cleared of any charge of tax fraud in his recent appeal to the Fifth Circuit. *Lisle* v. *Comm'r*, 341 F.3d at 375-383. That the trial judge independently reached the same conclusion about all three taxpayers would surely be relevant to proper appellate review. Even if the Tax Court judge and the trial judge later "collaborated" on creating new credibility findings — if due process permits such a thing — the original, independent, and unfiltered findings of the trial judge would remain just as essential to proper appellate review.

As amicus business and public-interest groups seeking to ensure fair trials in the Tax Court agree, Judge Cudahy was correct in concluding that due process requires disclosure of the STJ's report. He was also correct in concluding that Congress's command in 26 U.S.C. 7461(a) that "all reports" of Tax Court judges (including STJs) be disclosed applies here and reinforces the requirements of due process.

1. The Commissioner's newly invented "two-report" rationalization flies in the face of the Tax Court's rule and contradicts its own prior decisions in this case.

In an effort to salvage the bizarre practice of preparing trial judge findings that are legally presumed correct, yet nonetheless kept secret, the Commissioner offers this Court (Br. 14-15, 22-23) a description of Tax Court procedure that cannot be squared with the plain language of the Tax Court's rules or with the Tax Court's own prior decisions in this case. The Commissioner now argues that the practice of the Tax Court is for the STJ to file *two* reports. In making this argument, the Commissioner is forced to fabricate an entirely new set of terms — none of them found in the relevant statutes or Tax Court rules. The Commissioner acknowledges that STJ Couvillion did officially file his Rule 183 report and he does not deny that the report found no fraudulent intent. But the Commissioner refuses to admit that this report is "*the* Special Trial Judge report" referred to in Rule 183(c) (emphasis added). Instead, the Commissioner argues that the report STJ Couvillion filed under Rule 183 is merely an "original re-

port." According to the Commissioner, STJ Couvillion filed a *second* report. The Commissioner sometimes calls this second report the "final report" of the STJ; other times, he calls it the "ultimate recommended findings" of the STJ; yet other times, he calls it the STJ's "final recommended disposition." Br. 14-23. In other words, the required Rule 183 report that STJ Couvillion filed is merely an "original report" which the STJ "subsequently abandoned."

This contrived terminology is designed to support the claim that the Rule 183 report is protected deliberative material. But not only does this "two-report" rationalization fail to do so, it reveals how unlawful the Tax Court's practice is. First, Rule 183 does not authorize or in any way contemplate the filing of two distinct STJ reports. By its plain language, Rule 183(b) requires that "the Special Trial Judge shall submit *a* report, including findings of fact and opinion" (emphasis added). Rule 183(c) authorizes the Tax Court judge to "adopt *the* Special Trial Judge's report" or to "modify it" or to "reject it in whole or in part" (emphasis added). The definite article "the" obviously requires the Tax Court judge to review *the* Report that must be filed under Rule 183. *Freytag* v. *Commissioner*, 501 U.S. at 902 (Scalia, J., concurring) ("The definite article 'the' obviously narrows the class"). The Rule refers to one report and one set of findings. The invented terms "original" and "final" reports or "ultimate recommended findings" appear nowhere in the Rule or statutes. The Tax Court might prefer a system of adjudication in which the trial judge issues two reports, one kept secret and the other jointly authored with the reviewing judge. But that is not the system created by law.

Second, Rule 183(c) requires that "the findings of fact recommended by the Special Trial Judge shall be presumed to be correct." This plainly refers to "the findings of fact" set forth in the Rule 183 report. Rule 183(c) also requires the Tax Court to give "due regard" to the fact "that the Special Trial Judge had the opportunity to evaluate the credibility of witnesses." These provisions reflect the fundamental divi-

sion of labor that characterizes American judicial practice: the trial judge makes findings of fact, and the reviewing judge — under the relevant standard — reviews those findings. But the Commissioner's theory makes this provision in the Tax Court's rules utterly incoherent. According to the Commissioner, the Tax Court is required to presume correct only the findings in the "final" report of the STJ, yet the findings in that "final STJ report" are ones the Tax Court judge and the STJ have jointly created. Obviously, the Tax Court judge cannot "presume correct" or defer to findings of fact which he himself has crafted. How can the Tax Court judge review his own findings? The Rule requires that the Tax Court judge presume correct and give "due regard" to findings *in some other document* the Tax Court judge himself has not created: that document is the Rule 183 report that the STJ is required to file and which reflects the STJ's independent recommended findings.

Third, the Commissioner's brief before this Court contains the first suggestion by anyone, anywhere that STJ Couvillion filed two reports. In his Order denying petitioners' motion for access to the STJ's report, Judge Dawson wrote:

> After a lengthy trial, * * * Special Trial Judge Couvillion submitted his report containing findings of fact and opinion pursuant to Rule 183(b), which ultimately became the Memorandum Findings of Fact and Opinion (T.C. Memo. 1999-407) filed on December 15, 1999. In accordance with Rule 183(c), the Chief Judge referred the cases to Judge Dawson for review and, if approved, for adoption. In reviewing the Special Trial Judge's report, Judge Dawson gave due regard to the fact that Special Trial Judge Couvillion evaluated the credibility of witnesses * * *. Pet. App. 108a.

Judge Dawson's order refers to only *one* STJ report, the one required to be filed and reviewed under Rule 183. Likewise, an Order issued by the Chief Judge informed the parties that Judge Couvillion had filed "a report, as required by Rule 183(b)" and that the case was then assigned to Judge Daw-

son. Pet. App. 113a-114a. The Chief Judge's Order refers to only one report of the STJ and makes clear that it is that report — not some "second" or "final" report — that Judge Dawson was to review. *Ibid.* The Commissioner's assertion that the STJ filed two reports, and that in seeking the STJ's Rule 183 report petitioners seek to invade the STJ's "deliberative process," is flatly inconsistent with the Tax Court's own orders. And if the STJ did in fact file two reports, then the Courts of Appeals were seriously deceived by the official orders of the Tax Court.

The Commissioner is forced into more and more indefensible positions as he struggles to bring his new "two-report" theory into line with the actual language of Rule 183. The Commissioner urges this Court "to invalidate the offending language in the rule" — that is, the "due regard" and "presumed to be correct" language in Rule 183. Br. 29 n.7. According to the Commissioner, if Rule 183 gives litigants the right to ensure that the recommended findings of the trial judge are properly given due regard and presumed correct, then this Court should simply "invalidate" the Rule's "offending language." But this remarkable argument cites no authority that would permit the Court simply to "invalidate" legally binding language in a validly promulgated rule. "So long as this regulation is extant it has the force of law." *United States* v. *Nixon*, 418 U.S. 683, 695 (1974). The Tax Court, like other entities in the judicial or executive branches, has discretion to decide whether to adopt certain rules. But once it adopts a rule, the Tax Court is legally obligated to comply with it. See *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 265-267 (1954); accord *Service* v. *Dulles*, 354 U.S. 363, 388 (1957); *Vitarelli* v. *Seaton*, 359 U.S. 535, 539-545 (1959).

Finally, the Commissioner intimates that Rule 183 should be construed as merely an internal procedural directive to "guide" Tax Court judges, rather than as an enforceable command that trial judge findings "shall be presumed to be correct." Br. 26-29. But Rule 183 governs the *substantive*

legal weight to be given to recommended findings of fact of the trial judge. The Rule uses the mandatory term "shall" twice. The Commissioner points to no instance in which rules governing the legal weight to be given to judicial findings are treated as mere internal guidelines. The D.C. Circuit in *Stone* reversed the Tax Court precisely because the Tax Court had not properly applied the presumption of correctness to an STJ's findings. As *Stone* recognized, Rule 183 creates legal rights rather than just providing internal guidance.

The Commissioner's "two-report" rationalization is, therefore, virtually a confession that the Tax Court has violated its own rules and has no basis for concealing the original report. Rule 183 requires the STJ to file a report and requires the Tax Court judge to give deference to the findings in *that* report. Rule 183 does not permit the Tax Court judge to ignore the findings in the Rule 183 report but "defer" to findings in a second report for which the Tax Court judge himself served as contributing author and editor-in-chief. The Commissioner has described an idiosyncratic system of adjudication (of doubtful constitutional validity) that the Tax Court might adopt. But one thing is certain: that system is not the one Rule 183 currently creates.

There is only one Rule 183 report. The critical statement by the only judge who heard the witnesses is that contained in the Rule 183 report submitted to the Chief Judge because that is where the STJ is required by law to state his findings and opinion and it is the findings in that document that have legally operative weight. The Rule 183 report, therefore, cannot possibly be an internal document protected by deliberative privilege. It is not a law clerk's bench memo, nor a draft, but an officially submitted report with a legally operative set of findings. This report was required to be disclosed and served on the parties for over 40 years prior to the 1984 amendment of Rule 183, which belies the claim that keeping the report secret is "vital to the proper functioning of the Tax Court." IRS Br. 40.

The Commissioner's entire argument hinges on the false premise that the Rule 183 report is protected as part of the internal "deliberative process" of the Tax Court. Once that argument is rejected, the Commissioner has almost nothing left to say to refute petitioners' demonstration that due process and federal statutes require the Rule 183 report to be part of the record to enable proper appellate review.

2. Suppression of the STJ report violates Due Process and the appellate review statute.

Due process requires that the original, independent and presumptively-correct findings of the trial judge be part of the record on review. Suppression of the Rule 183 report also frustrates the appellate review statute, 26 U.S.C. 7482, which requires that appellate review of Tax Court decisions be just as thorough as review of District Court decisions, where magistrate findings of fact are treated as essential to appellate review. See Lederman Amicus Br. 9-22.

Petitioners and many supporting amici have shown that in every federal judicial and administrative context other than the Tax Court, Congress and the federal judiciary have concluded that fair, accurate adjudication requires inclusion in the record of the recommended findings of the original trier of fact. That is true whether the original factfinder is a hearing officer, magistrate judge, administrative law judge, special master, or bankruptcy judge. The same principle must surely apply to a formal adjudication before a judicial tribunal of the United States in which constitutionally protected property and liberty interests are at stake and in which the trial judge is the only judicial officer who has heard the testimony of the witnesses. Similarly, disclosure is always required even when (as in the agency context) the original, recommended findings are not presumed correct and the ultimate decisionmaker exercises de novo review over the facts. Disclosure must surely be at least as central to fair, accurate adjudication when — as even the Commissioner and Tax Court concede here — the Tax Court is *required by law*

to give deference to the STJ findings under the "due regard" and "presumed correct" standards of Rule 183.

There are at least three reasons why federal judicial and administrative practice everywhere require disclosure of original findings. The Commissioner's brief ignores all these reasons. First, as Judge Cudahy concluded, an appellate court cannot properly undertake the statutorily required clearly-erroneous review of Tax Court decisions without the original findings of the STJ who presided at trial. To undertake clearly-erroneous review, *Anderson* v. *City of Bessemer City* requires that appellate courts give "even greater deference to the trial court's findings" (470 U.S. at 575) on credibility matters than to other findings to which clearly-erroneous review also applies. Judge Cudahy rightly concluded that if appellate courts must give exceptionally great deference on credibility to triers of fact, "we must inevitably give less deference to the judge who subsequently reverses those findings." Pet. App. 90a. But faced with Tax Court decisions that completely obscure authorship of the findings of fact, even on credibility, the courts of appeals have no idea whose findings they are reviewing. The Tax Court's decision *appears* to "adopt" the findings of the STJ. The Commissioner's brief now argues, however, that these findings are actually the product of joint "collaboration" by the Tax Court judge and the STJ. If the findings were authored by the Tax Court judge, in whole or in part, the court of appeals would commit legal error in giving them the "greater deference" *Anderson* requires for findings independently made by the trial judge. Yet, if the findings are exclusively those of the STJ who actually heard the witnesses, the court of appeals would commit legal error in *not* giving those credibility findings the "greater deference" *Anderson* requires. The Tax Court's practice makes it impossible for the court of appeals to know *who* has authored these findings and therefore how to apply the proper legal standard of review.

Second, as Justice Frankfurter famously observed in *Universal Camera*, reasoned decision making and common sense

require recognition "that evidence 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." 340 U.S. at 496. Accordingly, "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Id.* at 488. Conflicts between the STJ — who plays a far more substantial judicial role than a hearing examiner — and the Tax Court judge must be on the record for the court of appeals properly to determine whether the evidence supporting the Tax Court's conclusions meets the clearly erroneous standard. When the Tax Court expunges these conflicts from the record (even if the Tax Court judge secretly collaborates with the STJ on a new opinion in which the Tax Court "persuades" the STJ to change his mind), the appellate courts are precluded from an essential aspect of proper review. This is all the more apparent in Tax Court cases, in which factual issues are exceptionally complex and appellate courts are likely to affirm factual findings absent any indication of conflict below. In view of these concerns, federal appellate courts consistently have held that decisionmakers must overtly address findings of hearing officers and state sufficient reasons for overturning them (Kanter Br. 35-36 n.15) — not conceal the discrepancy.

Third, failure to disclose the STJ report prevents the appellate court from determining whether the Tax Court has properly followed the law. The Tax Court and petitioners agree that Rule 183 requires the Tax Court to give at least some deference to the STJ's findings in his Rule 183 report. The parties differ over precisely what level of deference is required, but that deference is legally owed is not disputed. Yet, it is literally impossible for the courts of appeals to determine whether the Tax Court has given the required deference to the Rule 183 findings if the record does not include those findings. Congress granted the right to full appellate review to ensure that, among other things, the Tax Court

complied with the law. Secret STJ reports obviously frustrate this congressional design. Congress's constitutional power to allocate the initial adjudication of "public rights cases," such as tax disputes, to non-Article III courts depends on the presence of later Article III court review of all questions of law decided in Article I tribunals. Ballard Br. 24-25; Kanter Br. 38 n.18. But the Article III courts cannot determine whether the Tax Court has complied with Rule 183 absent the STJ's Rule 183 report.

Moreover, the original credibility findings in a formal adjudication of a trial judge or other factfinder have a special constitutional status. As this Court suggested in *Raddatz*, 447 U.S. at 681 n.7 — and as lower courts have uniformly concluded — a district court would violate due process were it to reject a magistrate's proposed credibility findings in a suppression hearing without the district court itself hearing the key witnesses. A tax fraud proceeding in which the government seeks millions of dollars in penalties would inflict serious reputational injuries that implicate constitutionally protected property and liberty interests. See *McKesson*, 496 U.S. at 36-37; *Comm'r* v. *Shapiro*, 424 U.S. 614, 629-633 (1976); *Oberg*, 512 U.S. at 430-432. At a minimum, *Raddatz* and due process must require that the independent credibility findings of the trier of fact be included in the record so that any reversal of those findings by the Tax Court (or the Tax Court in collaboration with the STJ) can be adequately assessed by the appellate courts.

"As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis." *Oberg*, 512 U.S. at 430. Petitioners and amici have demonstrated that in every area of federal judicial and administrative practice, the long-established rule is that the initial, recommended findings of a hearing officer are a critical element of the decisional process that must be disclosed and made part of the record. Disclosure of a report that is already required to be prepared and officially filed would impose no burden on the government. Petitioners contend

that due process *always* requires that trial judge findings that carry *legally operative weight* be made part of the record. Under the balancing test of *Eldridge* as well, due process requires such disclosure.

None of this analysis changes even if the Tax Court rules and congressional statutes permit — as they do not — the Tax Court to change its procedures in the middle of a trial. Even if the Tax Court judge is somehow permitted under Rule 183 to collaborate and "influence" the STJ (IRS Br. 20) to jointly author a new, second opinion that completely repudiates the STJ's independent and original findings, due process would still require that the Rule 183 report be part of the record. Regardless of what else happens, the Rule 183 report includes findings that must be treated as presumptively correct and given due regard, and this report contains the only record of the original, independent findings of the one judge who has heard the witnesses.

The Commissioner ignores the distinct role of the trial judge or original finder of fact in an Article I or Article III court. The Tax Court judge and the trial judge are not akin to appellate judges "jointly hearing a case as a panel." IRS Br. 21. They are, as even the Commissioner concedes, a trial judge who tries the case and submits a required report with recommended findings of fact, and a Tax Court judge who must review that report and decide whether — under the relevant standard of review — to modify, adopt, or reject proposed findings. Whatever the scope of the Tax Court's power to modify recommended findings, it remains the case that the Tax Court judge has not heard a single witness. Any procedure in which the credibility judgments of a trial judge who has heard the witnesses could be "influence[d]" (IRS Br. 20) before being finalized by a judge who is to review those judgments but has not heard the witnesses would raise troubling constitutional issues under *Raddatz* and the basic due process right to be heard. Those issues are adequately addressed at this stage by requiring that the original, independ-

ent and presumptively-correct findings of the trial judge be part of the record the appellate courts review.

That the STJ who is hired and serves at the pleasure of the Tax Court has no structural protection in office — not even that of an ALJ or magistrate — must also be kept in mind. As Judge Cudahy noted, "the STJs are not equal to the Tax Court judges." Pet. App. 95a. See also Winwood, *The Reclusive Report: The Tax Court Denies Due Process by not Disclosing Special Trial Judge Reports*, 2004 Fed. Cts. L. Rev. 3, ¶ III.A.1 (noting that STJs "may be removed from service without restriction"). To take account of this structural dependence is not to cast doubt on the honesty or integrity of STJs or Tax Court judges. It is simply to acknowledge the reality that underlies Article III of the Constitution and that also has characterized this Court's separation-of-powers caselaw: the power of a superior to remove an officeholder includes the power to influence, in subtle as well as overt ways, the subordinate's decisionmaking. See, *e.g.*, *Bowsher* v. *Synar*, 478 U.S. 714, 725-731 (1986); *Morrison* v. *Olson*, 487 U.S. 654, 682-697 (1988). In the nearly 900 decisions since STJ reports became secret, there is not a single instance in which the Tax Court judge and the STJ have disagreed on the record. Pet. App. 74a.

As Justice Scalia noted in his *Morrison* dissent, the purpose of structural guarantees is, ultimately, "to preserve individual freedom." 487 U.S. at 727 (Scalia, J., dissenting). A taxpayer charged with tax fraud must have the right to see the presumptively correct findings of the only judge who tried the case — whether or not that trial judge has authority to "collaborate" with a superior in producing a dramatically altered, second set of findings. *Morgan*, 304 U.S. at 16-22. The taxpayer also has the right to know whether findings, such as those on credibility, have been altered, and if so, for what reason.

Against all this, the Commissioner points to only two situations in which the findings of a trial judge or initial hearing officer are not disclosed. But neither context is analo-

gous. In the rare instance in which the full Tax Court decides to engage in en banc review of the proposed opinion of a single Tax Court judge, that proposed opinion is, by statute, excluded from the record. See 26 U.S.C. 7460(b). Of course, Section 7460(b) shows that, when Congress prefers special rules for the use of certain Tax Court reports, it knows how to provide them. But in any event, this statutory provision is irrelevant here.

As the Tax Court itself has made clear, Section 7460(b) proceedings are reserved for broad legal issues that warrant full Tax Court consideration in exceptional circumstances. The en banc process is not designed to review findings of fact made by the judge who has presided at trial. Cases warranting full court review "are generally ones that (1) decide legal issues not previously considered by the Tax Court; (2) invalidate a Treasury regulation; (3) would conflict with existing Tax Court case law; (4) involve a legal issue not previously considered by the Tax Court, and, as written, would conflict with the decision of a Court of Appeals other than the one to which appeal would lie; or (5) involve an issue on which the Tax Court was previously reversed by a circuit other than the one to which appeal would lie." Leandra Lederman & Stephen W. Mazza, TAX CONTROVERSIES: PRACTICE AND PROCEDURE 247 (2000). The Chief Judge of the Tax Court has confirmed that Section 7460 review is limited to those circumstances. See App. A to the ABA REPORT OF TASK FORCE ON CIVIL TAX LITIGATION PROCESS (1989).

Just as importantly, Rule 183(c) *requires* the Tax Court to defer to the findings of the Special Trial Judge under the "presumed correct" and "due regard" standards. There is no similar legal requirement when the full Tax Court reviews a single Tax Court judge's opinion. Moreover, the original Tax Court judge (who, unlike an STJ, is legally a peer of the other Tax Court judges) sits with the full Tax Court in this en banc process and, unlike the Special Trial Judge, can issue a dissent. Congress did not design the Section 7460(b) en banc review process as a means through which the Tax Court

could reverse the trial judge's findings of fact. But should the Tax Court attempt to do so, the original Tax Court judge — unlike the STJ — can publish his or her original findings. See Kafka & Ackerman, *Fact-Finding in the Tax Court: Access to Special Trial Judge Reports*, 91 Tax Notes 639 (2001).

After searching far and wide for any other situation in which original trial judge findings are not disclosed, the IRS can only point to the process by which government contract disputes are resolved. Br. 31-32. Of course, the interests at stake in executive-branch contract-dispute resolution are hardly comparable to those involved in judicial proceedings before the Tax Court in which the government seeks millions of dollars in fraud penalties against individual citizens. Nor have contract disputes given rise to the sort of controversy between the government and citizens that has led Congress to demand exceptional transparency and accountability in the adjudication of tax disputes.

Even so, the bodies that decide such disputes have structural safeguards that preclude the kind of unfairness that occurred here. The presiding judge whose original decision is reviewed by a board of contract appeals is a peer not dependent for continued employment on the other judges; he is a full participant in issuance of the final decision and can file a dissent. In addition, boards of contract appeals have made clear that they stand ready to provide *any* material needed by the reviewing court of appeals. For example, Rule 137 of the board of contract appeals for the General Services Administration, codified at 48 C.F.R. 6101.37(a), states that "[w]hen a party has appealed a Board decision to the United States Court of Appeals for the Federal Circuit, the record on review shall consist of the decision sought to be reviewed, the record before the Board * * * *and such other material as may be required by the Court of Appeals"* (emphasis supplied).

3. Rule 183 requires clear error review within the Tax Court.

The Commissioner and the Tax Court have taken inconsistent and constantly shifting positions on the meaning of Rule 183. In this litigation, the Commissioner argued at the certiorari stage that the "due regard" and "presumed correct" standards in the Rule do not require the Tax Court to give any deference at all to the findings of the STJ. Cert. Opp. 15. But as the Commissioner now admits, the Tax Court itself stated at the time these terms were codified that they require the Tax Court to accord the STJ's findings "special weight insofar as those findings are determined by the opportunity to hear and observe the witnesses." IRS Br. 27.

In a thorough analysis of the well-established plain meaning of the terms "presumed correct" and "due regard," along with the history of the relevant rules, Judge Williams concluded in *Stone* that the "special weight" Rule 183 accords STJ findings permits the Tax Court to overturn those findings only when clearly erroneous. Kanter Br. 28-34. This Court in *Freytag* similarly observed that "deferential" review is required by the rule. 501 U.S. at 874 n.3. And this Court has equated presumptive correctness with clear error review. *Bose*, 466 U.S. at 500. See 1 Childress & Davis, STANDARDS OF REVIEW 28 n.12 (1986) ("Today in ordinary civil cases *presumptively correct* is presented as the flip-side to *clear error review* * * * and seems no different in practice or common meaning"). As Judge Williams explained, the Tax Court is not at liberty to abandon or rewrite this regulatory standard in the midst of a lawsuit to achieve an advantage in the appellate court. See *supra*, p. 6 (citing cases holding that regulations bind decisionmakers until amended or withdrawn). If the Tax Court disagreed with the D.C. Circuit's interpretation in *Stone*, the Tax Court could have amended Rule 183 to eliminate the "presumed correct" and "due regard" constraints. But the Tax Court has not changed these terms in the Rule in the 15 years since *Stone* was decided. Rule 183 thus continues to ameliorate the constitutional

problem addressed in *Raddatz* by respecting the unique capacity of the trial judge to engage in factfinding, particularly on matters of credibility, especially where, as Judge Cudahy noted, factfinding depends on assessing the interlocking testimony of over 60 witnesses who testified at a five-week trial. Combined with disclosure of the STJ report, the clear error standard assures a fair adjudication.

The Commissioner seeks to avoid this result by arguing that the Rule does not by its terms mandate service of the STJ report on the parties. As a result, the Commissioner asserts that the Rule does not require "any sort of appellate-style review." Br. 25. But this is another straw man. Petitioners do not argue that Rule 183 requires full appellate-style review. Petitioners argue only that the standard of review in the Rule requires that the Tax Court give "special weight" to the institutional position of the trial judge and overturn his recommended findings only if clearly erroneous. The Commissioner cites the Fifth Circuit's decision in *Freytag*, but there the complaint was that *too much deference* had been given to the STJ. Even the Fifth Circuit did not remotely suggest that no deference was due the STJ's findings. IRS Br. 27. The Commissioner does not propose any recognized legal standard to give operational content to the "special weight" obligation. As the D.C. Circuit rightly concluded, the proper standard is the familiar clearly-erroneous standard (which is little different than the substantial-evidence test). A less deferential standard would clash with the plain language of the Rule, the Tax Court's own pronouncements, and the due process concerns expressed in *Raddatz*.

4. Congress has made the STJ report a public record that may not be suppressed.

A specific disclosure provision in the Internal Revenue Code, 26 U.S.C. 7461(a) makes "all reports of the Tax Court" and "all evidence received by the Tax Court" public records. In twice using the word "all," Congress chose broad language, consistent with its objective of making tax pro-

ceedings fully transparent in every respect. The word "of" signifies simply that the report must originate from the Tax Court; it does not require that the report come from a particular judge within it. BLACK'S LAW DICTIONARY 1080 (1990). Whether the Rule 183 report submitted by the STJ is "adopted" by the Tax Court, "modified" by the Tax Court, or "rejected" by the Tax Court, it is still a report of the Tax Court. And as Judge Cudahy concluded, this statute should be construed to avoid serious constitutional problems. Pet. App. 96a. It should also be construed in harmony with Congress's purpose to ensure transparency and fairness at every stage of tax proceedings. See Kanter Br. 46-49.

Congress understood that conflicts over taxation were of exceptional political significance and that public confidence in the taxation system requires complete transparency of all tax proceedings. The history of these provisions reveals why Congress did not require disclosure only of final judgments, but of "all" evidence, "all reports," and "all" findings of fact in tax proceedings. See 26 U.S.C. 7459(b). The Tax Court must disclose the entire stenographer's report, all the documentary evidence, and "all" reports of its judges. As Senator Jones said in proposing this legislation: "whenever there is a controversy between the Government and a taxpayer * * *, the proceedings leading up to that decision should be public proceedings * * * so that we may understand the facts upon which decisions are reached." 65 CONG. REC. 8132-8134 (1924).

The Commissioner does not dispute that, if the STJ's report is not an internal deliberative document, it would have to be made available to the litigants and the public under the centuries-old common law presumption of access to judicial documents. But as demonstrated earlier, the Rule 183 report cannot be an internal deliberative document because, by law, its recommended findings are required to have legally operative weight in the Tax Court's decision. In enacting these disclosure statutes, Congress legislated against the backdrop of the familiar common-law right of access and paraphrased

that right and its justifications throughout the legislative debates. If a court considers a document in making its decision, the litigants and the public are entitled to review it.

This interpretation presents no anomalous consequences of the kind suggested (Br. 45) by the IRS. The Tax Court is free to print its STJ reports, as most tribunals do, but the language of 26 U.S.C. 7462 does not dictate the manner of disclosure. It leaves the Tax Court discretion in such matters. Of course, 26 U.S.C. 7459 requires that final decision be made "in accordance" with the report as adopted or modified by the Tax Court, not a rejected report of the STJ. But none of this suggests that the STJ report may be suppressed.

Avoidance of constitutional decisionmaking weighs in favor of a construction of this law that requires production of STJ reports. *DeBartolo*, 485 U.S. at 575. Congress has also given this Court rule-making power over all appeals arising from the Tax Court (26 U.S.C. 7482(c)(2)) and has required transparency in the clearest possible language. As Professor Lederman explains, the Tax Court's authority over its own proceedings does not include improperly truncating the record to be reviewed in the Courts of Appeals. Br. 19-22.

5. Disclosure of the STJ report is needed to guard against the risk of serious injustice in this case.

Judge Couvillion had ample reason to conclude that the IRS failed to prove underpayment of taxes or fraud in this case. Kanter Br. App. 6a; JA 16-22. Although the centerpiece of the IRS's case against petitioners was a claim that they received "kickbacks" (IRS Br. 4-5), each and every witness called by the government denied that kickbacks were paid or that improper "influence" was ever exercised. See, *e.g.*, JA 11-16. Although the IRS complained of a "complex network of corporations" used to "launder" these purported kickbacks (IRS Br. 5), the Tax Court since has made clear that "the Court did not hold" that these corporations were "a sham to be disregarded for tax purposes." *Investment Research Associates* v. *Comm'r*, No. 43966-85, Feb. 21, 2001 Order, at 1. The revenues at issue in this litigation were paid

to these same corporations and reported on their income tax returns, a fact never disputed by the IRS. Those revenues flowed from the investment of corporate funds and were not taxable individually to Kanter or Ballard.*

Two of the IRS revenue agents who examined this case accordingly concluded: "No intent to defraud was found per this agent and the prior agents' exam, discussions with involved parties and professional judgment." Tr. 3184-3186, 3194-3200, 3202-3209; Exs. 9056-9058 PBL. Judge Couvillion, after reviewing thousands of exhibits and hearing from over 60 witnesses, agreed with these IRS agents' assessment. Kanter Br. App. 6a. That conclusion was reached after four years of study of the record and is supported by the Fifth Circuit's finding that there was no clear and convincing evidence of fraud in the appeal of taxpayer Lisle. *Lisle* v. *Comm'r*, 341 F.3d 364. Judge Dawson overturned the findings set forth in the Rule 183 report without mentioning or acknowledging them. The result is that a tax practitioner and prominent businessman have been branded as fraudfeasors, exposed to a demand for $30 million (most of which consists of penalties for fraud), and stripped of professional and business opportunities they formerly enjoyed. The Rule 183 report is sorely needed by the appellate courts to do justice to these citizens.

CONCLUSION

The decisions of the Seventh and Eleventh Circuits should be reversed.

Respectfully submitted.

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* During the years in question, petitioner Ballard paid over $6 million in federal income taxes. Petitioner Kanter paid self-employment taxes but no income taxes because he suffered large investment losses.

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NOVEMBER 2004