544 U.S. 40, *; 125 S. Ct. 1270, **;
161 L. Ed. 2d 227, ***; 2005 U.S. LEXIS 2403

FOCUS - 1 of 11 DOCUMENTS

CLAUDE M. BALLARD, et ux., Petitioners v. COMMISSIONER OF INTERNAL REVENUE ESTATE OF BURTON W. KANTER, DECEASED, et al., Petitioners v. COMMISSIONER OF INTERNAL REVENUE

(No. 03-184), (No. 03-1034)

SUPREME COURT OF THE UNITED STATES

544 U.S. 40*; *125 S. Ct. 1270*; *161 L. Ed. 2d 227*; *2005 U.S. LEXIS 2403*; *73 U.S.L.W. 4194*; *95 A.F.T.R.2d (RIA) 1302*; *18 Fla. L. Weekly Fed. S 157

December 7, 2004, Argued
March 7, 2005, Decided *

* Together with No. 03-1034, Estate of Kanter, Deceased, et al. v. Commissioner of Internal Revenue, on certiorari to the United States Court of Appeals for the Seventh Circuit.

SUBSEQUENT HISTORY: On remand at, Remanded by, Request denied by *Estate of Kanter v. Comm'r, 406 F.3d 933, 2005 U.S. App. LEXIS 8064 (7th Cir., 2005)*

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT.
Ballard v. Comm'r, 321 F.3d 1037, 2003 U.S. App. LEXIS 2700 (11th Cir., 2003)
Estate of Kanter v. Comm'r, 337 F.3d 833, 2003 U.S. App. LEXIS 14785 (7th Cir., 2003)

DISPOSITION: Reversed and remanded.

DECISION:

[***227] United States Tax Court held not authorized to exclude, from record on appeal, reports--which included findings of fact and opinion--submitted to court by special trial judges pursuant to Tax Court Rule 183(b).

SUMMARY:

Under *26 USCS § 7443A*, (1) the United States Tax Court's Chief Judge appointed auxiliary officers known as special trial judges to hear certain cases; but (2) ultimate decision, when tax deficiencies exceeded $50,000, was reserved for the Tax Court. Tax Court *Rule 183*, which was enacted in 1983, and which governed the proceedings in which a special trial judge heard a case but the court rendered the final decision, provided (1) in *Rule 183(b)*, that after trial and submission of briefs, the special trial judge was required to submit a report, including findings of fact and opinion, to the Chief Judge, who would assign the case to a Tax Court judge; and (2) in *Rule 183(c)*, that the assigned Tax Court judge (a) was required to (i) give due regard to the circumstance that the special trial judge had had the opportunity to evaluate the credibility of the witnesses, and (ii) presume that the factfindings contained in the special trial judge's report were correct, and (b) could adopt, modify, or reject the report in whole or in part.

In *Rule 183*, the Tax Court had eliminated a predecessor rule's provision for service of copies of the special trial judge's report to the parties and had also eliminated the predecessor rule's procedure permitting the parties to file exceptions to the report. After *Rule 183* was enacted, the court started a practice under which (1) in all cases, the Tax Court judge issued a decision stating that the court agreed with and adopted the special trial judge's [***228] opinion; (2) the extent to which the Tax Court had modified or rejected the special trial judge's findings and opinion was undisclosed; and (3) unlike under the court's practice under the predecessor rule, the special trial judge's report was (a) withheld from the public, and (b) excluded from the appellate record.

Taxpayers in three federal judicial circuits who had received notices of deficiency from the Commissioner of Internal Revenue--charging the taxpayers with failure to report certain payments on their individual tax returns and with tax fraud--filed petitions for redetermination in the Tax Court. The Chief Judge assigned the consolidated case to a special trial judge who, after trial, submitted a *Rule 183(b)* report to the Chief Judge, who then issued an order assigning the case to a Tax Court judge for review of the report, and if approved, for adoption.

The Tax Court judge issued the Tax Court's decision, holding the taxpayers liable for underpaid taxes and

for fraud penalties. That decision, which included a document labeled "Opinion of the Special Trial Judge," stated "The Court agrees with and adopts the opinion of the Special Trial Judge, which is set forth below."

On appeals by two groups of the taxpayers, the United States Court of Appeals for the Seventh Circuit (*337 F.3d 833*) and the Court of Appeals for the Eleventh Circuit (*321 F.3d 1037*) (1) rejected the taxpayers' requests that the special trial judge's report be made available to the taxpayers or be placed under seal in the record on appeal, and (2) affirmed in principal part the Tax Court's decision that the taxpayers were liable for unpaid taxes and for fraud penalties.

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by Ginsburg, J., joined by Stevens, O'Connor, Scalia, Kennedy, Souter, and Breyer, JJ., it was held that the Tax Court was not authorized to exclude, from the record on appeal, reports submitted to the Tax Court by special trial judges pursuant to *Rule 183(b)*, as (1) no statute authorized, and the current text of *Rule 183* did not warrant, the concealment at issue; (2) it was routine in federal judicial and administrative decisionmaking both to (a) disclose the initial report of a hearing officer, and (b) make that report part of the record available to an appellate forum; and (3) a departure of the bold character practiced by the Tax Court--the creation and attribution solely to the special trial judge of a superseding report composed in unrevealed collaboration with a regular Tax Court judge--demanded at the very least, full and fair statement in the Tax Court's own rules.

Kennedy, J., joined by Scalia, J., concurring, expressed the view that (1) the Supreme Court was correct in holding that (a) *Rule 183(c)* mandated that deference was due to factfindings made by the special trial judge, and (b) it was the *Rule 183(b)* report that *Rule 183(c)* instructed the Tax Court to review and adopt, modify, or reject; (2) a reasonable reading of *Rule 183* required litigants and the Courts of Appeals to be able to evaluate any changes made to the findings of fact in the special trial judge's initial report; [***229] and (3) including the original findings of fact in the record on appeal would make that possible.

Rehnquist, Ch. J., joined by Thomas, J., dissenting, expressed the view that the Supreme Court (1) hinged its decision on an argument--that *Rule 183* did not authorize the practice that the Tax Court had been following--that had not been presented by the taxpayers for the Supreme Court's consideration; and (2) ought to defer to the Tax Court's interpretation of its compliance with its own rules, which interpretation, in this instance, was reasonable.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

INTERNAL REVENUE §82.4

-- Tax Court -- special trial judges' reports -- omission from record

Headnote: [1A][1B][1C][1D][1E][1F][1G][1H][1I]

The United States Tax Court was not authorized to exclude, from the record on appeal, reports submitted to the Tax Court by special trial judges--auxiliary officers appointed by the Chief Judge of the Tax Court--pursuant to Tax Court *Rule 183(b)*, where:

(1) *Rule 183(b)* required that after trial and submission of briefs, the special trial judge submit a report, including findings of fact and opinion, to the Chief Judge, who would assign the case to a Tax Court judge.

(2) *Rule 183(c)* provided that the assigned Tax Court judge (a) was required to (i) give due regard to the circumstance that the special trial judge had had the opportunity to evaluate the credibility of the witnesses, and (ii) presume that the factfindings contained in the special trial judge's report were correct, and (b) could adopt, modify, or reject the report in whole or in part.

(3) No statute authorized, and the current text of *Rule 183* did not warrant, the concealment at issue.

(4) It was routine in federal judicial and administrative decisionmaking both to (a) disclose the initial report of a hearing officer, and (b) make that report part of the record available to an appellate forum.

(5) A departure of the bold character practiced by the Tax Court--the creation and attribution solely to the special trial judge of a superseding report composed in unrevealed collaboration with a regular Tax Court judge--demanded at the very least, full and fair statement in the Tax Court's own rules.

(6) The Tax Court's practice of not disclosing a special trial judge's original reports, and of obscuring a Tax Court judge's mode of reviewing that report, impeded fully informed appellate review of the Tax Court's decision. As illustrated by the consolidated cases at hand, fraud cases, in particular, might involve critical credibility assessments, rendering the appraisals of the judge who presided at trial vital to the Tax Court's ultimate determinations.

(7) The Commissioner of Internal Revenue could not rely on the Tax Court's arbitrary construction of its own rules to insulate special trial judges' reports from disclosure. The initial findings or recommendations of magistrate judges, special masters, and bankruptcy

judges were available to the Federal Court of Appeals authorized to review the operative [***230] decision of the Federal District Court.

(8) The Administrative Procedure Act provided in *5 USCS § 557(c)* that all decisions, including initial, recommended, and tentative decisions, were a part of the record on appeal.

(9) In comparison to the nearly universal practice of transparency in forums in which one official conducted the trial (and thus saw and heard the witnesses) and another official subsequently rendered the final decision, the Tax Court's practice was anomalous.

(10) For several reasons, the United States Supreme Court rejected the Commissioner's endeavor to equate the Tax Court proceedings in question to proceedings that differed markedly.

(Ginsburg, J., joined by Stevens, O'Connor, Scalia, Kennedy, Souter, and Breyer, JJ.)

[***LEdHN2]

APPEAL §1087.7

-- question raised on certiorari

Headnote: [2A][2B]

On certiorari to review two Federal Court of Appeals' judgments to the effect that some taxpayers were liable for underpaid taxes and for fraud penalties, the United States Supreme Court rested its decision in favor of the taxpayers on the Supreme Court's conclusion that the United States Tax Court was not authorized to exclude, from the record on appeal, reports (which included findings of fact and opinion) submitted to the Tax Court by special trial judges pursuant to Tax Court *Rule 183(b)*, where--although the parties might not have discretely referred to the ground on which the Supreme Court's decision rested--(1) one taxpayer's brief had asked whether *Rule 183* required Tax Court judges to uphold findings made by special trial judges unless "clearly erroneous"; (2) the meaning of *Rule 183* was a question anterior to all other questions that the parties had raised; (3) the requirements of *Rule 183* had been aired in the taxpayers' briefs; and (4) under the circumstances, it was evident that the Supreme Court's disposition was in accord with Supreme Court *Rule 14.1(a)*, which provided that the statement of any question presented was deemed to comprise every subsidiary question fairly included therein. (Ginsburg, J., joined by Stevens, O'Connor, Scalia, Kennedy, Souter, and Breyer, JJ.)

[***LEdHN3]

COURTS §538.9

-- following own rules

Headnote: [3]

The United States Tax Court, like all other decisionmaking tribunals, is obliged to follow its own rules. However, the Tax Court is not without leeway in interpreting its own rules. (Ginsburg, J., joined by Stevens, O'Connor, Scalia, Kennedy, Souter, and Breyer, JJ.)

[***LEdHN4]

INTERNAL REVENUE §82.5

INTERNAL REVENUE §82.7

-- Tax Court review -- legal issues -- findings of fact

Headnote: [4]

Full United States Tax Court review of the decisions of special trial judges appointed by the court is designed for the resolution of legal issues, not for review of findings of fact made by the judge who presided at trial. When the full Tax Court reviews, it is making a de novo determination of the legal issue presented. In contrast, findings of fact are key to special trial judges' reports. (Ginsburg, J., joined by Stevens, O'Connor, Scalia, Kennedy, Souter, and Breyer, JJ.)

SYLLABUS

[***231] The Tax Court's Chief Judge appoints auxiliary officers, called special trial judges, to hear certain cases, *26 U.S.C. § 7443A(a)* [*26 USCS § 7443A(a), (b)*],*(b)*, but ultimate decision, when tax deficiencies exceed $50,000, is reserved for the court itself, *§ 7443A(b)(5), (c)*. Tax Court *Rule 183(b)* governs the two-tiered proceedings in which a special trial judge hears the case, but the court renders the final decision. *Rule 183(b)* directs that, after trial and submission of briefs, the special trial judge "shall submit a report, including findings of fact and opinion, to the Chief Judge, [who] will assign the case to a Judge . . . of the Court." In acting on the report, the assigned Tax Court judge must give "[d]ue regard . . . to the circumstance that the [s]pecial [t]rial [j]udge had the opportunity to evaluate the credibility of the witnesses," must "presum[e] to be correct" factfindings contained in the report, and "may adopt the [s]pecial [t]rial [j]udge's report or may modify it or may reject it in whole or in part." *Rule 183(c)*. Until 1983, such special trial judge reports were made public and included in the record on appeal. Pursuant to a rule revision that year, those reports are now withheld from the public and excluded from the appellate record, and Tax Court judges do not disclose whether the final decision "modi[fies]" or "reject[s]" the special trial judge's initial report. Instead, the final decision [***232] invariably begins with a stock statement that the Tax Court

judge "agrees with and adopts the opinion of the [s]pecial [t]rial [j]udge." Whether and how the final decision deviates from the special trial judge's original report is never revealed.

Petitioners Claude Ballard, Burton Kanter, and another taxpayer received notices of deficiency from respondent Commissioner of Internal Revenue (Commissioner) charging them with failure to report certain payments on their individual tax returns and with tax fraud. They filed petitions for redetermination in the Tax Court, where the Chief Judge assigned the consolidated case to Special Trial Judge Couvillion. After trial, Judge Couvillion submitted a *Rule 183(b)* report to the Chief Judge, who issued an order assigning the case to Tax Court Judge Dawson "for review [of that report] and, if approved, for adoption." Ultimately, Judge Dawson issued the Tax Court's decision, finding that the taxpayers had acted with intent to deceive the Commissioner, and holding them liable for underpaid taxes and substantial fraud penalties. That decision, consisting wholly of a document labeled "Opinion of the Special Trial Judge," declared: "The Court agrees with and adopts the opinion of the Special Trial Judge, which is set forth below."

Based on conversations between Kanter's attorney and two Tax Court judges, the taxpayers came to believe that the decision was *not* in fact a reproduction of Judge Couvillion's *Rule 183(b)* report. According to a declaration submitted by Kanter's attorney, Judge Couvillion had concluded that the taxpayers did not owe taxes with respect to some of the payments at issue and that the fraud penalty was not applicable. The taxpayers therefore filed motions seeking access to Judge Couvillion's initial report as submitted to the Chief Judge or, in the alternative, permission to place that report under seal in the appellate record. Denying the requested relief, the Tax Court stated: "Judge Dawson . . . and Special Trial Judge Couvillion agre[e] that . . . Judge Dawson adopted the findings of fact and opinion of . . . Judge Couvillion, . . . presumed [those] findings of fact . . . were correct, and . . . gave due regard" to Judge Couvillion's credibility findings. The order added that "any preliminary drafts" of the special trial judge's report were "not subject to production because they relate to [the court's] internal deliberative processes." On appeal, both the Eleventh Circuit in Ballard's case and the Seventh Circuit in Kanter's case rejected the taxpayers' objection to the absence of the special trial judge's *Rule 183(b)* report from the appellate record. Proceeding to the merits, both Courts of Appeals affirmed the Tax Court's final decision in principal part.

Held:

The Tax Court may not exclude from the record on appeal *Rule 183(b)* reports submitted by special trial judges. No statute authorizes, and *Rule 183*'s current text does not warrant, the concealment at issue.

(a) *Rule 183(c)*'s promulgation history confirms the clear understanding, from the start, that deference is due the trial judge's factfindings under the "[d]ue regard" and "presumed to be correct" formulations. Under *Rule 183*'s precursor, the Tax Court's review of the special trial judge's report was a transparent process. The report was served on the parties, who were authorized to [***233] file objections to it, and the regular Tax Court judge reviewed the report independently, on the basis of the record and the parties' objections. Parties were therefore equipped to argue to an appellate court that the Tax Court failed to give the special trial judge's findings the required measure of respect. On adoption of the 1983 amendments, however, the Tax Court stopped acknowledging instances in which it rejected or modified special trial judge findings. Instead, it appears that the Tax Court inaugurated a novel practice whereby the special trial judge's report is treated essentially as an in-house draft to be worked over collaboratively by the regular Tax Court judge and the special trial judge. The regular Tax Court judge then issues a decision purporting to "agre[e] with and adop[t] the opinion of the Special Trial Judge."

Nowhere in the Tax Court's current Rules is this joint enterprise described or authorized. Notably, the Rules provide for only one special trial judge "opinion": *Rule 183(b)* instructs that the special trial judge's report, submitted to the Chief Judge *before* a regular Tax Court judge is assigned to the case, shall consist of findings of fact and opinion. It is the *Rule 183(b)* report, not some subsequently composed collaborative report, that *Rule 183(c)*, tellingly captioned "Action on the Report," instructs the Tax Court judge to review and adopt, modify, or reject. It is difficult to comprehend how a Tax Court judge would give "[d]ue regard" to, and "presum[e] to be correct," an opinion he himself collaborated in producing.

The Tax Court, like all other decisionmaking tribunals, is obliged to follow its own Rules. See, *e.g., Service v. Dulles, 354 U.S. 363, 388, 1 L. Ed. 2d 1403, 77 S. Ct. 1152*. Although the Tax Court is not without leeway in interpreting its Rules, it is unreasonable to read into *Rule 183* an unprovided-for collaborative process, and to interpret the formulations "due regard" and "presumed to be correct," to convey something other than what those same words meant prior to the 1983 rule changes.

(b) The Tax Court's practice of not disclosing the special trial judge's original report, and of obscuring the Tax Court judge's mode of reviewing that report, impedes fully informed appellate review of the Tax Court's decision. In directing the regular judge to give "due re-

gard" to the special trial judge's credibility determinations and to "presum[e] . . . correct" the special trial judge's factfindings, *Rule 183(c)* recognizes a well-founded, commonly accepted understanding: The officer who hears witnesses and sifts through evidence in the first instance will have a comprehensive view of the case that cannot be conveyed full strength by a paper record. Fraud cases, in particular, may involve critical credibility assessments, rendering the appraisals of the judge who presided at trial vital to the ultimate determination. In the present cases, for example, the Tax Court's decision repeatedly draws outcome-influencing conclusions regarding the credibility of Ballard, Kanter, and other witnesses. Absent access to the special trial judge's *Rule 183(b)* report in this and similar cases, the appellate court will be at a loss to determine (1) whether the credibility and other findings made in that report were accorded "[d]ue regard" and were "presumed . . . correct" by the Tax Court judge, or (2) whether they were displaced [***234] without adherence to those standards.

The Tax Court's practice is extraordinary, for it is routine in federal judicial and administrative decision-making both to disclose a hearing officer's initial report, see, *e.g., 28 U.S.C. § 636(b)(1)(C)* [*28 USCS § 636(b)(1)(C)*], and to make that report part of the record available to an appellate forum, see, *e.g., 5 U.S.C. § 557(c)* [*5 USCS § 557(c)*]. The Commissioner asserts a statutory analogy, however, *26 U.S.C. § 7460(b)* [*26 USCS § 7460(b)*], which instructs that when the full Tax Court reviews the decision of a single Tax Court judge, the initial one-judge decision "shall not be a part of the record." This Court rejects the Commissioner's endeavor to equate proceedings that differ markedly. Full Tax Court review is designed for resolution of legal issues. Review of that order is *de novo.* In contrast, findings of fact are key to special trial judge reports. Those findings, under the Tax Court's Rules, are not subject to *de novo* review. Instead, they are measured against "due regard" and "presumed correct" standards. Furthermore, all regular Tax Court members are equal in rank, each has an equal voice in the Tax Court's business, and the regular judge who issued the original decision is free to file a dissenting opinion recapitulating that judge's initial opinion. The special trial judge, who serves at the pleasure of the Tax Court, lacks the regular judges' independence and the prerogative to publish dissenting views.

Given this Court's holding that the Tax Court's practice is not described and authorized by that court's Rules, this Court need not reach, and expresses no opinion on, the taxpayers' further arguments based on due process and other statutory provisions. Should the Tax Court some day amend its Rules to adopt the idiosyncratic procedure here rejected, the changed character of the Tax Court judge's review of special trial judge reports would be subject to appellate review for consistency with the relevant federal statutes and due process.

No. 03-184, *321 F.3d 1037*; No. 03-1034, *337 F.3d 833*, reversed and remanded.

COUNSEL: Steven M. Shapiro argued the cause for petitioners in No. 03-184 and No. 03-1034.

Thomas G. Hungar argued the cause for respondent in No. 03-184 and No. 03-1034.

JUDGES: Ginsburg, J., delivered the opinion of the Court, in which Stevens, O'Connor, Scalia, Kennedy, Souter, and Breyer, JJ., joined. Kennedy, J., filed a concurring opinion, in which Scalia, J., joined, *post*, p. 65. Rehnquist, C. J., filed a dissenting opinion, in which Thomas, J., joined, *post*, p. 68.

OPINION BY: GINSBURG

OPINION

[*44] [**1274] Justice **Ginsburg** delivered the opinion of the Court.

[***LEdHR1A] [1A] These cases concern the Tax Court's employment of special trial judges, auxiliary officers appointed by the Chief Judge of the Tax Court to assist in the work of the court. See *26 U.S.C. § 7443A(a)* [*26 USCS § 7443A(a)*]. Unlike Tax Court judges, who are appointed by the President for 15-year terms, see *§ 7443(b), (e)*, special trial judges have no fixed term of office, *§ 7443A(a)*. Any case before the Tax Court may be assigned to a special trial judge for hearing. Ultimate decision in cases involving tax deficiencies that exceed $50,000, however, is reserved for the Tax Court. *§ 7443A(c)*.

Tax Court *Rule 183* governs the two-tiered proceedings in which a [***235] special trial judge hears the case, but the Tax Court itself renders the final decision. The Rule directs that, after [*45] trial and submission of briefs, the special trial judge "shall submit a report, including findings of fact and opinion, to the Chief Judge, and the Chief Judge will assign the case to a Judge . . . of the Court." Tax Ct *Rule 183(b)*, 26 USC App, p 1619 [USCS Court Rules, Tax Court Rules, *Rule 183(b)*]. In acting on the report, the Tax Court judge to whom the case is assigned must give "[d]ue regard . . . to the circumstance that the [s]pecial [t]rial [j]udge had the opportunity to evaluate the credibility of the witnesses." *Rule 183(c), ibid.* Further, factfindings contained in the report "shall be presumed to be correct." *Ibid.* The final Tax Court decision "may adopt the [s]pecial [t]rial [j]udge's report or may modify it or may reject it in whole or in part." *Ibid.*

Until 1983, special trial judge reports, as submitted to the Chief Judge, were made public and were included in the record on appeal. A rule revision that year deleted the requirement that, upon submission of the special trial judge's report, "a copy . . . shall forthwith be served on each party." See *Rule 183* note, 81 T.C. 1069-1070 (1984). Correspondingly, the revision deleted the prior provision giving parties an [**1275] opportunity to set forth "exceptions" to the report. *Ibid.* [1] Coincident with those rule changes, the Tax Court significantly altered its practice in cases referred for trial, but not final decision, to special trial judges. Since the January [*46] 16, 1984 effective date of the rule revision, the post-trial report submitted to the Chief Judge, then transmitted to the Tax Court judge assigned to make the final decision, has been both withheld from the public and excluded from the record on appeal. Further, since that time, Tax Court judges have refrained from disclosing, in any case, whether the final decision in fact "modi[fies]" or "reject[s] [the special trial judge's initial report] in whole or in part." Cf. *Rule 183(c)*, 26 USC App, p 1619 [USCS Court Rules, Tax Court Rules, *Rule 183(c)*]. Instead, the final decision invariably begins with a stock statement that the Tax Court judge "agrees with and adopts the opinion of the [s]pecial [t]rial [j]udge." See, *e.g., Investment Research Assoc., Ltd. v. Commissioner, 78 TCM 951, 963 (1999), P99, 407 RIA Memo TC, pp. 2562-2563.* Whether and how the opinion thus adopted deviates from the special trial judge's original report is never made public.

1 Unlike other judicial and administrative bodies, the Tax Court does not maintain a formal practice of publicly disclosing proposed amendments to its Rules. See *Estate of Kanter v. Commissioner, 337 F.3d 833, 877-878, n. 2 (CA7 2003)* (Cudahy, J., concurring in part and dissenting in part) (describing the Tax Court's lack of a "formal documented procedure" for amending its Rules as "oddly out of sync with prevailing practices in other areas of the law"). Although the Tax Court solicits comments on proposed rule changes from the American Bar Association's Section on Taxation, see ABA Members Suggest Modifications to Proposed Amendments of Tax Court Rules, 97 Tax Notes Today, p 167-25 (Aug. 28, 1997), the court apparently does not publish its proposals to, or accept comments from, the general public.

[***LEdHR1B] [1B] [***LEdHR2A] [2A] Petitioners are taxpayers who were unsuccessful in the Tax Court and on appeal. They object to the concealment of the special trial judge's initial report and, in particular, exclusion of the report from the record on appeal. They urge that, under the Tax Court's current practice, the parties and the Court of Appeals [***236] lack essential information: One cannot tell whether, as *Rule 183(c)* requires, the final decision reflects "[d]ue regard" for the special trial judge's "opportunity to evaluate the credibility of [the] witnesses," and presumes the correctness of that judge's initial factfindings. We agree that no statute authorizes, and the current text of *Rule 183* does not warrant, the concealment at issue. We so hold, mindful that it is routine in federal judicial and administrative decisionmaking both to disclose the initial report of a hearing officer, and to make that report part of the record available to an appellate forum. A departure of the bold character practiced by the Tax Court--the creation and attribution solely to the special trial judge of a superseding report composed in unrevealed collaboration with a regular [*47] Tax Court judge--demands, at the very least, full and fair statement in the Tax Court's own Rules. [2]

2 [***LEdHR2B] [2B] The dissent observes that the parties did not discretely refer to the ground on which our decision rests. See *post, at 68, 125 S. Ct. 1270, 161 L. Ed. 2d 227*, n 1 (opinion of Rehnquist, C. J.); Brief for Petitioner Kanter (i) (asking whether Tax Court *Rule 183* requires Tax Court judges to uphold findings made by special trial judges unless "clearly erroneous" (internal quotation marks omitted)). The meaning of *Rule 183*, however, is a question anterior to all other questions the parties raised, and the requirements of the Rule were indeed aired in the taxpayers' briefs. See *id.*, at 34-39; Reply Brief for Petitioner Ballard 2-3, 8-10; Reply Brief for Petitioner Kanter 3-8. Under the circumstances, we think it evident that our disposition is in entire accord with "our own Rule." Compare *post, at 68, 125 S. Ct. 1270, 161 L. Ed. 2d 227*, n 1 (opinion of Rehnquist, C. J.), with this Court's *Rule 14.1(a)* ("The statement of any question presented is deemed to comprise every subsidiary question fairly included therein."); and *R. A. V. v. St. Paul, 505 U.S. 377, 381, n. 3, 120 L. Ed. 2d 305, 112 S. Ct. 2538 (1992).* See generally R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice 414 (8th ed. 2002) (observing that "[q]uestions not explicitly mentioned but essential to analysis of the decisions below or to the correct disposition of the other issues have been treated as subsidiary issues fairly comprised by the question presented" (internal quotation marks omitted)).

[**1276] I

After repeated Internal Revenue Service audits spanning several years, taxpayers Claude Ballard, Burton W. Kanter, and Robert Lisle received multiple notices of

deficiency from the Commissioner of Internal Revenue (Commissioner). [3] The Commissioner charged that during the 1970's and 1980's, Ballard and Lisle, real estate executives at the Prudential Life Insurance Company of America (Prudential), had an arrangement with Kanter, a tax lawyer and business entrepreneur, under which people seeking to do business with Prudential made payments to corporations controlled by [*48] Kanter. Those payments, the Commissioner alleged, were then distributed to Kanter, Ballard, and Lisle, or to entities they controlled. Ballard, Kanter, and Lisle did not report the payments on their individual tax returns. See *Investment Research Assoc., 78 TCM, at 1058, P99, 407* RIA Memo TC, pp 2672-2673; *Ballard v. Comm'r, 321 F.3d 1037, 1038-1039 (CA11 2003)*; Brief for Petitioner Ballard 3-4; Brief for Petitioner Kanter 11. After the initial deficiency notices, the Commissioner, in 1994, additionally charged that [***237] the taxpayers' actions were fraudulent. See *Investment Research Assoc., 78 TCM, at 966, P99, 407 RIA Memo TC, p 2693*. As to each asserted deficiency, Ballard, Kanter, and Lisle filed petitions for redetermination in the Tax Court. See *Ballard, 321 F.3d, at 1040*.

> 3 Petitioners here are Ballard; his wife, who was included in the notices of deficiency because she filed joint returns with her husband; Kanter's estate; Kanter's executor; and Kanter's wife. Brief for Petitioner Ballard (ii); Brief for Petitioner Kanter (ii). Lisle's estate is not a petitioner before this Court. See *infra, at 52, and n 8, 161 L. Ed. 2d, at 239*. For convenience, this opinion will refer to the petitioners simply as "Ballard" and "Kanter."

The Tax Court is composed of 19 regular judges appointed by the President for 15-year terms, and several special trial judges appointed, from time to time, by the Tax Court's Chief Judge. See *26 U.S.C. §§ 7443(a)-(b), (e), 7443A(a)* [*26 USCS §§ 7443(a)-(b), (e), 7443A(a)*]. [4] The statute governing the appointment and competence of special trial judges, *§ 7443A*, [5] prescribes no term of office for them, but sets their salaries at 90% of the salary paid to regular judges of the Tax Court, see *§ 7443A(d)*. The Tax Court may authorize special trial judges to hear and render final decisions in declaratory judgment proceedings, "small tax cases," and levy and lien proceedings. See *§ 7443A(b)(1)-(4), (c)*; Tax Ct *Rule 182*, 26 USC App, p 1619 [USCS Court Rules, Tax Court Rules, *Rule 182*]; Brief for Respondent 3. If the amount of the taxes at issue exceeds $50,000, a special trial judge may be assigned [*49] to preside over the trial and issue a report containing recommended factfindings and conclusions as to the taxpayers' liability, but decisional authority is [**1277] reserved for the Tax Court. See *§ 7443A(b)(5), (c)*; *Freytag v. Commissioner, 501 U.S. 868, 881-882, 115 L. Ed. 2d 764, 111 S. Ct. 2631 (1991)* (noting that special trial judges "take testimony, conduct trials, [and] rule on the admissibility of evidence," but "lack authority to enter a final decision" in certain cases). Tax Court *Rule 183* governs the Tax Court's review of the special trial judge's findings and opinion. See *supra, at 44-45,161 L. Ed. 2d, at 234-235*.

> 4 Special trial judges were called "commissioners" when the office was created in 1943. The Tax Court changed the title to "special trial judge" in 1979. See Tax Ct *Rule 182* note, *71 T.C. 1215 (1979)*; Brief for Petitioner Kanter 6.
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> 5 *Section 7443A* was amended and renumbered in 1998, some years after the 1994 trial in these cases. See Pub L 105-206, § 3401(c), 112 Stat 749. The alterations did not change the statute's text in any relevant respect. This opinion refers to the current version of the statute.

After Ballard, Kanter, and Lisle sought review in the Tax Court, the Chief Judge assigned the consolidated case to Special Trial Judge D. Irvin Couvillion for trial. Judge Couvillion presided over a five-week trial during the summer of 1994, and the parties' briefing was completed in May 1995. App. 7; see also *Ballard, 321 F.3d, at 1040*. The post-trial proceedings in the case are not fully memorialized in either the Tax Court's docket records or its published orders, but certain salient events can be traced. On or before September 2, 1998, Judge Couvillion submitted to the Chief Judge a report containing his findings of fact and opinion, "as required by [Tax Court] *Rule 183(b)*." Order of Dec. 15, 1999, in No. 43966-85 etc. (TC), App. to Kanter Pet. for Cert. 113a-114a. On September 2, 1998, the Chief Judge assigned the case to Tax Court Judge Howard A. Dawson, Jr., "for review [of the special trial judge's report] and, if approved, for adoption." *Id.*, at 114a. [6] Fifteen [***238] months later, on December 15, 1999, the Chief Judge "reassigned" the case "from [Judge] Couvillion to [Judge] Dawson." *Id.*, [*50] at 113a. That same day, Judge Dawson issued the decision of the Tax Court.

> 6 Judge Dawson is a retired Tax Court judge who served two terms, from 1962 until 1985, as a regular member of the court. He was recalled to judicial duties by the Chief Judge of the Tax Court in 1990. See *26 U.S.C. § 7447(c)* [*26 USCS § 7447(c)*]. Recalled judges serve "for any period . . . specified by the chief judge." *Ibid.* Their salary, unlike that of special trial judges, see *supra, at 48, 161 L. Ed. 2d, at 237*, is equal to that of Tax Court judges.

Judge Dawson found that Ballard, Kanter, and Lisle had acted with intent to deceive the Commissioner, and held them liable for underpaid taxes and substantial fraud penalties. See, *e.g.* , *Investment Research Assoc., 78 TCM, at 1071, 1075, 1085, P99,407 RIA Memo TC, pp 2689, 2692-2693, 2705-2706*. In so ruling, Judge Dawson purported to adopt the findings contained in the report submitted by Judge Couvillion: "The Court agrees with and adopts the opinion of the Special Trial Judge, which is set forth below." *Id., at 963, P99,407 RIA Memo TC, pp 2562-2563*. Judge Dawson's decision consists in its entirety of a document, over 600 pages in length, labeled "Opinion of the Special Trial Judge." *Ibid.*

The taxpayers came to believe that the document titled "Opinion of the Special Trial Judge" was *not* in fact a reproduction of Judge Couvillion's *Rule 183(b)* report. A declaration, dated August 21, 2000, submitted by Kanter's attorney, Randall G. Dick, accounts for this belief. Dick attested to conversations with two Tax Court judges regarding the Tax Court's decision. According to the declaration, the judges told Dick that in the *Rule 183(b)* report submitted to the Chief Judge, Judge Couvillion had concluded that Ballard, Kanter, and Lisle did not owe taxes with respect to payments made by certain individuals seeking to do business with Prudential, and that the fraud penalty was not applicable. App. to Ballard Pet. for Cert. 308a-309a, P 4. Attorney Dick's declaration further stated:

> "In my conversations with the judges of the Tax Court, I was told the following: That substantial sections of the opinion [**1278] 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 [*51] findings relating to credibility and fraud were made by Judge Dawson." *Id.* at 309a, P 5.

Concerned that Judge Dawson had modified or rejected special trial judge findings tending in their favor, see Tax Ct *Rule 183(c)*, the taxpayers filed three successive motions in the Tax Court; each motion sought access to the report Special Trial Judge Couvillion had submitted to the Chief Judge or, in the alternative, permission to place the special trial judge's report under seal in the record on appeal. See Order of Aug. 30, 2000, App. to Kanter Pet. for Cert. 99a-101a; Motion of May 25, 2000, *id.*, at 105a. The Tax Court denied the motions. See Order of Aug. 30, 2000, *cf., id.*, at 100a-101a, 103a. In response to the taxpayers' third motion, filed in August 2000, the Tax Court elaborated: "Judge Dawson states and Special Trial Judge Couvillion agrees, that, after a meticulous and time-consuming [***239] review of the complex record in these cases, Judge Dawson adopted the findings of fact and opinion of Special Trial Judge Couvillion, . . . Judge Dawson presumed the findings of fact recommended by Special Trial Judge Couvillion were correct, and . . . Judge Dawson gave due regard" to Judge Couvillion's credibility findings. *Id.*, at 102a. To the extent that the taxpayers sought "any preliminary drafts" of the special trial judge's report, the Tax Court added, such documents are "not subject to production because they relate to the internal deliberative processes of the Court." *Id.*, at 101a (quoting Order of Apr. 26, 2000, *id.*, at 109a).

Appeals from Tax Court decisions are taken to the court of appeals for the circuit in which the taxpayer resides. *26 U.S.C. § 7482(b)(1)(A)* [*26 USCS § 7482(b)(1)(A)*]. Ballard therefore appealed to the Eleventh Circuit, Kanter to the Seventh Circuit, and Lisle to the Fifth Circuit. All three Courts of Appeals accepted the Commissioner's argument that the special trial judge's signature on the Tax Court's final decision rendered that decision in fact Special Trial Judge Couvillion's report. *Estate of Kanter v. Commissioner, 337 F.3d 833, 840-841 (CA7 2003)*; [*52] *Ballard, 321 F.3d, at 1042*; accord *Estate of Lisle v. Commissioner, 341 F.3d 364, 384 (CA5 2003)* (adopting the reasoning of the Seventh and Eleventh Circuits without elaboration). The appeals courts further agreed with the Commissioner that the special trial judge's original report, submitted to the Chief Judge pursuant to *Rule 183(b)*, qualified as a confidential document, shielded as part of the Tax Court's internal deliberative process. See *Kanter, 337 F.3d, at 841-844*; *Ballard, 321 F.3d, at 1042-1043*; accord *Estate of Lisle, 341 F.3d, at 384*.

Having rejected the taxpayers' objection to the absence of the special trial judge's *Rule 183(b)* report from the record on appeal, the Seventh and Eleventh Circuits proceeded to the merits of the Tax Court's final decision and affirmed that decision in principal part. See *Kanter, 337 F.3d, at 873-874*; *Ballard, 321 F.3d, at 1044*. [7] The Fifth Circuit's judgment, which is not before this Court, reversed the fraud penalties assessed against Lisle for evidentiary insufficiency but upheld the Tax Court's determination of tax deficiencies for certain [**1279] years. See *Estate of Lisle, 341 F.3d, at 384-385*. [8] Seventh Circuit Judge Cudahy dissented on the issue of the special trial judge's initial report, maintaining that intelligent review of the Tax Court's decision required inclusion of that report in the record on appeal. See *Kanter, 337 F.3d, at 874, 884-888*.

7 Finding one of Kanter's deductions legitimate, the Seventh Circuit reversed the Tax Court's ruling on that issue. See *Kanter, 337 F.3d, at 854-857*.

8 Lisle's estate did not seek this Court's review of the adverse portions of the Fifth Circuit's decision.

[***LEdHR1C] [1C] We granted certiorari, *541 U.S. 1009, 158 L. Ed. 2d 618, 124 S. Ct. 2065 (2004)*, to resolve the question whether the Tax Court may exclude from the record on appeal *Rule 183(b)* reports submitted by special trial judges. We now reverse the decisions of the Seventh and Eleventh Circuits upholding the exclusion.

[*53] [***240] II

[***LEdHR1D] [1D] Central to these cases is Tax Court *Rule 183*, which delineates the procedural framework and substantive standards governing Tax Court review of special trial judge findings. *Rule 183(b)*, captioned "Special Trial Judge's Report," provides that after the trial of a case and submission of the parties' briefs, "the Special Trial Judge shall submit a report, including findings of fact and opinion, to the Chief Judge, and the Chief Judge will assign the case to a Judge . . . of the Court." 26 USC App, p 1619 [USCS Court Rules, Tax Court Rules, *Rule 183*]. [9] *Rule 183(c)*, directed to the Tax Court judge to whom the case is assigned for final decision, reads:

9 *Rule 183* has been amended since these cases were before the Tax Court, but the substantive provisions of the Rule have not been altered in any relevant respect. Compare Tax Ct *Rule 183*, 26 USC App, p 1483 (1994 ed.) [USCS Court Rules, Tax Court Rules, *Rule 183*], with Tax Ct *Rule 183* (interim amendment), 26 USC App, p 1670 (2000 ed.) [USCS Court Rules, Tax Court Rules, *Rule 183*]. Citations in this opinion are to the version of the Rule reprinted in the 2000 edition of the United States Code.

"Action on the Report: The Judge to whom . . . 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. Due 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."

The Tax Court judge assigned to take action on the special trial judge's report in these cases invoked none of the means *Rule 183(c)* provides to supplement the record. He did not "direct the filing of additional briefs[,] receive further evidence or . . . direct oral argument." See *ibid.* Nor does the record show, or the Commissioner contend, see Brief for Respondent 14-15, that the Tax Court judge "recommit[ed] [*54] the [special trial judge's] report with instructions." *Rule 183(c)*. [10] From [**1280] all that appears on the record, then, Judge Dawson's review of the factfindings contained in Judge Couvillion's report [***241] rested on the *Rule 183(b)* report itself, the trial transcript, and the other documents on file. *Rule 183(c)* guides the appraisal of those filed materials.

10 The record does contain an order stating in its entirety:

"For cause, it is ORDERED: That these cases are reassigned from Special Trial Judge D. Irvin Couvillion to Judge Howard A. Dawson, Jr., for disposition.

"After the Special Trial Judge submitted a report, as required by *Rule 183(b)*, Tax Court Rules of Practice and Procedure, these cases were referred to Judge Dawson on September 2, 1998, for review and, if approved, for adoption.

* * * * *

"Dated: Washington, D. C. December 15, 1999." App. to Kanter Pet. for Cert. 113a-114a.

One might speculate, from the reference to a "reassign[ment]," that at some point between September 1998 and December 1999, Judge Dawson "recommitted" the report to Judge Couvillion, who subsequently submitted a revised report to the Chief Judge who, in turn, referred that report to Judge Dawson. The Commissioner does not urge such an interpretation of the December 15, 1999 order, however, and it is, in any event, implausible. The Tax Court's docket reveals no action taken between the initial assignment and the enigmatic reassignment. Had Judge Dawson turned back the report after first receiving it, an order recommitting the case to Judge Couvillion

"with instructions," *Rule 183(c)*, should have memorialized that action. Moreover, Judge Dawson rendered the final decision of the Tax Court on the same day the case was "reassigned" to him. Had he faced a recast *Rule 183(b)* report, it is doubtful that he could have absorbed and acted upon it so swiftly.

Rule 183(c)'s origin confirms the clear understanding, from the start, that deference is due to factfindings made by the trial judge. Commenting in 1973 on then newly adopted *Rule 182(d)*, the precursor to *Rule 183(c)*, the Tax Court observed that the Rule was modeled on *Rule 147(b)* of the former Court of Claims. Tax Ct *Rule 182* note, *60 T.C. 1150* (Tax Court review procedures were to be "comparable" to those used in the Court of Claims). *Rule 182(d)*'s "[d]ue [*55] regard" and "presumed to be correct" formulations were taken directly from that earlier Rule, [11] which the Court of Claims interpreted to require respectful attention to the trial judge's findings of fact. See *Hebah v. United States, 456 F.2d 696, 698, 197 Ct. Cl. 729 (Ct. Cl. 1972)* (*per curiam*) (challenger must make "a strong affirmative showing" to overcome the presumption of correctness that attaches to trial judge findings). The Tax Court's acknowledgment of Court of Claims *Rule 147(b)* as the model for its own Rule, indeed the Tax Court's adoption of nearly identical language, lead to the conclusion the Tax Court itself expressed: Under the Rule formerly designated *Rule 182(b)*, now designated 183(c), special trial judge findings carry "special weight insofar as those findings are determined by the opportunity to hear and observe the witnesses." Tax Ct *Rule 182* note, *60 T.C. 1150 (1973)*; see *Stone v. Commissioner, 275 U.S. App. D.C. 123, 865 F.2d 342, 345 (CADC 1989)*.

11 Court of Claims *Rule 147(b)* provided:

"The court may adopt the [trial judge's] report, including conclusions of fact and law, or may modify it, or reject it in whole or in part, or direct the [trial judge] to receive further evidence, or refer the case back to him with instructions. Due regard shall be given to the circumstance that the [trial judge] had the opportunity to evaluate the credibility of the witnesses; and the findings of fact made by the [trial judge] shall be presumed to be correct." 28 USC App, p 7903 (1970 ed.).

Under *Rule 182* as it was formulated in 1973, the Tax Court's review of the special trial judge's report was a transparent process. *Rule 182(b)* provided for service of copies of the special trial judge's report on the parties and *Rule 182(c)* allowed parties to file exceptions to the report. *60 T.C., at 1149*. The process resembled a district court's review of a magistrate judge's report and recommendation: The regular Tax Court judge reviewed the special trial judge's report independently, on the basis of the record and the parties' objections to the report. See *Rule 182(c), (d), id.*, at 1149-1150. In years before 1984, the Tax Court acknowledged [*56] instances in which it "disagree[d] with the Special Trial Judge," see *Rosenbaum v. Commissioner, 45 TCM 825, 827 (1983), P83,113 P-H Memo TC, p 373*, or modified the special trial judge's findings, see *Taylor v. Commissioner, 41 TCM 539 (1980), P80,552 P-H Memo TC, p 2344* (adopting special trial judge's report with "some modifications"). Parties were [**1281] therefore equipped to argue to an appellate court that the Tax Court failed to give the special trial judge's findings the measure of respect required by *Rule 182(d)*'s "[d]ue regard" and "presumed to be correct" formulations.

In 1983, the Tax Court amended the Rule, which it simultaneously [***242] renumbered as *Rule 183*. The 1983 change eliminated the provision, formerly in *Rule 182(b)*, for service of copies of the special trial judge's report on the parties; it also eliminated the procedure, formerly in *Rule 182(c)*, permitting the parties to file exceptions to the report. See *Rule 183* note, 81 T.C., at 1069-1070. The Tax Court left intact, however, the Rule's call for "[d]ue regard" to the special trial judge's credibility determinations and the instruction that "the findings of fact recommended by the Special Trial Judge shall be presumed to be correct." *Rule 183(c)*, *id.*, at 1069. Further, the 1983 amendments did not purport to change the character of the action the Tax Court judge could take on the special trial judge's report; as before, the Tax Court could "adopt" the report, "modify it," or "reject it in whole or in part." *Ibid.* In practice, however, the Tax Court stopped acknowledging instances in which it rejected or modified special trial judge findings. Judge Cudahy, in dissent in the Seventh Circuit, commented on the "extraordinary unanimity" that has prevailed since the 1983 amendments: "Never, in any instance since the adoption of the current *Rule 183* that I could find," Judge Cudahy reported, "has a Tax Court judge *not* agreed with and adopted the [special trial judge's] opinion." *Kanter, 337 F.3d, at 876*; cf. Tr. of Oral Arg. 44 (Counsel for the Commissioner, in response [*57] to the Court's question, stated: "We're not aware of any cases in which the Tax Court judge has rejected the [special trial judge's] findings . . . .").

[***LEdHR1E] [1E] It appears from these cases and from the Commissioner's representations to this Court that the Tax Court, following the 1983 amendments to *Rule 183*, inaugurated a novel practice regarding the report the special trial judge submits post-trial to the Chief Judge. No longer does the Tax Court judge assigned to the case alone review the report and issue a decision adopting it, modifying it, or rejecting it in whole

or in part. Instead, the Tax Court judge treats the special trial judge's report essentially as an in-house draft to be worked over collaboratively by the regular judge and the special trial judge. See *id.*, at 38 (Counsel for the Commissioner acknowledged that the special trial judge and regular Tax Court judge engage in "a collegial deliberative process, " and that such a process, "involving more than one person . . . in the decision-making," is "unusual"); see also *id.*, at 29-30 (referring to "the deliberative process" occurring after the special trial judge submits his report to the Chief Judge); *Kanter, 337 F.3d, at 876-877* (Cudahy, J., dissenting). Nowhere in the Tax Court's Rules is this joint enterprise described. [12]

> 12 [***LEdHR1F] [1F] Nor does any other Tax Court publication, such as an interpretive guide or policy statement, suggest that the 1983 amendments to *Rule 183* altered the internal process by which the Tax Court judge reviews the special trial judge's findings.

[***LEdHR1G] [1G] When the collaborative process is complete, the Tax Court judge issues a decision in all cases "agree[ing] with and adopt[ing] the opinion of the Special Trial Judge." See *supra, at 46, 161 L. Ed. 2d, at 235*. The extent to which that "opinion" modifies or rejects the special trial judge's *Rule 183(b)* findings and opinion, and is in significant part prompted or written by the regular Tax Court judge, is undisclosed. Cf. Order of Apr. 26, 2000, App. to Kanter Pet. for Cert. 108a (denying motion for access to [**1282] original [***243] special trial judge report prepared [*58] under *Rule 183(b)*, Tax Court Judge Dawson stated: "Special Trial Judge Couvillion submitted his report . . . pursuant to *Rule 183(b)*, which ultimately became the Memorandum Findings of Fact and Opinion . . . filed on December 15, 1999."). [13]

> 13 The Tax Court's post-1983 process for reviewing special trial judge reports appears not to have been comprehended, even by cognoscenti, prior to the airing it has received in these cases. See Cahill, Tax Judges Decide Cases They Do Not Hear, 37 ABA J. E-Report 3 (Sept. 27, 2002) (quoting tax attorney Gerald Kafka's statement that "[w]hen this case surfaced, a lot of people scratched their heads" (internal quotation marks omitted)).

Judge Cudahy appears accurately to have described the process operative in the Tax Court:

> "[T]here are two '[special trial judge's] reports' in many . . . Tax Court cases--the original 'report' filed under *Rule 183* with the Chief Judge of the Tax Court, which is solely the work product of the [special trial judge] (and which represented the [special trial judge's] views at the end of trial) and the later 'opinion' of the [special trial judge], which is a collaborative effort, but which the Tax Court then 'agrees with and adopts' as the opinion of the Tax Court." *Kanter, 337 F.3d, at 876*.

Notably, however, the Tax Court Rules refer only once to a special trial judge "opinion": "[T]he Special Trial Judge shall submit a report, including findings of fact and *opinion*, to the Chief Judge." Tax Ct *Rule 183(b)*, 26 USC App, p 1619 [USCS Court Rules, Tax Court Rules, *Rule 183(b)*] (emphasis added). That opinion, included in a report completed and submitted *before* a regular Tax Court judge is assigned to the case, is the sole opinion properly ascribed to the special trial judge under the current Rules. Correspondingly, it is the *Rule 183(b)* report, not some subsequently composed collaborative report, that *Rule 183(c)*, tellingly captioned "Action on the Report," instructs the Tax Court judge to review and adopt, modify, or reject. See *Rule 183(c)* (the Tax Court judge "may adopt the Special [*59] Trial Judge's report"). [14] In the review process contemplated by *Rule 183(c)*, the Tax Court judge must accord deference to the special trial judge's findings. *Ibid.* One would be hard put to explain, however, how a final decisionmaker, here the Tax Court judge, would give "[d]ue regard" to, and "presum[e] to be correct," an opinion the judge himself collaborated in producing.

> 14 The Tax Court, we are confident, would not woodenly apply its Rules to prevent a special trial judge from correcting a clerical error. But see *post, at 71, n 6, 161 L. Ed. 2d, at 251* (Rehnquist, C. J., Dissenting). Moreover, if the special trial judge, on re-reading his *Rule 183(b)* report post-submission, detects an error of substance, the special trial judge might ask to have the report "recommit[ted]" for modification. See *Rule 183(c)*.

[***LEdHR1H] [1H] [***LEdHR3] [3] However efficient the Tax Court's current practice may be, we find no warrant for it in the Rules the Tax Court publishes. The Tax Court, like all other decisionmaking tribunals, is obliged to follow its own Rules. See *Service v. Dulles, 354 U.S. 363, 388, 1 L. Ed. 2d 1403, 77 S. Ct. 1152 (1957)* (Secretary of State "could not, so long as the Regulations remained unchanged, proceed without regard to them"); see also *Vitarelli v. Seaton, 359 U.S. 535, 540, 3 L. Ed. 2d 1012, 79 S. Ct. 968 (1959)* (Secretary bound by regulations he promulgated "even though

without such regulations" he could have [***244] taken the challenged action); *id., at 546-547, 3 L.Ed. 2d 1012, 79 S. Ct. 968* (Frankfurter, J., concurring in part and dissenting in part) (observing that an agency, all Members of the Court agreed, and "rightly so," "must be rigorously held to the standards by which it professes its action to be judged"). Although the Tax Court is not without leeway [**1283] in interpreting its own Rules, it is unreasonable to read into *Rule 183* an unprovided-for collaborative process, and to interpret the formulations "[d]ue regard" and "presumed to be correct" to convey something other than what those same words meant prior to the 1983 rule changes. See *supra, at 54-56, 161 L. Ed. 2d, at 241-242*.

[***LEdHR1I] [1I] The Tax Court's practice of not disclosing the special trial judge's original report, and of obscuring the Tax Court judge's mode of reviewing that report, impedes fully informed [*60] appellate review of the Tax Court's decision. In directing the Tax Court judge to give "due regard" to the special trial judge's credibility determinations and to "presum[e] . . . correct" the special trial judge's factfindings, *Rule 183(c)* recognizes a well-founded, commonly accepted understanding: The officer who hears witnesses and sifts through evidence in the first instance will have a comprehensive view of the case that cannot be conveyed full strength by a paper record.

Fraud cases, in particular, may involve critical credibility assessments, rendering the appraisals of the judge who presided at trial vital to the Tax Court's ultimate determinations. These cases are illustrative. The Tax Court's decision repeatedly draws outcome-influencing conclusions regarding the credibility of Ballard, Kanter, and several other witnesses. See, *e.g., Investment Research Assoc., 78 TCM, at 1060, P99,407 RIA Memo TC, p 2675* ("We find Kanter's testimony to be implausible."); *id., at 1083, P99,407 RIA Memo TC, p 2703* ("[W]e find Ballard's testimony vague, evasive, and unreliable."); *id., at 1079, P99,407 RIA Memo TC, p 2698* ("The testimony of Thomas Lisle, Melinda Ballard, Hart, and Albrecht is not credible."); *id., at 1140, P99,407 RIA Memo TC, p 2776* ("[T]he witnesses presented on behalf of [Investment Research Associates] in this case were obviously biased, and their testimony was not credible."). Absent access to the special trial judge's *Rule 183(b)* report in this and similar cases, the appellate court will be at a loss to determine (1) whether the credibility and other findings made in that report were accorded "[d]ue regard" and were "presumed . . . correct" by the Tax Court judge, or (2) whether they were displaced without adherence to those standards. See *Kanter, 337 F.3d, at 886* (Cudahy, J., concurring in part and dissenting in part) ("I can think of no single item of more significance in evaluating a Tax Court's decision [*61] on fraud than the unfiltered findings of the [special trial judge] who stood watch over the trial.").

The Commissioner urges, however, that the special trial judge's report is an internal draft, a mere "step" in a "confidential decisional process," and therefore properly withheld from a reviewing court. See Brief for Respondent 16-17 (courts should not "probe the mental processes" of decisional authorities (quoting *United States v. Morgan, 313 U.S. 409, 422, 85 L. Ed. 1429, 61 S. Ct. 999 (1941)*)); [***245] accord Order of Aug. 30, 2000, App. to Kanter Pet. for Cert. 101a. Our conclusion that *Rule 183* does not authorize the Tax Court to treat the special trial judge's *Rule 183(b)* report as a draft subject to collaborative revision, see *supra, at 59-60, 161 L. Ed. 2d, at 243-244*, disposes of this argument. The Commissioner may not rely on the Tax Court's arbitrary construction of its own rules to insulate special trial judge reports from disclosure. Cf. *Kanter, 337 F.3d, at 888* (Cudahy, J., concurring in part and dissenting in part) (access on appeal to the special trial judge's *Rule 183(b)* report should not be blocked by the Tax Court's "concealment of [its] revision process behind th[e] verbal formula" through which the Tax Court judge purports to "agre[e] with and adop[t]" the [**1284] opinion of the special trial judge (internal quotation marks omitted)).

We are all the more resistant to the Tax Court's concealment of the only special trial judge report its Rules authorize given the generally prevailing practice regarding a tribunal's use of hearing officers. The initial findings or recommendations of magistrate judges, special masters, and bankruptcy judges are available to the appellate court authorized to review the operative decision of the district court. See *28 U.S.C. § 636(b)(1)(C)* [*28 USCS § 636(b)(1)(C)*] (magistrate judge's proposed findings must be filed with the court and mailed to the parties); *Fed. Rule Civ. Proc. 53(f)* (special masters); *Fed. Rule Bkrtcy. Proc. 9033(a), (d)* (bankruptcy judges); *Fed. Rule App. Proc. 10(a)* (record on appeal includes the original papers filed in [*62] the district court). And the Administrative Procedure Act provides: "All decisions, including initial, recommended, and tentative decisions, are a part of the record" on appeal. *5 U.S.C. § 557(c)*; see also *§ 706* (the reviewing court shall evaluate the "whole record"). In comparison to the nearly universal practice of transparency in forums in which one official conducts the trial (and thus sees and hears the witnesses), and another official subsequently renders the final decision, the Tax Court's practice is anomalous. As one observer asked: "[I]f there are policy reasons that dictate transparency for everyone else, why do these reasons not apply to the Tax Court?" *Kanter, 337 F.3d, at 874* (Cudahy, J., concurring in part and dissenting in part); cf. *Mazza v. Cavicchia, 15 N. J. 498, 519, 105 A.2d 545, 557 (1954)* ("We have not been able to find a

single case in any state . . . justifying or attempting to justify the use of secret reports by a hearer to the head of an administrative agency."). [15]

> 15 It is curious that the Commissioner, always a party in Tax Court proceedings, argues strenuously in support of concealment of the special trial judge's report. As Judge Cudahy noted, the Tax Court's current practice allows it "very easily [to] reverse findings (credibility-related and otherwise) of [special trial judges] in a manner that is detrimental to the Commissioner as well as to" taxpayers. *Kanter, 337 F.3d, at 888* (concurring in part and dissenting in part). Inclusion of the report in the record on appeal would therefore seem "a procedural result that may benefit all parties." *Ibid.;* see Tr. of Oral Arg. 28 (Court inquired of counsel for the Commissioner: "[A]ren't there situations where it might be that the special trial judge would call a credibility question in the Government's favor and then the Government loses the case before the Tax Court judge and might like to know, before it goes to the court of appeals, how solid the credibility findings were?").

The Commissioner asserts, however, that the Tax Court's practice of [***246] replacing the special trial judge's initial report with a "collaborative" report and refusing to disclose the initial report is neither "unique" nor "aberrational." Brief for Respondent 31. As a "direct *statutory* analog," *ibid.*, the Commissioner points to *26 U.S.C. § 7460(b)* [*26 USCS § 7460(b)*], the provision [*63] governing cases reviewed by the full Tax Court. *Section 7460(b)* instructs that when the full Tax Court reviews the decision of a single Tax Court judge, the initial one-judge decision "shall not be a part of the record." For several reasons, we reject the Commissioner's endeavor to equate proceedings that differ markedly.

[***LEdHR4] [4] First, as the Commissioner himself observes, omission of the single Tax Court judge's opinion from the record when full court review occurs has been the *statutory* rule "[f]rom the earliest days of the Tax Court's predecessor." Brief for Respondent 31 (citing Revenue Act of 1928, ch. 852, § 601, 45 Stat. 871). To this day, Congress has ordered no corresponding omission of special trial judge initial reports. Understandably so. Full Tax Court review is designed for the resolution [**1285] of legal issues, not for review of findings of fact made by the judge who presided at trial. See L. Lederman & S. Mazza, Tax Controversies: Practice and Procedure 247 (2000). When the full Tax Court reviews, it is making a *de novo* determination of the legal issue presented. In contrast, findings of fact are key to special trial judge reports. See Tax Ct *Rule 183(c)*, 26 USC App, p 1619 [USCS Court Rules, Tax Court Rules, *Rule 183(c)*]. And those findings, under the Tax Court's Rules, are not subject to review *de novo.* Instead, they are measured against "[d]ue regard" and "presumed correct" standards. *Ibid.;* see *supra, at 54-56, 161 L. Ed. 2d, at 241-242*.

Furthermore, the judges composing the full Tax Court and the individual Tax Court judge who made the decision under review are presidential appointees equal in rank. Each has an equal voice in the business of the Tax Court. To the extent that the individual judge disagrees with his colleagues, he is free to file a dissenting opinion repeating or borrowing from his initial decision. The special trial judge, serving at the pleasure of the Tax Court, lacks the independence enjoyed by regular Tax Court judges and the prerogative to publish dissenting views. See *Kanter, 337 F.3d, at* [*64] *879-880* (Cudahy, J., concurring in part and dissenting in part). [16]

> 16 The Commissioner also notes that "numerous boards of contract appeals established by various agencies . . . do not require disclosure of initial reports prepared by presiding judges." Brief for Respondent 31-32. This analogy, too, is unimpressive. The contract dispute resolution panels to which the Commissioner points issue decisions after reviewing the initial report of a "presiding judge," designated to conduct an evidentiary hearing on behalf of the panel. Only the final decision is served on the parties and included in the record on appeal. *Ibid.* Unlike the situation of the special trial judge, however, the presiding judge holds a position equal in stature to that of the other panel members, and can file a dissent. See Reply Brief for Petitioner Kanter 15.
>
> In discussing the text of *Rule 183(b)* and *(c)*, and the Tax Court's current interpretation of that text, we surely do not intend to "impugn the integrity" of any Tax Court judge. Compare *post, at 72, 161 L. Ed. 2d, at 251-252* (opinion of Rehnquist, C. J.), with *Kanter, 337 F.3d, at 880, n. 6* (Cudahy, J., concurring in part an dissenting in part) ("I am not suggesting that . . . the judges of the Tax Court . . . exert undue influence over [special trial judges]. The judicial independence of finders of fact, however, is a structural principle.").

We note, finally, other arguments tendered by the taxpayers. Ballard and Kanter urge that the *Due Process Clause* [***247] requires disclosure of a trial judge's factfindings that have operative weight in a court's final decision. Brief for Petitioner Ballard 43-48; Brief for Petitioner Kanter 19-27. They also argue that, just as reports of special masters, magistrate judges, and bank-

ruptcy judges form part of the record on appeal from a district court, so special trial judge reports must form part of the record on appeal from the Tax Court. They base this argument on the appellate review statute, *26 U.S.C. § 7482(a)(1)* [*26 USCS § 7482(a)(1)*], which instructs courts of appeals to review Tax Court decisions "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." Brief for Petitioner Ballard 23-27 (internal quotation marks omitted); Brief for Petitioner Kanter 27, 34-35. In addition, they maintain that *26 U.S.C. §§ 7459(b)* and *7461(a)* [*26 USCS §§ 7459* and *7461(a)*] require disclosure of all reports [*65] generated in Tax Court proceedings, absent specific exemption. Brief for Petitioner Kanter 42-44. Because we hold that the Tax Court's Rules do not authorize the practice that the Tax Court now follows, we need not reach these arguments and express no opinion on them.

The idiosyncratic procedure the Commissioner describes and defends, although not the system of adjudication that *Rule 183* [**1286] currently creates, is one the Tax Court might some-day adopt. Were the Tax Court to amend its Rules to express the changed character of the Tax Court judge's review of special trial judge reports, that change would, of course, be subject to appellate review for consistency with the relevant federal statutes and due process.

* * *

For the reasons stated, the judgments of the Courts of Appeal for the Seventh and Eleventh Circuits are reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

CONCUR BY: KENNEDY; SCALIA

CONCUR

Justice **Kennedy,** with whom Justice **Scalia** joins, concurring.

I concur in the opinion of the Court and note some points that may be considered in further proceedings, after the cases are remanded.

The Court is correct, in my view, in holding, first, that Tax Court *Rule 183(c)* mandates "that deference is due to factfindings made by the [special] trial judge," *ante, at 54, 161 L. Ed. 2d, at 241*, and, second, that "it is the *Rule 183(b)* report . . . that *Rule 183(c)* . . . instructs the Tax Court to review and adopt, modify, or reject," *ante, at 58, 161 L. Ed. 2d, at 251*.

The latter holding is supported by the most natural reading of the text of *Rule 183*. Accepting the Commissioner of Internal Revenue's contrary construction would require reading the word "report" in subdivisions (b) and (c) to mean [*66] two different things. One additional indication in the text, moreover, is contrary to the Commissioner's position. *Rule 183(c)* authorizes the Tax Court judge to "recommit [***248] the report with instructions" to the special trial judge. Recommittal is generally a formal mechanism for initiating reconsideration or other formal action by the initial decisionmaker. See, *e.g.,Fed. Rule Civ. Proc. 72(b)* ("The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions"); *Fed. Rule Civ. Proc. 53(e)(2)* (amended 2003) ("The court after hearing may adopt the [special master's] report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions"); cf. *Kansas v. Colorado, 543 U.S. 86, 106, 160 L. Ed. 2d 418, 125 S. Ct. 526 (2004)* ("We accept the Special Master's recommendations and recommit the case to the Special Master for preparation of a decree consistent with this opinion"). Given that Tax Court *Rule 183(c)* provides a formal channel for the Tax Court judge to send a report back to the special trial judge for reconsideration, it is difficult to interpret the Rule to permit the informal process the Commissioner and the dissenting opinion defend here.

If the Tax Court deems it necessary to allow informal consultation and collaboration between the special trial judge and the Tax Court judge, it might design a rule for that process. If, on the other hand, it were to insist on more formality--with deference to the special trial judge's report and an obligation on the part of the Tax Court judge to describe the reasons for any substantial departures from the original findings--without requiring disclosure of the initial report, that would present a more problematic approach. It is not often that a rule requiring deference to the original factfinder exists, but the affected parties have no means of ensuring its enforcement.

That brings us to the questions of how these cases should be resolved on remand and how the current version of the [*67] Rule should be interpreted in later cases. As to the former, this question is difficult because [**1287] we do not know what happened in the Tax Court, a point that is important to underscore here. From a single affidavit, the majority extrapolates "a novel practice" whereby the Tax Court treats the initial special trial judge report as "an in-house draft to be worked over collaboratively by the regular judge and the special trial judge." *Ante, at 57, 161 L. Ed. 2d, at 242*. I interpret the opinion as indicating that there might be such a practice,

not that there is. The dissent, in contrast, appears to assume that any changes to the initial report were the result of reconsideration by the special trial judge or informal suggestions by the Tax Court judge. *Post, at 70-71, 161 L. Ed. 2d, at 250-251* (opinion of Rehnquist, C. J.). Given the sparse record before us, I would not be so quick to make either assumption, particularly given that the Commissioner, charged with defending the Tax Court's decision, is no more privy to the inner workings of the Tax Court than we are.

Given the lingering uncertainty about whether the initial report was in fact altered or superseded, and the extent of any changes, there are factual questions that still must be resolved. If the initial report was not substantially altered, then there will have been no violation of the Rule. If, on the other hand, substantial revisions were made during a collaborative effort between the special trial judge and the Tax Court judge, [***249] the Tax Court might remedy that breach of the Rule in different ways. For instance, it could simply recommit the special trial judge's initial report and start over from there. More likely in these circumstances the remedy would be for the Tax Court to disclose the report that Judge Couvillion submitted on or before September 2, 1998.

This leads to the question of how *Rule 183* should be interpreted in future cases. *Rule 183*'s requirement of deference to the special trial judge surely implies that the parties to the litigation will have the means of knowing whether deference [*68] has been given and of mounting a challenge if it has not. Thus, a reasonable reading of the Rule requires the litigants and the courts of appeals to be able to evaluate any changes made to the findings of fact in the special trial judge's initial report. Including the original findings of fact in the record on appeal would make that possible.

All of these matters should be addressed in the first instance by the Courts of Appeals or by the Tax Court.

With these observations, I join the Court's opinion.

DISSENT BY: REHNQUIST

DISSENT

Chief Justice **Rehnquist,** with whom Justice **Thomas** joins, dissenting.

The Court reverses the judgments of the Courts of Appeals on the ground that Tax Court *Rule 183* does not "authorize the practice that the Tax Court now follows." *Ante, at 65, 161 L. Ed. 2d, at 247.* [1] I disagree. The [**1288] Tax Court's compliance with its own Rules is a matter on which we should defer to the interpretation of that court. I therefore dissent.

1 It bespeaks the weakness of the taxpayers' arguments that the Court hinges its conclusion on an argument not even presented for our consideration. See Tr. of Oral Arg. 46 (Deputy Solicitor General Hungar noting that compliance with *Rule 183* was not included within the questions presented). This Court does not consider claims that are not included within a petitioner's questions presented. See this Court's *Rule 14.1(a)*; *Yee v. Escondido, 503 U.S. 519, 535-538, 118 L. Ed. 2d 153, 112 S. Ct. 1522 (1992).* Two of the taxpayers' three claims included in the four questions presented do not even mention *Rule 183*, instead claiming violations of due process, U.S. Const., Art. III, and governing federal statutes, *26 USC §§ 7459*, *7461*, and *7482* [*26 USCS §§ 7459*], *7461*, and *7482*[*26 USCS §§ 7459*, *7461*, and *7482*]. The only question presented that mentions *Rule 183* is limited to asking whether *Rule 183* requires the Tax Court to uphold findings of fact made by a special trial judge unless they are '"clearly erroneous."' Kanter Pet. for Cert. (i). Nor was this argument contained within the taxpayers' certiorari petitions or in their briefs submitted to the Courts of Appeals. See *Lopez v. Davis, 531 U.S. 230, 244, n. 6, 148 L. Ed. 2d 635, 121 S. Ct. 714 (2001).* Only by failing to abide by our own Rules can the Court hold that the Tax Court failed to follow its Rules.

The Tax Court interprets *Rule 183* not to require the disclosure of the report submitted by the special trial judge [*69] pursuant to paragraph (b) when the Tax Court judge adopts the special trial judge's report. In 1983, the Tax Court amended the Rule to eliminate the requirement that the special trial judge's submitted report be disclosed to the parties so that they could file exceptions before the Tax Court judge acted on the report. See Tax Ct *Rule 183* note, 81 T.C. 1069-1070 (1984). The 1983 amendment also changed the Rule to require that the special trial judge "submit" his report to the Chief Judge instead of "file" it, see Tax Ct *Rule 182(b),* 60 T. C. 1150 (1973), thereby removing the initial report from the appellate record. See *Fed. Rule App. Proc. 10(a)(1)* (requiring [***250] the record on appeal contain "the original papers and exhibits *filed* in the district court" (emphasis added)). [2]

2 By contrast, a "magistrate judge shall *file* his proposed findings and recommendations . . . with the court and a copy shall forthwith be mailed to all parties." *28 U.S.C. § 636(b)(1)(C)* [*28 USCS § 636(b)(1)(C)*] (emphasis added).

Consistent with these amendments, in an opinion signed by Judge Dawson, Special Trial Judge Couvillion, and Chief Judge Wells, the Tax Court held that disclosure of the *Rule 183(b)* report was not required in these cases because "[t]he only official Memorandum Findings of Fact and Opinion by the Court in these cases is TC Memo. 1999-407, filed on December 15, 1999, by Special Trial Judge Couvillion, reviewed and adopted by Judge Dawson, and reviewed and approved by former Chief Judge Cohen." Order of Aug. 30, 2000, in No. 43966-85 etc. (TC), App. to Kanter Pet. for Cert. 102a (hereinafter Order of Aug. 30, App. to Kanter Pet. for Cert.). [3] The Commissioner's brief makes clear that any [*70] changes that might exist between the special trial judge's initial opinion and his final opinion "would presumptively be the result of the [special trial judge's] legitimate reevaluation of the case." Brief for Respondent 11; accord, Brief for Appellee in No. 01-17249 (CA11), pp 92-93; Brief for Appellee in No. 01-4316 etc. (CA7), pp 122-123. Thus, consistent with its practice during the more than 20 years since *Rule 183* was adopted in its current form, the Tax Court interprets *Rule 183* as not requiring disclosure of "any preliminary drafts of reports or opinions." Order of Apr. 26, 2000, in No. 43966-85 etc. (TC), App. to Kanter Pet. for Cert. 109a.

> 3 See also Order of Aug. 30, App. to Kanter Pet. for Cert. 102a ("Judge Dawson states and Special Trial Judge Couvillion agrees, that, after a meticulous and time-consuming review of the complex record in these cases, Judge Dawson adopted the findings of fact and opinion of Special Trial Judge Couvillion, . . . Judge Dawson presumed the findings of fact recommended by Special Trial Judge Couvillion were correct, and . . . Judge Dawson gave due regard to the circumstance that Special Trial Judge Couvillion evaluated the credibility of witnesses"); Order of Apr. 26, 2000, in No. 43966-85 etc. (TC), *id.*, at 108a (noting that findings of fact and credibility assessments made by Special Trial Judge Couvillion were "reflected in the Memorandum Findings of Fact and Opinion (TC Memo. 1999-407)").

Because this interpretation of *Rule 183* is reasonable, it should be accepted. An agency's interpretation of its own rule or regulation is entitled to "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole* [**1289] *Rock & Sand Co., 325 U.S. 410, 414, 89 L. Ed. 1700, 65 S. Ct. 1215 (1945)*; see also *United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 219-220, 149 L. Ed. 2d 401, 121 S. Ct. 1433 (2001)*; *Martin v. OSHRC, 499 U.S. 144, 150-157, 113 L. Ed. 2d 117, 111 S. Ct. 1171 (1991)*. [4]

> 4 Though the Tax Court is an Article I court and not an executive agency, *Freytag v. Commissioner, 501 U.S. 868, 887-888, 115 L. Ed. 2d 764, 111 S. Ct. 2631 (1991)*, there is no reason why *Seminole Rock* deference does not extend to the Tax Court's interpretation of its own procedural rules. See *ante, at 59, 161 L. Ed. 2d, at 244* ("[T]he Tax Court is not without leeway in interpreting its own Rules").

Notwithstanding the deference owed the Tax Court's legitimate interpretation of this Rule, the Court reads the Rule as requiring disclosure of the submitted report because paragraph (c) requires action on "the [***251] Special Trial Judge's *[initial]* report." See *ante, at 58-59, 161 L. Ed. 2d, at 243* (internal quotation marks omitted). To the contrary, *Rule 183* mandates only that action be taken on "the Special Trial Judge's report." The Rule is silent on whether the special trial judge may correct [*71] technical or substantive errors in his original report after it is submitted to the Chief Judge and before the Tax Court judge takes action, either on his own initiative or by informal suggestion. Paragraph (c)'s use of the possessive "Special Trial Judge's report" is most naturally read to refer to the report authored and ascribed to by the special trial judge. [5] If the special trial judge changes his report, then the new version becomes "the Special Trial Judge's report." It is the special trial judge's signature that makes the report attributable to him. At the very least, it is not unreasonable or arbitrary for the Tax Court to construe the Rule as not requiring the disclosure of preliminary drafts or reports. [6] See *Estate of Kanter v. Commissioner, 337 F.3d 833, 841 (CA7 2003)* ("[I]t is clear that the Tax Court's own rules do not require the report to be disclosed . . .").

> 5 There can be no claim made that Tax Court Judge Dawson, and not Special Trial Judge Couvillion, wrote and controlled the content of the report. See, *e.g.*, Brief for Respondent 11 (noting that any changes to a special trial judge's report "would presumptively be the result of the STJ's legitimate reevaluation of the case"); Tr. of Oral Arg. 31 ("The only way it is possible for there to be a change is for the special trial judge himself to determine, in the exercise of his responsibility as a judicial officer, that he made a mistake"); Order of Aug. 30, App. to Kanter Pet. for Cert. 102a (indicating the adopted report was written "by Special Trial Judge Couvillion" and "adopted by Judge Dawson").
>
> 6 Indeed, following the Court's interpretation that a Tax Court judge must act on the report submitted pursuant to paragraph (b), a Tax Court judge would be required to presume correct any

factual findings that a special trial judge had disclaimed. For example, if the Special Trial Judge, after submitting a copy of his report to the Chief Judge, found a critical typographical error that the Tax Court judge might not recognize as such, then the Tax Court judge would be required, under the Court's view, to defer to the report as initially drafted instead of a corrected version of the report.

Nor does the Court's claim that judicial review is impeded withstand scrutiny. Because paragraph (c) can be read, as the Tax Court does, to permit the adoption of the report authored and signed by the special trial judge, the Courts of [*72] Appeals both determined that Tax Judge Dawson expressly adopted Special Trial Judge Couvillion's report. *Id., at 840-841*; *Ballard v. Comm'r, 321 F.3d 1037, 1038-1039 (CA11 2003)*. There can be no doubt that in *adopting* Special Trial Judge Couvillion's findings of fact as well as his legal conclusions in their entirety, Tax Court Judge Dawson complied with whatever [**1290] degree of deference is required by *Rule 183(c)*.

Contrary to the Court's claimed distinctions, the statutory requirement that a Tax Court judge's initial opinion not be published when the Chief Judge directs that such opinion be reviewed by the full Tax Court is quite analogous to the Tax Court's interpretation of *Rule 183*. See *26 U.S.C. § 7460(b)* [*26 USCS § 7460(b)*]; *Estate of Varian v. Commissioner, 396 F.2d 753 (CA9 1968)*. A Tax Court judge whose decision is being reviewed may dissent from the full court's decision. Similarly, the special trial judge may choose not to change his initial findings of fact and opinion. In order to distinguish *§ 7460(b)*, the Court implies that Tax [***252] Court Judge Dawson exercised, or at least may have exercised, undue influence or improper control over Special Trial Judge Couvillion. [7] See *ante, at 62*. This Court generally does not assume abdication or impropriety, see *Freytag v. Commissioner, 501 U.S. 868, 872, n. 2, 115 L. Ed. 2d 764, 111 S. Ct. 2631 (1991)*; *United States v. Morgan, 313 U.S. 409, 422, 85 L. Ed. 1429, 61 S. Ct. 999 (1941)*; *Fayerweather v. Ritch, 195 U.S. 276, 306, 49 L. Ed. 193, 25 S. Ct. 58 (1904)*, and should not impugn the integrity of judges based on an unsubstantiated, nonspecific affidavit. [8]

7 Any implication that Judge Dawson used his higher "rank" to exert improper influence or control is particularly inapt in these cases: Judge Dawson, as a retired Tax Court judge recalled into duty by the Chief Judge, has absolutely no authority over Special Trial Judge Couvillion as both serve at the will of the Tax Court's Chief Judge. See *26 U.S.C. §§ 7443A, 7447(c)* [*26 USCS §§ 7443A, 7447(c)*].

8 The mere absence of any post-1983 decisions in which a Tax Court judge disagreed with a special trial judge does not support the Court's broad charges. A similar degree of agreement was evident *prior* to 1983 when the special trial judge's report was filed and served on the parties, who had the opportunity to file exceptions. From 1976 to 1983, for example, less than one percent (6 out of 680) of special trial judge reports were not adopted by the Tax Court judge, only 1 case reversed the special trial judge, and only 14 cases involved adoption with mostly minor modifications. See Brief for Respondent 17-18, and n 4.

[*73] In sum, *Rule 183* is silent on the question whether the report submitted to the Chief Judge pursuant to paragraph (b) must be the same report acted on by the Tax Court judge under paragraph (c). This Court should therefore defer to the Tax Court's interpretation of the Rule, as amended in 1983, allowing the disclosure of only the special trial judge's report that was adopted by the Tax Court judge.

As every Court of Appeals to consider the arguments has concluded, the taxpayer's statutory and constitutional arguments are not colorable. See *Estate of Lisle v. Commissioner, 341 F.3d 364, 384 (CA5 2003)*; *Estate of Kanter v. Commissioner, supra, at 840-843*; *Ballard v. Comm'r, supra, at 1042-1043*. I agree with those conclusions. [9]

9 With respect to the taxpayers' statutory arguments, *26 U.S.C. §§ 7459* and *7461* [*26 USCS §§ 7459* and *7461*] require only the disclosure of reports adopted by the Tax Court and not those reports that are not adopted. See *§§ 7459* ("shall be the duty of the Tax Court . . . to include in *its* report upon any proceeding its findings of fact or opinion or memorandum opinion" (emphasis added)), 7461 ("[R]eports *of the Tax Court*" shall be public records (emphasis added)). *Section 7482*, which requires courts of appeals to review "decisions of the Tax Court" in the same manner as they review similar district court decisions, was passed to eliminate any special deference paid to Tax Court decisions, see *Dobson v. Commissioner, 320 U.S. 489, 88 L. Ed. 248, 64 S. Ct. 239, 1944-1 C.B. 56 (1943)*, does not portend to govern the record on appeal, cf. *Fed. Rules App. Proc. 10* and *13*, and addresses only the decisions of the Tax Court--not special trial judge reports.

As to their constitutional arguments, neither due process nor Article III requires disclosure.

Disclosure of any report that has been abandoned by the special trial judge is in no way necessary to effective appellate review because the adoption of the special trial judge's report ensures that sufficient deference was given. Nor must all reports be disclosed in order for the Tax Court procedure itself to comport with due process. See *Morgan v. United States, 298 U.S. 468, 478, 481-482, 80 L. Ed. 1288, 56 S. Ct. 906 (1936)*.

[**1291] For these reasons, I would affirm the Courts of Appeals.

REFERENCES

35 Am Jur 2d, Federal Tax Enforcement §§ 621, 622, 904, 905

26 USCS § 7443A; USCS Court Rules, Rules of the *United States Tax Court, Rule 183(b)*

L Ed Digest, Internal Revenue § 82.4

L Ed Index, Tax Court

Annotation References

Supreme Court's construction and application of Supreme Court Rule 14 (and similar predecessor provisions), prescribing requirements of petition for certiorari. 118 L Ed 2d 665.

FOCUS - 3 of 11 DOCUMENTS

CLAUDE M. BALLARD, MARY B. BALLARD, Petitioners-Appellants, versus COMMISSIONER OF INTERNAL REVENUE, Respondents-Appellees.

Nos. 01-17249, 01-17251, 01-17253, 01-17255, 01-17256, 01-17257

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

429 F.3d 1026*; *2005 U.S. App. LEXIS 23640*; *2005-2 U.S. Tax Cas. (CCH) P50,621*; *96 A.F.T.R.2d (RIA) 6818*; *18 Fla. L. Weekly Fed. C 1097

November 2, 2005, Decided
November 2, 2005, Filed

SUBSEQUENT HISTORY: Judgment entered by, Findings of fact/conclusions of law at, Motion granted by, Motion to strike granted by, On remand at *Estate of Kanter v. Comm'r, T.C. Memo 2007-21, 2007 Tax Ct. Memo LEXIS 21 (T.C., 2007)*

PRIOR HISTORY: [**1] Appeals from a Decision of the United States Tax Court. Tax Court Nos. 1984-92, 22884-93, 21616-91 16421-90, 23743-02, 20211-91. *Investment Research Assocs. Ltd. v. Commissioner, T.C. Memo 1999-407, 1999 Tax Ct. Memo LEXIS 463 (T.C., 1999)*

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JUDGES: Before HULL, FAY and GIBSON [*], Circuit Judges.

[*] Honorable John R. Gibson, United States Circuit Judge for the Eighth Circuit, sitting by designation.

OPINION

[*1026] **ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES**

PER CURIAM:

In this tax fraud case the Tax Court ruled that taxpayers fraudulently failed to declare and pay income tax on approximately $ 3,200,000. We affirmed. *Ballard v. Comm'r of Internal Revenue, 321 F.3d 1037 (11th Cir.2003)*. The Supreme Court granted Certiorari and

reversed. *Ballard v. Comm'r of Internal Revenue, 544 U.S. 40, 125 S. Ct. 1270, 161 L. Ed. 2d 227 (2005)*. Following the Supreme Court's guidance, [*1027] we now remand the case to the Tax Court with the following instructions: (1) The "collaborative report and opinion" of the Tax Court is ordered stricken; (2) The original report of the special trial judge is ordered reinstated; (3) The Chief Judge of the Tax Court is instructed to assign this matter to a regular Tax Court Judge who had no involvement in the preparation of the aforementioned "collaborative report; [**2] " (4) The Tax Court shall proceed to review this matter in accordance with the dictates of the Supreme Court, and with the Tax Court's newly revised *Rules 182* and *183*, giving "due regard" to the credibility determinations of the special trial judge and presuming correct fact findings of the trial judge. This is a limited remand, and should either party seek appellate review following this new ruling by the Tax Court, such appeal should be assigned to this panel. [1]

> 1 *See Pettway v. Am. Cast Iron Pipe Co., 681 F.2d 1259, 1269 (11th Cir.2001)* (panel retains jurisdiction to hear subsequent appeals of case following remand); *see also In re Petition of Geisser, 627 F.2d 745, 748-49 (5th Cir. 1980)* (in order for same panel to retain jurisdiction, panel must be referred to explicitly) (binding precedent under *Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir.1981)* (en banc)).

I. Factual Background

The allegations of the Internal Revenue Service (IRS) set [**3] forth a complicated scheme of kickbacks to influence decisions of the Real Estate Department of Prudential Life Insurance Company of America (Prudential). According to these allegations, the principal players were Burton W. Kanter (Kanter), a well known Chicago tax attorney, Claude M. Ballard (Ballard), and Robert W. Lisle (Lisle), two senior executives with Prudential. The details of the alleged schemes are set forth in our earlier opinion and need not be repeated here. The gravamen of the allegations is that Kanter "sold" influence with Ballard and Lisle to gain financing for various projects through Prudential, charged fees for these "services," and split these monies with Ballard and Lisle through a group of legal entities. These allegations focus primarily on five arrangements made between Kanter and J.D. Weaver, Bruce Frey, William Schaffel, Kenneth Schnitzer, and John Eulich. It is alleged that these five individuals paid "kickbacks" to Kanter who in turn funneled a portion to Ballard and Lisle through a complex web of corporations, partnerships, and trusts.

II. Procedural History

A. *Public History*

As set forth in our earlier opinion, the record brought to our [**4] court showed the following:

> Petitioners-Appellants received Notices of Deficiency from the IRS pertaining to years 1975 through 1982, 1984, and 1987 through 1989, alleging that they owed additional taxes. As to each deficiency asserted by the IRS, the Ballards filed petitions for redetermination in the Tax Court. Pursuant to *I.R.C. § 7443A* and *Rules 180*, *181* and *183*, the Chief Judge of the Tax Court assigned the consolidated case to Special Trial Judge D. Irwin Couvillion for trial.
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> At the conclusion of the five-week trial during the summer of 1994, Special Trial Judge Couvillion, in accordance with *Rule 183(b)*, prepared and submitted a written report containing his findings of facts and opinions to the Chief Judge for subsequent review by a Tax Court Judge. In accordance with *Rule 183*, none of the litigants received a copy of Special Trial Judge Couvillion's report at that time. Thereafter, pursuant to *Rule 183(b)*, the Chief Judge assigned [*1028] the case to Tax Court Judge H.A. Dawson, Jr. for his review and final disposition. On December 15, 1999, Judge Dawson issued the opinion of the Tax Court in which the Tax Court both approved of and adopted Special Trial [**5] Judge Couvillion's report (*T.C. Memo 1999-407*; *see Investment Research Assocs. Ltd. v. Commissioner, T.C. Memo 1999-407, 1999 Tax Ct. Memo LEXIS 463, 78 T.C.M. (CCH) 951 (1999)*), a copy of which was provided to the parties. On July 24, 2001, Judge Dawson entered the final order of the Tax Court against Petitioners-Appellants, assessing tax deficiencies of $ 1,318,648. Of that amount, $ 422,812 is penalties against Ballard pursuant to *I.R.C. § 6653(b)*.
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> On April 20, 2000, prior to the Tax Court's final order of assessment, the Ballards, joined by the other petitioners, filed a motion requesting access to "all reports, draft opinions or similar documents, prepared and delivered to the [Tax] Court pursuant to *Rule 183(b)*," or, in the alternative, that the Tax Court either certify

the issue for interlocutory appeal pursuant to *Rule 193* or make the initial findings part of the record for subsequent appeal to the circuit court. On April 26, 2000, Judge Dawson issued an order denying the motion. In the order, Judge Dawson noted that "[he] gave due regard to the fact that Special Trial Judge Couvillion evaluated the credibility of witnesses . . . and treated the findings [**6] of fact recommended by the Special Trial Judge as being presumptively correct." [2] On May 26, 2000, the Ballards, along with the other petitioners, filed a second motion with the Tax Court. The second motion requested that Special Trial Judge Couvillion's original report or other documentation be placed under seal and made part of the record for subsequent appellate review. That motion was denied on May 30, 2000.

On August 22, 2000, the Ballards, once again joined by the other petitioners, filed a motion requesting that the Tax Court reconsider its denial of access to Special Trial Judge Couvillion's original report or, alternatively, that the Tax Court grant the petitioners a new trial. In support of this motion, an affidavit from Randall G. Dick ("Dick"), attorney for IRA and for Kanter, was filed. In the affidavit, Dick indicated that two unidentified Tax Court Judges approached him and stated that in the original report submitted to the Chief Judge in accordance with *Rule 183(b)*, Special Trial Judge Couvillion concluded that payments made by "the Five" were not taxable to the individual petitioners and that the fraud penalty was not applicable. Furthermore, Dick indicated that [**7] the two unidentified Tax Court Judges expressed 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." According to Dick, the two Tax Court Judges stated that the changes to Special Trial Judge Couvillion's findings relating to credibility and fraud were made by Judge Dawson. Finally, Dick indicated that he confirmed what he was told by the two unidentified Tax Court Judges with yet another unidentified Tax Court Judge. Apparently, the third unidentified Tax Court Judge confirmed that Special Trial Judge Couvillion's opinion had been "changed." On August [*1029] 30, 2000, the Tax Court issued an order signed by Special Trial Judge Couvillion, Judge Dawson and the Chief Judge of the Tax Court denying the motion and confirming that, contrary to the contents of the affidavit, the underlying report adopted by the Tax Court is, in fact, Special Trial Judge Couvillion's report.

Subsequently, the Ballards petitioned this court for a writ of mandamus seeking an order directing the Tax [**8] Court to provide the Ballards with a copy of the original Special Trial Judge Couvillion report or, alternatively, seeking an order requiring that the Tax Court provide any changes made by Judge Dawson to the original Special Trial Judge Couvillion report. The petition was denied on October 23, 2000.

Ballard, 321 F.3d at 1040-41 (11th Cir.2003).

2 *Rule 183(c)* provides in relevant part, "due 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."

B. *Undisclosed History*

We now know, based on new documents filed with this Court, that the following events occurred in the Tax Court:

1. Judge Couvillion's original report initially recommended that Ballard was not liable for the deficiencies in tax asserted against him. Specifically, Judge Couvillion concluded that "there were no 'kickback schemes,' [**9] and none of the alleged 'kickback schemes' payments by 'The Five' represented unreported income of Kanter, Ballard, and Lisle. There was, therefore, no underpayment of tax." In fact, Judge Couvillion's original report did not consider the government's allegation of fraud "as even rising to the level of suspicion of fraud."

2. After Judge Dawson was assigned to the case, he reviewed Judge Couvillion's original report and advised the Chief Judge that he disagreed with it. Approximately one week later, on or about August 27, 1998, then Chief Judge Cohen advised Judge Dawson that she also disagreed with Judge Couvillion's original report.

3. A conference was scheduled between Chief Judge Cohen, Judge Dawson, and Judge Couvillion. It appears that shortly before this conference was to take place, Judge Couvillion was aware that both Chief Judge Cohen and Judge Dawson disagreed with his report.

4. On September 1, 1998, Judge Couvillion withdrew his original report.

5. Chief Judge Cohen assigned Judge Dawson and Judge Couvillion to write a "collaborative report." This "collaborative report" stood in stark contrast to Judge Couvillion's original report. In fact, the collaborative [**10] report now concluded that Ballard should be liable for the deficiencies in tax asserted against him.

6. On October 25, 1999, Judge Dawson adopted the "new collaborative report."

7. On November 4, 1999, Chief Judge Cohen adopted the "new collaborative report" with some minor modifications.

8. On December 15, 1999, Chief Judge Cohen formally assigned the case to Judge Dawson, and the "new collaborative report" was filed as the decision of the Tax Court.

III. Discussion

The Supreme Court has now made clear that the procedures outlined above run contrary to the rules of the Tax Court and completely disregard the deference due to the credibility determinations and fact findings of Special Trial Judge Couvillion. Although the Tax Court itself renders the [*1030] final decision, *Tax Court Rule 183* [3] governs the proceedings in which a special trial judge hears a case. Specifically, *Rule 183(b)* requires that the special trial judge "submit a report, including findings of fact and opinion, to the Chief Judge, and the Chief Judge will assign the case to a judge or Division of the Court." *Rule 183(c)* requires the assigned Tax Court Judge to give "due regard" to the [**11] report because the special trial judge "had the opportunity to evaluate the credibility of the witnesses." Fact findings in the report "shall be presumed to be correct." Tax Ct. *Rule 183(c)*. The Tax Court's final decision may either adopt, modify, or "reject in whole or in part" the special trial judge's report. *Id.*

3 The relevant provisions of Tax Court *Rule 183* were previously found in Tax Court *Rule 182*, prior to the 1983 amendment. Moreover, Tax Court *Rule 183* was recently amended on September 20, 2005. Unless otherwise stated, we cite the language of the rule as it was at the time of the Supreme Court's decision.

As discussed by the Supreme Court, special trial judge reports were once made public and were included in the record on appeal. Disclosure of the original reports as submitted to the Chief Judge marked the practice of the Tax Court prior to a 1983 revision to the Tax Court Rules. [4] This revision deleted the requirement found in *Tax Court Rule 182* that, upon submission of the report, [**12] "a copy... shall forthwith be served on each party." The revision also deleted a prior provision giving parties an opportunity to make exceptions to the report. As a result, the Tax Court significantly altered its practice regarding special trial judge recommendations.

4 The effective date of this rule revision was January 16, 1984.

Following the 1983 revision, the Tax Court began to withhold special trial judge reports from the public and to exclude these reports from the record on appeal. Tax Court Judges also refrained from stating whether they had "modified" or "rejected" reports in their decisions. Instead, decisions invariably stated that they agreed with and adopted the special trial judge's recommendations. *See Ballard, 125 S. Ct. at 1275*. [5] Thus, the Tax Court discontinued its practice of disclosing whether and how its final decision deviated from the special trial judge's original report. The Supreme Court has now concluded that this practice did not comply with Tax Court rules, [**13] and that "the Tax Court, like all other decision making tribunals, is obligated to follow its own Rules." *Id. at 1282*. Furthermore, the Supreme Court stated that the Tax Court's practice of not disclosing the "original report, and of obscuring the Tax Court judge's mode of reviewing that report, impedes fully informed appellate review for the Tax Court's decision." *Id. at 1283*.

5 This is apparently a stock statement used in opinions issued under post-revision Tax Court practices. *See Ballard, 125 S. Ct. at 1275*.

The Tax Court recently amended *Rule 183* to reflect the dictates of the Supreme Court's opinion. The current rule provides "substantially the same procedures as those set forth in former *Rule 182*." *Tax Ct. Rule 183* note on *Ballard, 544 U.S. 40, 161 L. Ed. 2d 227, 125 S. Ct. 1270(2005)* (as amended Sept. 20, 2005). Significantly, these procedures include service of the special trial judge report on the parties, an opportunity for objection to [**14] the recommendations, and a requirement that the final order or report reflect the presiding judge's action on the report. *See* id. Although these specific requirements were not in effect at the time of this lawsuit, they reflect the overall principles outlined [*1031] by the Supreme Court, giving force to the phrase "due regard" by requiring more of the appointed judge than the bare assertion that he gave "due regard" to the special trial judge's findings.

Credibility determinations are entitled to great deference, and must not be disturbed unless manifestly unreasonable. *See Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 575, 105 S. Ct. 1504, 1512, 84 L. Ed. 2d 518 (1985)* ("When findings are based on determinations regarding the credibility of witnesses, [*Fed. R. Civ. P.]52(a)* demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said") (citations omitted). As such, a reviewing court must be in the position to scrutinize whether or not such findings have been given "due regard." Absent [**15] Judge Couvillion's original report, we had no basis for comparison and could only defer to Judge Dawson's statement that he adopted the report. We now know that Judge Couvillion's original report stands in direct opposition to Judge Dawson's ultimate decision, and that collaboration amongst Chief Judge Cohen, Judge Dawson, and Judge Couvillion resulted in considerable and fundamental modifications to the original report. Unexplained modification of Judge Couvillion's credibility determinations is unacceptable. If a reviewing judge departs from a special trial judge's findings of fact, such departure must be reflected and explained in the final order, and must be evident to the reviewing court by making the original recommendations available in the record on appeal. Any such departures must be fully explained and supported by the record.

The situation is analogous to the district court's treatment of a magistrate judge's findings of fact. A magistrate's initial findings are made available to the reviewing court and to the parties. *See 28 U.S.C. § 636(b)(1)(c)*. [6] A district court must defer to a magistrate's findings unless the magistrate's understanding [**16] of facts is entirely unreasonable. *See U.S. v. Ramirez-Chilel, 289 F.3d 744, 749 (11th Cir.2002)*. Moreover, a district court may not reject a magistrate's credibility determinations without rehearing the disputed testimony. *See United States v. Cofield, 272 F.3d 1303, 1306*. Only in "rare cases," where "an articulable basis for rejecting the magistrate's original resolution of credibility" is found in the transcript, and where that basis is "articulated by the district judge," may an exception be made to the general rule requiring rehearing. *Id.* (citations omitted)(internal quotations omitted). As such, a reviewing court must be able to determine whether, as a matter of law, the district court gave the appropriate level of deference to the fact finder. This cannot be determined if original fact findings and credibility determinations are withheld from the record on appeal. The need for transparency under the present circumstances is no less than that required between magistrate and district court judge. Judge Couvillion's original report was not included in the record on appeal. We now know, however, that the Tax Court departed from Judge Couvillion's [**17] original report and articulated no [*1032] basis for this departure. The procedures employed by the Tax Court, purporting to adopt Judge Couvillion's opinion when in reality changing it, merely emphasize the need for such transparency, and run contrary to *Rule 183* both in principle and in application.

6 The same holds true for special masters and bankruptcy judges. *See Fed. R. Civ. P. 53(f)* (special masters); *Fed R. Bkrtcy. Proc. 9033(a)* (bankruptcy judges). Furthermore, *Fed. Rule App. Proc. 10(a)* requires that the record on appeal include original papers filed in district court. The *Administrative Procedure Act* specifies that the record on appeal must contain, "all decisions, including initial, recommended, and tentative decisions." *5 U.S.C. § 557(c)*.

The defendant taxpayers objected to the concealment of Special Trail Judge Couvillion's original report, and to its exclusion from the record on appeal. In compliance [**18] with the Supreme Court, we conclude that the original report of Special Tax Judge Couvillion cannot be excluded from the record on appeal because such concealment "impedes fully informed appellate review of the Tax Court's decision" by "obscuring the Tax Court Judge's mode of reviewing that report." *Ballard, 125 S. Ct. at 1283*. It is absolutely essential that Judge Couvillion's original report be reinstated and given the impact and deference required by law because all primary witnesses in this case are now deceased, thus foreclosing the opportunity for a retrial.

IV. Conclusion

Based on the recently disclosed history of this case and in light of the Supreme Court's decision, it has become evident that the procedures employed by the Tax Court do not comport with *Tax Court Rule 183* as it stood at the time of our original opinion, nor do they with *Rule 183* as it stands now. Altering the original credibility determinations and findings of Judge Couvillion without explanation was not only contrary to the requirements of the law but also misleading. It is obvious now that the withholding of Special Trial Judge Couvillion's original report did, in fact, impede [**19] the process of appellate review. We therefore vacate the Tax Court's decision and remand with instructions to: (1) Strike the "collaborative report" that formed the basis of the Tax Court's ultimate decision; (2) Reinstate Judge Couvillion's original report; (3) Refer this case to a regular Tax Court Judge who had no involvement in the preparation of the aforementioned "collaborative report" and who shall give "due regard" to the credibility determinations of Judge Couvillion, presuming that his fact findings are correct unless manifestly unreasonable; [7] and (4) Adhere strictly hereafter to the amended Tax Court Rules in finalizing Tax Court opinions.

7 Former Chief Judge Cohen, Judge Dawson, and Judge Couvillion are not to be involved in this new review.

VACATED and **REMANDED** to the Tax Court for proceedings consistent with this opinion. All pending motions are denied as moot.

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