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Katherine Kmiec Turner

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No More Secrets: Under *Ballard v. Commissioner*, Special Trial Judge Reports Must Be Revealed

By Katherine Kmiec Turner*

I. INTRODUCTION

The Supreme Court's determination that the Tax Court cannot keep its special trial judge reports secret is a "twist in a series of revelations that have shaken the foundations of the U.S. Tax Court and raised questions about the credibility of the court's decision-making process" ¹ On the surface, *Ballard v. Commissioner*² appears to be a simple case. The Tax Court interpreted its own rules to permit secrecy of the initial reports written by special trial judges, who are lower level Tax Court judges that make findings of fact and then pass the case on to a regular Tax Court judge.³ The Supreme Court disagreed, stating that the only possible way to keep these reports secret is to rewrite the Tax Court rules.⁴ While issues of due process were continually brought up, the Supreme Court ultimately

* J.D. Candidate, 2007, Pepperdine University School of Law.

1. Maurice Possley, *Judges set aside Tax Court ruling; Decision a victory for late Chicago lawyer*, CHI. TRIB., Nov. 3, 2005, at B1. This article was written in response to the Supreme Court decision in *Ballard v. Comm'r*, 544 U.S. 40 (2005). It traces the history of the case and does further independent research regarding how many "Tax Court judges secretly changed the findings of lower-level trial judges . . . over the past decade." Possley, at B1.

2. *Ballard v. Comm'r*, 544 U.S. 40 (2005). This case was argued on Dec. 7, 2004 and on March 5, 2005 was decided in favor of Petitioners, two businessmen accused of fraud. *Id.*

3. *Ballard v. Comm'r*, 321 F.3d 1037 (11th Cir. 2003); *Estate of Kanter v. Comm'r*, 337 F.3d 833 (7th Cir. 2003).

4. *Ballard*, 544 U.S. at 64-66. Justice Ginsberg, writing for the majority, states: "The idiosyncratic procedure the Commissioner describes and defends, although not the system of adjudication that Rule 183 currently creates, is one the Tax Court might some day adopt." *Id.* at 65.

based its determination on the statutory interpretation of the role of a special trial judge.⁵ The impact of *Ballard* is so strong that the authority of “the whole administrative array of the federal government” is affected by its outcome.⁶ As the petition for certiorari points out, “[t]he [q]uestions [p]resented are of [m]anifest [n]ational [i]mportance . . . [t]he implications of this case stretch far beyond the Tax Court context.”⁷ This case struggles to balance two essential aspects of administrative law: (1) the ability of the agency to have the deference and authority to write and interpret its own rules without Article III court interference; and (2) the ability of a party to be able to see what its initial findings of fact are to give confidence in the administrative procedure and allow for a meaningful appeal.

This case note evaluates *Ballard*, its roots, and its impact on the Tax Court and administrative agencies. First, the history of the United States Tax Court is provided with a focus on the special trial judges and the structure of Tax Court Rule 183 that was the central focus of *Ballard*.⁸ Second, there is a brief comparison of other

5. See Transcript of Oral Argument at 2, *Ballard*, 544 U.S. at 40 (Nos. 03-184, 03-1034) for a question posed by Justice O'Connor: “There also are due process allegations, and I’m not sure I even quite understand what the precise due process violation is that’s alleged. But I would like you to address both and to tell us, first of all, how it would be resolved solely on a statutory basis from your perspective.” Arguing on behalf of the Petitioners, Mr. Shapiro stated: “The readiest ground for decision is the statutory basis, and we believe that the statute is a good means to avoid a complex due process question.” *Id.*

6. Petition for Writ of Certiorari, *Ballard*, 544 U.S. at 40, No. 03-184, 2003 WL22428707 (2004). Although the case only directly affects the Tax Court by forcing it upon remand to interpret its rules in a particular way, the ability of administrative agencies and courts to make their own rules and interpret them are threatened by this case. The public’s confidence in the administrative process is tested by this case as well. *Id.*

7. *Id.*

8. See *infra* notes 15-72; TAX CT. R. 183 (as amended 2005); see *infra* notes 15-72 and accompanying text. Rule 183 (a) is a Tax Court rule that authorizes special trial judges to conduct certain trials assigned to them by the Chief Tax Court Judge. Rule 183(b) requires that the special trial judge make a report of its findings of fact. Rule 183(c) requires that the regular Tax Court judge give deference to the findings of fact made by the special trial judge and either accept, modify, or reject the special trial judge report. TAX CT. R. 183(a)-(c). See also Brief of the Petitioner on the Merits, *Ballard*, 544 U.S. at 40, 2004 WL 2004 WL 2336550 (2004).

positions, such as a magistrate, to the special trial judge.⁹ Third, this article simplifies the complicated, prior history of *Ballard* that includes three different petitioners, weeks of trial, and numerous courts proceedings and opinions.¹⁰ Fourth, the *Ballard* opinion is analyzed in detail, separately describing the majority opinion authored by Justice Ginsberg,¹¹ the concurring opinion authored by Justice Kennedy,¹² and the dissenting opinion authored by the late Chief Justice Rehnquist.¹³ Finally, there is an explanation of *Ballard's* effect on the taxpayers involved, the effect on the Tax Court rules and practices, and the impact it will have on "the whole administrative array of the federal government."¹⁴

A. The United States Tax Court

1. Authority and Jurisdiction of the Tax Court

The United States Tax Court is a federal court established under the authority granted to Congress in Article I of the United States Constitution.¹⁵ Under the Necessary and Proper Clause, Congress

9. See *infra* notes 73-98 and accompanying text.

10. See *infra* notes 99-123 and accompanying text. There are currently twenty-two cases listed in the direct history of *Ballard*. For a simple, graphical representation of all of the cases involved in *Ballard*, look at the Westlaw Direct History graphic depiction by looking up *Ballard*, 544 U.S. at 40 and clicking on the "Direct History" (graphical view in the left-hand column).

11. See *infra* notes 124-198 and accompanying text.

12. See *infra* notes 199-211 and accompanying text.

13. See *infra* notes 212-223 and accompanying text.

14. See *infra* notes 224-268 and accompanying text. Petition for Writ of Certiorari at 8, *supra* note 7.

15. United States Tax Court, About the Court, at <http://www.ustaxcourt.gov/about.htm> (last visited April 12, 2006). See also *Ex Parte Bakelite Corp.*, 279 U.S. 438, 451 (1929) (recognizing Article I power to establish legislative courts, specifically dealing with consular courts and the Court of Claims). Cf. CHRISTOPHER N. MAY & ALLAN IDES, CONSTITUTIONAL LAW NATIONAL POWER AND FEDERALISM, EXAMPLES & EXPLANATIONS (Aspen Publishers 3rd ed. 2004), (stating that the argument against non-Article III courts is that Article III courts are not distinct from Article III courts and "[t]he complete independence of the courts of justice is particularly essential in a limited constitution" (quoting THE FEDERALIST NO. 78, at 466 (Clinton Rossiter ed., 1961))).

has the authority to create courts that do not fall under its Article III power.¹⁶ This power was judicially acknowledged in 1828 when the Supreme Court authorized “legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States.”¹⁷

The Tax Court was originally established to resolve the numerous disputes taxpayers have with the government.¹⁸ This is a unique court that the government, specifically the Commissioner of the Internal Revenue Service (IRS), has special interest in because the government is always a party to a claim.¹⁹ Taxpayers have the right to dispute their tax claims in either the U.S. District Courts, the U.S. Court of Federal Claims, the U.S. Tax Court or possibly the Bankruptcy Court.²⁰ There are two major differences that distinguish the Tax Court from the U.S. District Courts and the Court of Federal

16. See *American Ins. Co. v. Bales of Cotton*, 26 U.S. 511, 542 (1828) (holding that the Constitution permits Congress to enact laws that are necessary and proper for execution of its powers). Congress has set up numerous other Article I courts including: U.S. Court of Federal Claims, U.S. Court of Appeals for the Armed Forces, U.S. Court of Appeals for Veterans Claims, D.C. municipal court system, U.S. bankruptcy courts, and the U.S. district courts for the districts of Guam, the Virgin Islands, and the Northern Mariana Islands. Stephen C. Gara, *Challenging the Finality of Tax Court Judgments: When Is Final Not Really Final?* 20 AKRON TAX J. 35, 57 (2005).

17. *American Ins. Co.*, 26 U.S. at 546 (approving formation of an admiralty court as a legislative court).

18. Gara, *supra* note 16, at 38.

The Supreme Court has generally limited Congress' authority to establish Article I courts to four areas: (1) U.S. possessions and territories, (2) military affairs, (3) civil disputes between private parties and the United States, and (4) other areas where the Article I court serves merely as an adjunct to an Article III court who oversees the former's actions. The United States Tax Court falls into category three, resolving civil tax disputes between private parties (taxpayers) and the United States (Internal Revenue Service).

Id. (citing ERWIN CHERMERINSKY, FEDERAL JURISDICTION 181-82 (Little Brown & Co. 1989) and *Burns, Stix Friedman & Co. v. Comm'r*, 57 T.C. 392, 396 (T.C. 1971)).

19. See Transcript of Oral Argument, *supra* note 5.

20. Mervyn S. Gerson, et. al., *Dealing with Tax Disputes*, 2-JUL HAW. B.J. 6.

claims. First, as will be discussed below, the Tax Court is the only forum where a taxpayer can file suit and challenge the amount being demanded from the IRS *before* paying the amount.²¹ Second, the Tax Court is an Article I court while the other two courts are Article III.²²

The implications of the distinction between Article I and Article III courts are significant. First, under Article I, Tax Court judges do not receive life tenure; rather, the nineteen Tax Court judges are appointed to fifteen-year terms.²³ Second, Article I courts do not receive a constitutionally protected and guaranteed salary.²⁴ Third, as an Article I court, the Tax Court has a narrow jurisdiction defined by Congress to keep these courts from encroaching on Article III court jurisdiction.²⁵

21. To be heard by the Tax Court, taxpayers have to file a petition stating that they disagree with the Commissioner's determination of their tax deficiency. They also pay a \$60 filing fee.

Cases are calendared for trial as soon as practicable (on a first in/first out basis) after the case becomes at issue. When a case is calendared, the parties are notified by the Court of the date, time, and place of trial. Trials are conducted before one judge, without a jury, and taxpayers are permitted to represent themselves if they desire. Taxpayers may be represented by practitioners admitted to the bar of the Tax Court.

About the Court, *supra* note 15.

22. Gara, *supra* note 16 at 37-38.

23. 26 USCS § 7443(a) ("The Tax Court shall be composed of 19 members.") Article I Court judges do receive life tenure. DOUGLAS W. KMEC ET. AL, THE HISTORY, PHILOSOPHY, AND STRUCTURE OF THE AMERICAN CONSTITUTION (2nd ed. 2004).

24. Gara, *supra* note 16 at 37-38; *see also* May, *supra* note 15.

25. *Burns, Stix Friedman & Co.*, 57 T.C. at 396. This Tax Court case states:

The Court presently has no jurisdiction to execute its decisions; it does not render a monetary judgment; it simply determines the amount of the deficiency or overpayment of tax. The Tax Court has only such jurisdiction as is conferred upon it by statute. It has no jurisdiction to exercise the broad common law concept of "judicial power" invested in courts of general jurisdiction by article III of the Constitution. If the jurisdiction and function presently vested in the Tax Court could be exercised constitutionally by an "independent agency within the Executive Branch," there is little reason to believe that Congress could not constitutionally delegate that jurisdiction to a "legislative court."

Id. (quoting *Old Colony Trust Co. v. Comm'r*, 279 U.S. 716 (1929)).

The jurisdiction of the Tax Court includes the authority to hear tax disputes concerning notices of deficiency, notices of transferee liability, certain types of declaratory judgment, readjustment and adjustment of partnership items, review of the failure to abate interest, administrative costs, worker classification, relief from joint and several liability on a joint return, and review of certain collection actions.”²⁶

2. Creation of the Tax Court

In 1924, the executive branch created an independent agency to permit taxpayers to challenge the IRS *before* they had to pay the debt owed.²⁷ At the time, the agency was called the Board of Tax Appeals, but its name was changed to the “Tax Court” in 1942.²⁸ Shortly after its creation, Congress ruled that the decision of the tax board “judges” had to be reviewed by an appellate district court.²⁹ In 1969, under the Tax Reform Act, the Tax Court status was increased and its role was solidified by statute.³⁰ This act changed the court from being considered an *executive, independent agency* to being called an *Article I, legal court* called the “United States Tax Court.”³¹

26. About the Court, *supra* note 15.

27. Rev. Act of 1924, ch. 234, 900, Pub. L. No. 68-176, 43 Stat. 253, 336-38 (1924). At this time, the IRS was called the Bureau of Inland Revenue. When the bill was signed, President Coolidge stated: “The provisions of the bill . . . with reference to the Board, make it in its essentials practically a court of record.” Steve R. Johnson, *The Phoenix and the Perils of the Second Best: Why Heightened Appellate Deference To Tax Court Decisions Is Undesirable*, 77 OR. L. REV. 235, 280 (1998).

28. Rev. Act of 1942, ch. 619, 504(a), Pub. L. No. 77-753, 56 Stat. 798, 957 (1942). Tax Court Chairman Murdock explained the change as appropriate because it “validate[d] the generally recognized view that the Board was a court in everything but name.” Johnson, *supra* note 27, at 281.

29. Rev. Act of 1926, ch. 27, 1001(a), 1002, Pub. L. No. 69-20, 44 Stat. 9, 109-10 (1926).

30. When changing the Tax Court to an Article I court, the legislative history explained that “[s]ince the Tax Court has only judicial duties, the committee believes it is anomalous to continue to classify it with quasi-judicial executive agencies that have rulemaking and investigatory functions.” S. REP. NO. 91-552 (1969), as reprinted in 1969 U.S.C.C.A.N. 2027, 2341. See also Johnson, *supra* note 27, at 281.

31. Johnson, *supra* note 27, at 39.

There is an ongoing dispute regarding whether the Tax Court should be treated like an administrative agency because it was established as such, or if it should be treated strictly as a tribunal court of law. In *Freytag v. Commissioner*, the Supreme Court majority clarified that the court is considered an Article I court; however, the minority view rears its head, continually echoing the fact that the tax court was originally an executive administrative agency and should be treated as such.³² While all nine Justices in *Freytag* agree that the special trial judges are “inferior [o]fficers,”³³ five Justices stated that the Tax Court is a “Court of Law” under the appointments clause, while the other four justices argue that the Tax Court is a “Department.”³⁴ A thoughtful discussion of the *Freytag* case states the following:

The majority held that “Courts of Law” are not required to be Article III courts, and that the tax court is a “Court of Law,” because its function is essentially judicial, being “neither advocate nor rule maker.” The concurrence equated “Court of Law,” with Article III courts, but considered the tax court to be a Department, and noted that the Constitution does not require departments to be those cabinet-level agencies headed by a secretary. Moreover, the concurrence noted that Article I courts and administrative agencies, however judicial their decision-making may appear, cannot and do not exercise the judicial power of the United States. Instead, they exercise executive power. Both opinions in *Freytag* recognize that non-Article III courts function substantially the same as Article III courts.³⁵

The operations of the court remained almost identical to the pre-1969 Tax Court; however, because they are now considered Article I, legal court judges rather than officers of an administrative agency, the judges hold more judicial power, such as the ability to hold

32. *Freytag v. Comm’r*, 501 U.S. 868 (holding that as inferior officers they must be appointed by “Heads of the Departments” or the “Courts of Law”).

33. *Id.* at 882; *see also id.* at 901 (Scalia, J., concurring).

34. *Id.* at 883 (majority opinion).

35. Alec P. Ostrow, *Constitutionality Of Core Jurisdiction*, 68 AM. BANKR. L.J. 91, 104, n.98 (1994) (citing *Freytag*, 501 U.S. at 868) (internal citations omitted).

parties in contempt.³⁶ Additionally, the right of parties to have the Tax Court decisions reviewed by the U.S. District Courts was affirmed in this Act.³⁷

3. Organization of the Tax Court

The Tax Court is made up of nineteen judges appointed by the President, one of whom serves as the Tax Court's Chief Judge.³⁸ These "regular" judges serve fifteen-year terms and receive a salary established by statute.³⁹ The Chief Judge has the right to assign a "special trial judge" to perform the fact-finding in any case and be the ultimate decision-maker in certain cases.⁴⁰ It is 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," that is at issue in *Ballard*.⁴¹

Once a determination has been made in favor of the IRS by either the special trial court judge or the regular judge, any party has the right to appeal to a U.S. Court of Appeal.⁴² The circuit court hearing

36. Gara, *supra* note 16 at 57, n.45 (citing *Burns, Stix Friedman & Co.*, 57 T.C. at 395-96.).

37. Rev. Act of 1926, ch. 27, 1001(a), 1002.

38. *Ballard*, 544 U.S. at 48 (citing 26 U.S.C. § 7443(a)-(b), (e), A(a) (1980)). See also About the Court, which gives the Tax Court's own description of the organization as follows:

The Tax Court is composed of 19 members appointed by the President. Trial sessions are conducted and other work of the Court is performed by those judges, by senior judges serving on recall, and by special trial judges. All of the judges have expertise in the tax laws and apply that expertise in a manner to ensure that taxpayers are assessed only what they owe, and no more. Although the Court is physically located in Washington, D.C., the judges travel nationwide to conduct trials in various designated cities.

About the Court, *supra* note 15.

39. *Ballard*, 544 U.S. at 48 (citing 26 U.S.C. § 7443(a)-(b), (e), A(a)).

40. *Id.* at 48 (citing 26 U.S.C. § 7443(a)-(b), (e), A(a)).

41. *Id.* at 48; see also *infra* notes 55-73 and accompanying text.

42. I.R.C. §7482 (2000) (codified as 26 U.S.C.S. § 7482). This code states:

The United States Courts of Appeals (other than the United States Court of Appeals for the Federal Circuit) shall have exclusive jurisdiction to review the decisions of the Tax Court,

the appeal treats as if it was coming directly from a regular U.S. District Court trial.⁴³

4. Rules of the Tax Court

Although Congress established the Tax Court and proscribed general guidelines, the Tax Court has adopted its own procedural rules.⁴⁴ The rule that permits and regulates special trial judges and is at issue in *Ballard*, Rule 183, is one of these self-established Tax Court rules.⁴⁵ The deference given to an Article I court to interpret its self-determined rules is one of the major issues discussed in *Ballard*.⁴⁶ Currently, under the rule established in *Bowles v. Seminole Rock & Sand Co.*, it is clear that administrative agencies have the right to interpret their own rules and regulations within

except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code.

I.R.C. §7482.

43. *Id.*

44. TAX CT. R. 1 (codified as 26 U.S.C.A. 7453 (a)-(b) (2000)) (“The United States Tax Court, after giving appropriate public notice and an opportunity for comment, may make and amend rules governing its practice and procedure.”) Section (a) explains the scope of the rule as follows:

These Rules govern the practice and procedure in all cases and proceedings before the Court. Where in any instance there is no applicable rule of procedure, the Court or the Judge before whom the matter is pending may prescribe the procedure, giving particular weight to the Federal Rules of Civil Procedure to the extent that they are suitably adaptable to govern the matter at hand.

Id. at (b).

45. For a more detailed discussion of Tax Court Rule 183 and its impact on the Tax Court *see infra* notes 55-73 and accompanying text.

46. The fact that Justice Rehnquist noted that the Tax Court interpreted its rules to permit the report to remain secret is the entire rationale for his dissenting opinion in *Ballard*, 544 U.S. at 68-73 (Rehnquist, C.J., dissenting).

reason.⁴⁷ *Bowles* involved a dispute over a price administrator's interpretation of Maximum Price Regulation No. 188 that was issued by the price administrator.⁴⁸ The court stated that "[s]ince this involves an interpretation of an administrative regulation . . . the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."⁴⁹ Whether this same deference should be granted to an agency that was changed to an Article I court has not been settled.⁵⁰ It is clear that Congress granted the Tax Court exclusive rulemaking authority under 26 U.S.C. 7443A(a) and 7453, which should carry some weight in this argument.⁵¹ These statutes permit the Tax Court to have a choice when interpreting ambiguity in congressional rules relating to the Tax Court.⁵² When the Tax Court became the official U.S. Tax Court and was elevated from an executive agency to an Article I court in 1969, was its power to interpret its own rules also diminished?⁵³

47. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (discussing emergency price control laws); *see also Ballard*, 544 U.S. at 68-69.

48. *Bowles*, 325 U.S. at 413.

49. *Id.* at 413-14.

50. *See Ballard*, 544 U.S. at 68-69. The late Chief Justice argued that "[t]hrough the Tax Court is an Article I court and not an executive agency, there is no reason why *Seminole Rock* deference does not extend to the Tax Court's interpretation of its own procedural rules. Further, Justice O'Connor in the majority acknowledges that "the Tax Court is not without leeway in interpreting its own Rules." *Ballard*, 544 U.S. at 60 (majority opinion).

51. 26 U.S.C.S. § 7443A(a) states: "The chief judge may, from time to time, appoint special trial judges who shall proceed under such rules and regulations as may be promulgated by the Tax Court." 26 U.S.C.S. § 7453 states:

Except in the case of proceedings conducted under section 7436(c) or 7463 [26 U.S.C.S. § 7436(c) or 7463], the proceedings of the Tax Court and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Tax Court may prescribe and in accordance with the rules of evidence applicable in trials without a jury in the United States District Court of the District of Columbia.

Id.

52. Brief for Respondent at 33, *Ballard*, 544 U.S. at 40.

53. *See also Freytag* 501 U.S. at 911-12 (Scalia, J., concurring in part and concurring in judgment) (stating that that Tax Court should be characterized as an independent agency because it was once an executive agency); Rev. Act of 1924,

5. Special Trial Judges

In 1943, before the Tax Court was considered an Article I court, it created “special trial judges,” which were later called “commissioners.”⁵⁴ The chief judge of the Tax Court was granted authority to “from time to time, appoint [these] special trial judges.”⁵⁵ The Special trial judges do not have set terms like the regular fifteen-year renewable term tax court judges.⁵⁶ The special trial judges have a set salary of 90% of what the regular tax court judges receive.⁵⁷

While there is very little litigation regarding special trial judges,⁵⁸ in 1991, the Supreme Court ruled that the special trial judges are “constitutionally recognized ‘officers,’” and that the Chief Tax Judge is within his authority to assign cases to the special trial judges.⁵⁹

Pub. L. No. 68-176, tit. IX, section 900, 43 Stat. 253, 336 (1924). 501 U.S. at 911-12.

54. Rev. Act of 1943, ch. 63, sec. 503(b), 58 Stat. 72. See also Brief of Petitioner, *supra* note 8, at 6. In 1979, the Tax Court changed the name from “commissioners” to “special trial judges.” *Ballard*, 544 U.S. at 49 n.4.

55. 26 U.S.C. § 7443A(a). According to this rule:

The chief judge may assign

- (1) any declaratory judgment proceeding,
- (2) any proceeding under section 7463 [26 U.S.C.S. § 7463],
- (3) any proceeding where neither the amount of the deficiency placed in dispute (within the meaning of section 7463 [26 U.S.C.S. § 7463]) nor the amount of any claimed overpayment exceeds \$ 50,000,
- (4) any proceeding under section 6320 or 6330 [26 U.S.C.S. § 6320 or 6330], and
- (5) any other proceeding which the chief judge may designate, to be heard by the special trial judges of the court.

§ 7443A(b).

56. *Ballard*, 544 U.S. at 48.

57. *Id.*

58. Under a LexisNexis search of all state and federal cases, there are only twenty-five cases that have “special trial judge(s)” in the Lexis Headnotes. Under a WestLaw search, there are only twenty-one cases that have “special trial judge(s)” in the KeyCite Notes (searches last conducted on Jan. 30, 2006).

59. Honorable James P. Timony, *Performance Evaluation of Federal Administrative Law Judges*, 7 ADMIN. L.J. AM. U. 629, 657 (citing *Freytag*, 501 U.S. at 868).

Special trial judges can “hear and render final decisions in declaratory judgment proceedings, ‘small tax cases,’ and levy and lien proceedings.”⁶⁰ If a case is worth over \$50,000, the Tax Court follows a two-tier process because the special trial court “lack[s] authority to enter final decision” in these cases.⁶¹

In 1944, just one year after special trial judges were created, the special trial judges, who were then called “commissioners,” were required to write a special report discussing their findings.⁶² From 1944 until 1983, under Rule 182(b) (the predecessor to Rule 183), special trial judges reports were required to be published and served upon the parties so that the parties could file exceptions to the special trial judge report.⁶³ The regular Tax Court judge was required to 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.”⁶⁴ Additionally, the special trial judge “shall be presumed to be correct.” After giving due regard and presuming that the report is correct, the regular Tax Court judge is required to “adopt the [s]pecial [t]rial [j]udge’s report or . . . modify it or . . . reject it in whole or in part.”⁶⁵

From 1944 through 1983, there were times when the regular Tax Court judge disagreed with the fact-finding of the special trial judge and the parties could see the discrepancies between the special trial

In *Freytag v. Commissioner*, the Tax Court judge adopted the finding of the special trial judge that the taxpayers were guilty of failing to pay taxes on improper deductions that they claimed. The taxpayers appealed, arguing that allowing special trial judges to be assigned cases is a violation of the Appointments Clause of the Constitution. The Supreme Court held that special trial judges are constitutionally appointed “inferior officers” and have the authority to hear the cases assigned to it.

Id.

60. *Ballard*, 544 U.S. at 48 (quoting § 7443A(b)(1)-(4), (c)); TAX CT. R. 182, 26 U.S.C. App. P. 1619; Brief of the Respondent on the Merits, *Ballard*, 540 U.S. at 40, 2004 WL 2336550 (2004).

61. *Freytag*, 501 U.S. at 881.

62. TAX CT. R. 48 (c) (July 1, 1948 ed.).

63. Brief of Petitioner, *supra* note 8, at 6.

64. *Ballard*, 544 U.S. at 48 (quoting the current Tax Court Rule 183(b) that was in effect when the special trial judges were created).

65. *Id.*

court judge and the regular Tax Court judge.⁶⁶ In some of these cases, the report was modified; the modified report was then incorporated into the regular Tax Court judge's final decision.⁶⁷

In 1983, the Tax Court revised its rules and *removed* the requirement that the special trial report had to be served upon the parties and be put into the record.⁶⁸ Rule 183(b) of the revised rules states that 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."⁶⁹ The new version of the rules still maintained that the regular Tax Court judge must give "due regard" to the Special Trial Court report and the regular tax court judge must presume that "the findings of fact recommended by the Special Trial Judge . . . [are] correct." Since the 1983 rule went into affect, no Tax Court judge has separately published the report of the special trial judge or served it upon the parties.⁷⁰ Rather, every judge simply states that he is adopting the report of the special trial judge and only one report (which may or not be the same as the special trial judge's report) is published.⁷¹ The practice of each and every Tax Court judge has been to keep the records sealed, even upon appeal.⁷²

66. *Rosenbaum v. Comm'r*, 45 TCM 825, 827 (1983).

67. *Taylor v. Comm'r*, 41 TCM 539 (1980).

68. TAX CT. R. 183(b) (1984 ed.). As the majority opinion in *Ballard* points out, the Tax Court "does not maintain a formal practice of publicly disclosing proposed amendments to its rules." *Ballard*, 125 S. Ct. at 1275, n.1. For a critical comment on this practice, see *Estate of Kanter v. Comm'r*, 337 F.3d 833, 877-78, n.2 *rev'd sub nom. Ballard*, 544 U.S. 40 (2005) (stating that this practice is "oddly out of sync with prevailing practice").

69. TAX CT. R. 183(b).

70. Since this decision, it has been determined that there have been 923 cases that followed this procedure since 1983 and were neither published in the appellate record nor given to the parties. Louise Story, *Tax Court Lifts Secrecy, Putting Some Cases in New Light*, N.Y. TIMES, Sec. C, Sept. 24, 2005.

71. *Ballard*, 544 U.S. at 56 (quoting *Kanter*, 337 F.3d at 876; cf. Transcript of Oral Argument., *supra* note 5, at 44 ("Counsel for Commissioner, in response to the Court's question, stated: 'We're not aware of any cases in which the [regular] Tax Court judge has rejected the [special trial judge's] findings").

72. *Id.* at 46.

6. Similarity of Special Trial Judge Procedure to Other Positions in Courts or Agencies

Each side in this case, as well as the judges ruling upon it, have attempted to analogize the two-tiered proceedings of the tax court with another established procedure within a court or agency.⁷³ A brief look at some of the similarities and differences between these examples and the tax court will assist in understanding *Ballard*.

a) Magistrate Judges

District courts have the ability to hire magistrates.⁷⁴ A magistrate judge makes findings and recommendations, and has the ability to conduct a trial.⁷⁵ The decisions of the magistrate judges can become findings of the court without further review if there is no objection by the parties.⁷⁶ Magistrate judges must follow the Fifth Amendment's due process requirements by disclosing adjudicative fact finding.⁷⁷ "The initial findings or recommendations of magistrate judges . . . are available to the appellate court authorized to review the operative decision of the district court."⁷⁸ In addition to being available to the appellate court, under 28 U.S.C. § 636(b)(1)(C), magistrate judges

73. All of the briefs filed in this case, the oral arguments and the final decision compare or contrast the special trial court judge with another type of position that falls below the authority of the "regular judge." See *infra* notes 73-98 for details regarding different positions compared and contrasted.

74. 28 U.S.C. §631 (2000).

75. Brief of Amica Curiae Professor Leandra Lederman in Support of Petitioners, (2004) (Nos. 03-184, 03-1034) (citing *Estate of Smith v. Comm'r*, 638 F.2d 665, 669 (3d Cir. 1981) ("the special trial judge acts in a capacity not dissimilar to that of a magistrate in district court")).

76. Brief of Respondent, *supra* note 60, at 34; *Thomas v. Arn*, 474 U.S. 140, 148-152 (1985). See also *FED. R. CIV. P. 53(g)(3)*; *Kentucky v. Indiana*, 474 U.S. 1, 1 (1985)

77. Brief of Amici Curiae Senator David Pryor; Estate of Robert W. Lisle; and Estate of Donna M. Lisle in Support of Petitioners, 2004 WL 1759878 (August 2, 2004) at 4.

78. *Ballard*, 544 U.S. at 61 (citing § 636(b)(1)(C)). This statute states that "[t]he magistrate judge shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties." § 636(b)(1)(C).

are required to mail a copy of the report to the parties.⁷⁹ The comparison to magistrate judges appears to be a strong one. In *Estate of Smith v. Comm'r*, the special trial judge's duties were compared to a magistrate.⁸⁰ Further, in a Tax Note article, it was pointed out that "[m]agistrate judges and special trial judges enjoy the same constitutional status as 'inferior officers.'"⁸¹

b) Special Masters

"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."⁸² "The initial findings or recommendations of . . . special masters . . . are available to the appellate court authorized to review the operative decision of the district court."⁸³ Federal Rule of Appellate Procedure 10(a) requires that "the original papers and exhibits filed in the district court" be available to the appellate court.⁸⁴

c) Bankruptcy Court Judges

A bankruptcy judge files "proposed findings of fact and conclusions of law" in its initial report.⁸⁵ "The initial findings or recommendations of . . . bankruptcy judges are available to the appellate court authorized to review the operative decision of the district court."⁸⁶ The rule governing this process is Bankruptcy Rule

79. *Id.* See also Brief of Amici Curiae Senator David Pryor, *supra* note 77, at 5 n2.

80. Brief of Amica Curiae Professor Leandra Lederman, *supra* note 75, at 15 (citing *Estate of Smith*, 638 F.2d at 669).

81. *Id.* (quoting Kathleen Pakenham, You Better Shop Around: The Status and Authority of Specialty Trial Judges in Federal Tax Cases, 103 TAX NOTES 1527, 1532 (June 21, 2004)).

82. *Ballard*, 544 U.S. at 66 (citing FED. R. CIV. P. 53(e)(2)(amended 2003)); *cf.* *Kansas v. Colorado*, 543 U.S. 86 (2004).

83. *Ballard*, 544 U.S. at 61 (citing FED. R. APP. P. 10(a)).

84. Brief of Amica Curiae Professor Leandra Lederman, *supra* note 75 (quoting 20 MOORE'S FEDERAL PRACTICE § 310.10 [1] (3d. ed. 1997)).

85. 2003 U.S. Briefs 184, 18 (U.S. S. Ct. Briefs 2004) (quoting FED. R. CIV. P. 53(e)).

86. *Ballard*, 544 U.S. at 61 (citing FED. R. BKRTCY. P. 9033(a), (d)).

9033(a), which requires “[i]n non-core proceedings, ‘[t]he clerk shall serve forthwith copies [of bankruptcy judge’s findings of fact] on all parties by mail and note the date of mailing on the docket.’”⁸⁷

d) Administrative Agencies

“An administrative law judges’ recommended decision automatically ‘becomes the decision of the agency’ unless a party objects, without any review whatsoever by the ultimate agency decision maker.”⁸⁸ The Administrative Procedure Act, section 557, “which applies to the less formal processes of agencies, not to courts such as the Tax Court,”⁸⁹ states that “the reports of hearing officers automatically become part of the administrative record.”⁹⁰ However, these are subject to review by superiors in some cases.⁹¹

e) Law Clerks

When the special tax court judge and the regular tax court judge sit down with one another and work together to change the original report into a collaborative document, there is a similarity to a law clerk. Just as a law clerk might discuss the problem with other law clerks and the judge prior to and during publication of the memo or brief prepared by the clerk, those documents are kept confidential. If the special tax court report is not the final report, but rather a tool to help the regular tax judge make their final determination, it could be considered a private step in deliberation. However, one of the major differences is that a law clerk’s bench memo will never be published,

87. See also Brief of Amici Curiae Senator David Pryor, *supra* note 77, at 5 n.2 (quoting FED. R. BKRTCY. P. 9033(a)).

88. Brief of Respondent, *supra* note 60, at 34; 5 U.S.C. § 557(b) (1976).

89. Brief of Joshua S. Kanter, as Executor of the Estate of Burton W. Kanter, as Amicus Curiae in Support of Petitioners, 2003 WL 22429190 (Oct. 6, 2003) at 11.

90. Brief of Amici Curiae Senator David Pryor, *supra* note 77, at 5 n.2 (citing §557(c)).

91. Petition for Writ of Certiorari, *supra* note 6, at 15.

nor will their determinations be communicated to the parties.⁹² One of the parties even describes a law clerk on the same level as a secretary.⁹³ Additionally, the law clerk does not have the same responsibility as a special trial judge. There are no guaranteed term limits for law clerks, the salary is much lower, and they do not have the authority to file a dissenting opinion. A law clerk's work is "inherently internal in nature," whereas a special trial court judge's work is referenced and given deference in the final, external Tax Court procedure and appeal.⁹⁴

f) Boards of Contract Appeals

Established by numerous agencies, contract boards have a presiding judge who makes an initial report and gives that report to another judge for a final decision.⁹⁵ These boards of contracts are established to resolve any dispute between agencies and contractors. Typically, there is a chairperson and several administrative judges. The chairperson puts a "presiding judge" in charge of hearing the evidence and making a report.

g) Stenographers

While attempting to demonstrate how different the special trial judge's report is from other higher-level judges, such as a magistrate, some briefs compare the special trial judge to a stenographer.⁹⁶ A stenographer "takes notes" and then reports theme to whoever has assigned them to the case. Similarly, a special trial judge "takes notes on behalf of the absent actual factfinder, the Regular Tax Court Judge."⁹⁷ Yet, again, the opposing argument is that the special trial

92. See Reply Brief for Petitioners, *Ballard*, 544 U.S. at 40, 2004 WL 2605088, 7 (2004) (pointing out that the special trial judge report is an "officially submitted report with a legally operative set of findings").

93. *Id.* at 11.

94. *Id.*

95. Brief of Respondent, *supra* note 60, at 31-32; Contract Disputes Act, 41 U.S.C. § 601 (2004).

96. Reply Brief on the Merits, WL 2652263 at 11.

97. *Id.*

judges “perform more than ministerial tasks . . . and must exercise significant discretion.”⁹⁸

II. SUMMARY OF FACTS

Burton W. Kanter, an estate-tax lawyer and former professor, Claude Ballard, a former senior vice-president of Prudential Insurance Co. and Robert Leslie, a former vice president at Prudential, all received notices of deficiency from the IRS.⁹⁹ While working at Prudential, Ballard and Leslie played essential roles in the purchase and development of real estate and construction projects. Since 1968, the IRS claims that Kanter, Ballard, and Lisle agreed that Kanter would “sell Ballard and Lisle’s influence over Prudential business and launder the proceeds through a complex network of corporations and trusts controlled by them.”¹⁰⁰ The IRS claims that all three of the parties received millions of dollars in unreported kickbacks, amounts that were taxable. The amount at issue, including interest and fees, is over thirty million dollars.¹⁰¹

All three parties filed a complaint to challenge the deficiency notices in the Tax Court where they could avoid paying until the ruling either found them responsible or dismissed the notices. The cases were consolidated and the Chief Judge Cohen assigned it to Special Trial Judge D. Irvin Couvillion pursuant to Section 7443A(b)(4).¹⁰² The case presented to Couvillion lasted five weeks. The transcript was nearly 5,500 pages and the additional paperwork was more than 4,600 pages.¹⁰³ Couvillion prepared the special trial judge report which was over 600 pages and gave it to Chief Judge Cohen. Judge Cohen referred the case to Tax Court Judge Howard A. Dawson so that Dawson could render a final decision. According to Tax Court Rule 183, Judge Dawson was required to give deference to the report because Couvillion was present for the five week trial,

* 98. *Freytag*, 501 U.S. at 881-82.

99. Brief for Petitioners, 2004 WL 1759877 at 11.

100. Brief of Respondent, *supra* note 60, at 31-32 (citing 03-184 Pet. App. 48a).

101. Possley, *Judges set aside Tax Court ruling*, *supra* note 1.

102. *Ballard*, 544 U.S. at 49-50.

103. Brief for Petitioners, 2004 WL 1759877 at 11.

while all Judge Dawson had for review was the paperwork and Couvillion's report.

After Judge Dawson had the report for fifteen months, he issued the decision on the same day that the Chief Judge officially assigned the case to Dawson. As required by Rule 183(X), the decision stated that the Tax Court "agrees with and adopts the opinion of the Special Trial Judge," which is set forth in the margin of its opinion.¹⁰⁴ Dawson's decision held Kanter, Ballard and Lisle liable for the taxes that were withheld and also assessed a fraud tax penalty.¹⁰⁵ This "adopted report" states that all three parties:

[E]ntered into arrangements pursuant to which [Kanter] would use his business and professional contacts, including his relationships with Ballard, and Lisle, to assist individuals and/or entities in obtaining business opportunities or in raising capital for business ventures with Prudential in return for kickbacks, which Kanter would launder through a complex organization of corporations, partnerships, and trusts, but nor report as income for tax purposes.¹⁰⁶

However, when the attorneys read the report, they did not believe that the report provided was actually the one that Special Trial Judge Couvillion wrote. Rather, they felt that Judge Dawson had modified and altered it without reason.¹⁰⁷ Kanter, Ballard and Lisle had heard from two or three other judges in the Tax Court that the original report that Couvillion submitted actually stated that the three parties

104. *Id.* at 9, citing TAX CT. R. 183(d).

105. 03-184 Pet. App. 19a-306a. Tax fraud penalties are very expensive: "[t]he penalty for tax fraud is a fine of 75% plus interest for any tax deficiency attributable to fraud, plus payment of the underlying tax deficiency." Reply Brief on the Merits, WL 265 WL 2652263 at 13, n.20 (quoting 26 U.S.C. § 6663).

106. 03-184 Pet. App. at 48a; *see also* Brief of Petitioners, *supra* note 8, at 6.

107. Keep in mind that, under Rule 183, Judge Dawson was required to give due deference to the Couvillion's report.

should not be charged the fee for tax fraud.¹⁰⁸ To find out if the report was actually modified, on April 20, 2000, Kanter, Ballard and Lisle filed motions seeking to have access to “all reports, draft opinions or similar documents prepared and delivered to the Court pursuant to Rule 183(b)” by the Special Trial Judge. If they could not have access to the material, they requested that the material be put on the record so they could obtain proper review.¹⁰⁹

The Tax Court denied the motion, stating that the special trial judge’s opinion “ultimately became the Memorandum Findings of Fact and Opinion filed on December 15, 1999” by Judge Dawson. Further, the court found that the parties would be able to access any other materials related to the case except for the adopted Memorandum Findings of Fact and Opinion because they are confidential and “relate to the internal deliberative processes of the Court.”¹¹⁰

In response to this denial, the three parties filed a motion for reconsideration.¹¹¹ With this motion, they included an affidavit stating that Kanter’s counsel had heard that the original special trial judge’s report had been modified. The Tax Court opinion in response to this motion to reconsider stated that “the only official Memorandum Findings of Fact and Opinion by the Court in these cases is T.C. 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.”¹¹² This opinion was signed by Judge Dawson, Special Trial Judge Couvillion and the new Chief Judge Wells.¹¹³

Disappointed with this result, all three parties pursued possible remedies in the appropriate district courts. Ballard filed a writ of mandamus in the Eleventh Circuit Court of Appeals, Kanter in the Seventh and Lisle in the Fifth; each requested an order that the Tax Court provide them with a copy of the original special trial judge

108. Randall G. Dick, counsel for Kanter stated in an affidavit that two or three of the Tax Court Judges told him that the original report found the parties were not liable for the fraud penalty. 03-134 Pet. App. 101a-102a.

109. Brief for Petitioners, 2004 WL 1759877 at 12.

110. 03-1034 Pet. App. 109a; Petitioners Brief, 2004 WL 2336550 at 7.

111. *Id.*

112. *Id.*

113. *Ballard*, 544 U.S. at 50.

report.¹¹⁴ All three courts denied the petitions for writ of mandamus. While all three of the courts held that taxpayers are not entitled to the original report, the results varied slightly.¹¹⁵ The Eleventh Circuit, in response to Ballard's appeal, affirmed the Tax Court decision entirely. The court additionally stated that withholding the report was not unconstitutional because Ballard's argument was wrongly "premised on the assertion that the underlying report adopted by the Tax Court is not, in fact, Couvillion's report." Ballard was required to presume that the report provided was actually an accurate reproduction of Special Trial Judge Couvillion's report. Even if the report was different, the Eleventh Circuit stated that there was no violation of due process due to the non-disclosure because "there is nothing unusual about judges conferring with one another about cases assigned to them."¹¹⁶ Further, the court stated that the record showed there was enough evidence to uphold the tax fraud charge.¹¹⁷ Similarly, in response to Kanter's appeal, the Seventh Circuit affirmed the entire decision. It stated that "the underlying report adopted by the Tax Court was in fact Special Trial Judge Couvillion's."¹¹⁸ If there were any changes to that original report, the special trial judge would have abandoned them, and therefore it due process was not violated. The collaborative process, of Couvillion working with Dawson to change the original report, was not a violation of due process because it was simply part of the deliberative process. Again, the judge found enough evidence to uphold the tax fraud penalty payment.¹¹⁹

114. *In re Ballard*, No. 00-14762-H (11th Cir. Oct. 23, 2000); *In re Investment Research Ass'ns*, No. 00-3369 (7th Cir. Dec. 15, 2000); *In re Estate of Lisle*, No. 00-60637 (5th Cir. Sept. 18, 2000); Petitioners Brief, 2004 WL 2336550 at 8.

115. 03-184 Pet. App. 1a-18a; 03-1034 Pet. App. 1a-97a; *Estate of Lisle*, 341 F. 3d at 364; Petitioners Brief, 2004 WL 2336550 at 8.

116. 03-184 Pet. App. 9a. Petitioners Brief, at 8.

117. 03-1034 at 14a. Petitioners Brief, 2004 WL 2336550 at 9.

118. 03-1034 at 7a. Petitioners Brief, 2004 WL 2336550 at 9.

119. In the Seventh Circuit's opinion, Judge Cudahy concurred in part and dissented in part. He stated that the record supports "the notion that the Tax Court engages in a quasi-collaborative process of review of the STJ's report from which a new and frequently different STJ's opinion emerges to be adopted and agreed with by the Tax Court." He states that this collaborated process does not violate Tax Court Rule 183, but it does violate due process because it does not permit the

In response to Lisle's appeal, the Fifth Circuit also stated that it was not a violation to withhold the original special trial judge report.¹²⁰ However, the Fifth Circuit ultimately found that the Commissioner had not met his burden of establishing fraud, so Lisle was not responsible for paying the fraud penalty.

Kanter and Ballard¹²¹ appealed to the Supreme Court, which granted certiorari on April 26, 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."¹²² Four questions were brought up by petitioners in their briefs. The first three questions address due process violations and the fourth asked "whether rule 183 requires the Tax Court to uphold findings of fact made by a special trial judge unless they are 'clearly erroneous.'"¹²³

III. ANALYSIS OF COURT'S OPINIONS

A. Justice Ginsburg's Majority Opinion

Justice Ginsburg, joined by five other justices, wrote the majority opinion holding that, under the current Tax Court Rules, the original special trial judge's report must be disclosed.¹²⁴ In short, Ginsburg believes that an explanation that a court cannot determine if the final decision "reflects 'due regard' for the special trial judge's

parties to have a "meaningful appellate review." No. 03-1034 at 70a-97a. Petitioners Brief, 2004 WL 2336550 at 9-10.

120. *Estate of Lisle*, 341 F.3d at 384.

121. Because Lisle's fraud assessment had been dropped at the appellate level, Lisle did not petition for review by the Supreme Court.

122. *Ballard v. Comm'r*, 541 U.S. 1009 (2004).

123. *Ballard*, 544 U.S. at 68 n.1 (2004) (Rehnquist, C.J., dissenting) (citing *Kanter Pet. For Cert.* (i)). "This court does not consider claims that are not included within a petitioner's questions presented." There are four questions presented, three of which do not even mention Rule 183. The only one that mentions Rule 183 is asking, as Justice Ginsburg points out, "whether Rule 183 requires the Tax Court to uphold findings of fact made by a special trial judge unless they are 'clearly erroneous.'" *Id.* (citing *Kanter Pet. For Cert.* (i)). Chief Justice Rehnquist also cites *Lopez*, 531 U.S. at 244 n.6 (holding that the only way that the Supreme Court could tell the Tax Court that they are not following their own rules is by failing to abide by the Supreme Court rules).

124. *Ballard*, 544 U.S. at 45-65 (majority opinion).

'opportunity to evaluate the credibility of [the] witnesses' and presumes the correctness of that judge's initial fact findings."¹²⁵ The majority bases its determination that the report cannot be disclosed on the following: (1) no statute permits withholding it, (2) federal practice requires disclosure, and (3) there is a need for full and fair statement of the original report.

The opinion begins by stating that the case involves the "employment of special trial judges."¹²⁶ She goes on to explain the role that the special trial judges play within the tax court. They are "auxiliary officers appointed by the Chief Judge of the Tax Court to assist in the work of the court."¹²⁷ She clearly distinguishes them from regular Tax Court judges because the special trial judges do not have fixed terms.¹²⁸ Next, she explains how Rule 183 governs the process between the regular and special trial court judges, which is referred to as a "two-tiered" proceeding.¹²⁹ The rule requires that the special trial judge hold a trial and "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."¹³⁰ When the case is assigned to the regular tax court judge, he must give "[d]ue regard . .

125. *Id.* at 45. Ginsburg is stating that the petitioners "urge that, under the Tax Court's current practice, the parties and the Court of Appeals 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 fact findings. *Id.* at 45 (quoting Rule 183(c)).

126. *Id.*

127. *Id.* (citing 26 U.S.C. § 7443A(a)). In its entirety, 26 U.S.C. § 7443A(a) states: "Appointment. The chief judge may, from time to time, appoint special trial judges who shall proceed under such rules and regulations as may be promulgated by the Tax Court."

128. *Id.*

129. *Id.* (quoting TAX CT. R. 183(b), 26 U.S.C. § 183(b)). In its entirety, Rule 183(b) states:

Special Trial Judge's Recommendations. After all the briefs have been filed by all the parties or the time for doing so has expired, the Special Trial Judge shall file recommended findings of fact and conclusions of law and a copy of the recommended findings of fact and conclusions of law shall be served in accordance with Rule 21.

TAX CT. R. 183(b), 26 U.S.C. § 183(b).

130. *Ballard*, 544 U.S. at 45 (quoting TAX CT. R. 183(b)).

. to the circumstance that the [s]pecial [t]rial [j]udge had the opportunity to evaluate the credibility of the witnesses” and the report “shall be presumed correct.”¹³¹ It is the responsibility of the regular Tax Court judge to either “adopt the [s]pecial [t]rial [j]udge’s report or . . . modify it or . . . reject it in whole or in part.”¹³² Prior to 1983, the initial special trial judge reports were public, but a change in Rule 183 changed this practice.¹³³ The new version of Rule 183, which was adopted in 1983 and went into effect in 1984, took out the requirement that the special trial judge report had to be served on the parties and that the parties can file exceptions to the special trial judge’s original report.¹³⁴

With the explanation of these basic rules of the Tax Court, it appears that Justice Ginsburg has found common ground among all of the parties, as well as each of the Justices.¹³⁵ It appears clear to all

131. *Id.* (quoting TAX CT. R. 183(b)). In its entirety, Rule 183(c) states:

Objections. Within 45 days after the service of the recommended findings of fact and conclusions of law, a party may serve and file specific, written objections to the recommended findings of fact and conclusions of law. A party may respond to another party's objections within 30 days after being served with a copy thereof. The above time periods may be extended by the Special Trial Judge. After the time for objections and responses has passed, the Chief Judge shall assign the case to a Judge for preparation of a report in accordance with Code section 7460. Unless a party shall have proposed a particular finding of fact, or unless the party shall have objected to another party's proposed finding of fact, the Judge may refuse to consider the party's objection to the Special Trial Judge's recommended findings of fact and conclusions of law for failure to make such a finding or for inclusion of such finding proposed by the other party, as the case may be.

TAX CT. R. 183(b)

132. *Ballard*, 544 U.S. at 45 (quoting TAX CT. R. 183(b))

133. *Id.*

134. *Ballard*, 544 U.S. at 45-46. The new version of Rule 183 went into effect on January 16, 1984.

135. See the concurring opinion written by Justice Kennedy, which cites the same rules and acknowledges that the reports have not been disclosed since Rule 183 was modified. *Ballard*, 544 U.S. at 65-68 (Kennedy, J., concurring). See also the dissenting opinion written by the former Chief Justice Rehnquist, which cites the exact same rules and acknowledges that the reports have not been disclosed

that the rule requires the special trial judge to first hear the case, write a report, and then give that report to the regular tax judge who must either adopt, modify, or reject it. But, the specific actions the special trial judge and regular judge should take are in dispute, as discussed below.

The final aspect of Ginsburg's summary of the case explains that, since 1984, none of the Tax Courts have published the special trial judge's initial reports.¹³⁶ Further, she points out that the Tax Court judges do not even explain whether they modify or reject the report as required by Rule 183. Instead, Ginsburg makes a strong statement that the Tax Court judges fail to even write whether they are modifying or rejecting, but rather use a "stock statement that the Tax Court judge 'agrees with and adopts the opinion of the [s]pecial [t]rial [j]udge.'"¹³⁷ Support for this statement comes from *Investment Research Assoc. Ltd. v. Comm'r*, which is only one of the many lower level *Ballard* decisions, all of which came to slightly different conclusions. The reason that this statement is so strong is self evident; the next sentence in Ginsburg's opinion states that "[w]hether and how the opinion thus adopted deviates from the special trial judge's original report is never made public."¹³⁸ If the original report is clearly never made public, Justice Ginsburg strongly believes from the evidence presented that there are changes to the opinions, even though the Tax Court judge states that he or she is adopting the special trial court opinion and is not modifying it.

In a footnote, Justice Ginsburg addresses the dissent's accusation that the certiorari question was not answered by the majority.¹³⁹ The

since Rule 183 was modified. *Ballard*, 544 U.S. at 68-73 (Rehnquist, J., concurring).

136. *Id.* at 45-46 (majority opinion) (quoting TAX CT. R. 183(b), n.81). Justice Ginsburg states that "[w]hether and how the opinion thus adopted deviates from the special trial judge's original report is never made public." *Id.* at 46.

137. *Id.* (citing *Inv. Research Assoc. Ltd. v. Comm'r*, 78 TMC 951, 963 (1999), P99, 477 RIA Memo TC, p. 2562-2563).

138. *Id.* (quoting *Inv. Research Assoc. Ltd.*, 78 TMC at 963).

139. *Id.* at n.2 (quoting the dissenting opinion of Rehnquist, C. J. at n.1 which states that: "This court does not consider claims that are not included within a petitioner's questions presented." *Id.* at 68 n.1 (Rehnquist, dissenting)). There are four questions presented, three of which do not even mention Rule 183. Chief Justice Rehnquist also cites *Lopez v. Davis*, which states that the only way that the Supreme Court could tell the Tax Court that they are not following their own rules

only question posed by petitioners that mentions Rule 183 is “whether Tax Court Rule 183 requires Tax Court judges to uphold findings made by special trial judges unless ‘clearly erroneous.’”¹⁴⁰ Justice Ginsburg quickly dismisses this issue by clarifying that the true meaning of Rule 183 is “anterior to all other questions the parties raised.”¹⁴¹ Further, Rule 14.1(a) of the Supreme Court Rules states that “[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein.”¹⁴²

Next, Justice Ginsburg gives a brief recitation of the facts leading up to the use of the special trial judge; at this point, she provides a detailed explanation of the Tax Court.¹⁴³ In this section of the opinion, she focuses on the differences between special trial judges and regular judges: the unlimited term,¹⁴⁴ the lower salary,¹⁴⁵ the limited cases that special trial judges can handle,¹⁴⁶ and how final authority in cases like the one at hand are reserved¹⁴⁷ for the regular

is by failing to abide by the Supreme Court rules. *Id.* (citing *Lopez v. Davis*, 531 U.S. 230, 244 n.6 (2001)).

140. *Id.* at 47 n.2 (majority opinion).

141. *Id.*

142. *Id.* (quoting SUP. CT. R. 14.1(a); citing *R.A.V. v. St. Paul*, 505 U.S. 337, 381 n.3 (1992); citing R. STERN, ET AL., SUPREME COURT PRACTICE 414 (8th ed. 2002) (“[q]uestions not explicitly mentioned but essential to analysis of the decisions below or to the correct disposition of other issues have been treated as subsidiary issues fairly comprised by the question presented”).

143. *Ballard*, 540 U.S. at 48-50. The facts of the case, although detailed (the original trial took five weeks) are consolidated into only five sentences and one footnote. *Id.* It is unnecessary to examine all of the detail of the case because the procedural aspect of the courts ruling is in question here; the content of the case will be determined upon remand if necessary.

144. *Id.* at 48-49. The nineteen regular judges are appointed by the President for a renewable term of fifteen-years. Special trial judges are appointed by the Chief Judge and there is no designated time.

145. *Id.* Special trial judges receive 90% of the salary of regular trial judges.

146. *Id.* The special trial judges have authority to make a final judgment in “small tax cases” as well as levy and lien proceedings. TAX CT. R. 182, 26 U.S.C. App, p. 1619; § 7443A(b)(1)-(4).

147. *Ballard*, 540 U.S. at 49 (citing *Freytag*, 501 U.S. at 881-882 (holding that special trial judges “take testimony, conduct trials, [and] rule on the admissibility of evidence,” in cases over \$50,000 but “lack authority to enter a final decision”)). *Id.*

tax judge.¹⁴⁸ Throughout the description of the facts, it seems clear that Justice Ginsburg doubts that the regular trial judge adopted the findings of the special trial judge as claimed. When discussing Judge Dawson's result, Justice Ginsburg states that the judge "*purported* to adopt the findings contained in the report submitted by Judge Couvillion."¹⁴⁹ There is also quite a bit of detail regarding the affidavit, which stated that the special trial court report was not actually written by Judge Couvillion. Justice Ginsburg also extensively quotes the Tax Court's ultimate conclusions that "'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."¹⁵⁰

Justice Ginsburg's analysis begins with an analysis of Rule 183, quoting the entire section below:

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.¹⁵¹

Although it was possible for Judge Dawson to go beyond the report provided him, Judge Dawson did nothing more than take the special trial judge's report into consideration along with the trial transcript and other documents on file.¹⁵² There is no evidence to

148. *Id.*

149. *Id.* (emphasis added). At this point in the trial, the original special trial judge's report had not been disclosed; however, it appears that the majority is assuming that the regular trial judge's report did not adopt the special trial judge's report as it said it did.

150. *Id.* at 51 (quoting order of Aug. 30, 2000, No. 43966-85, TC App. to Kanter, Pet. for Cert.).

151. *Id.* at 50 (citing Rule 183(c)).

152. *Id.* at 54. It appears from the writing, that Justice Ginsburg would have thought more highly of the diligence of Judge Dawson had he actually asked for

suggest that Judge Dawson asked the parties to file additional briefs, nor is there evidence that Judge Dawson asked the special trial judge to recommit the original report for any reason.¹⁵³

Justice Ginsburg finds a clear understanding of the “deference due” language from Rule 183(c) from the rule’s history. Rule 182(d), the predecessor to Rule 183(c), was modeled after the former Court of Claims’ Rule 147(b),¹⁵⁴ which included a requirement of “due regard” and a presumption of correctness.¹⁵⁵ In *Hebah v. United States*, the Court of Claims ruled that this meant it is necessary to “make ‘a strong affirmative showing’ to overcome the presumption of correctness that attaches to trial judge findings.”¹⁵⁶ Justice Ginsburg states that it is clear that a special trial court judge’s opinion must carry “special weight insofar as those findings are

additional information before making his final decision. This speculation again shows that Justice Ginsburg believes, at this point, that the original trial judge report has been changed. Respondents argue that judges are presumed to be correct and therefore the entire basis of the argument and Justice Ginsburg’s contentions are misplaced. Brief for the Petitioners, *supra* note 8.

153. *Ballard*, 540 U.S. at 54. While the record shows that the Chief Judge “reassigned” the case to Judge Dawson, this is not like recommitting. *Id.* at n.10. The “reassignment” that took place was actually not even a reassignment; rather, Judge Dawson knew the case was his and likely was working on it during the fifteen months after it was originally signed. *Id.* Judge Dawson’s opinion was published the same day that the Chief Judge reassigned the case to Judge Dawson which logically means that the reassignment was simply a technical, paperwork reassignment because it would have been impossible for Judge Dawson to write the opinion in one day.

154. The original version of Rule 147(b) being referenced here states:

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 U.S.C. App, p. 7903 (1970 ed.).

155. *Ballard*, 540 U.S. at 54. A comment, written in 1973, to Rule 182(b) stated that it was modeled after Rule 147(b). *Stephens v. C.I.R.*, 60 T.C. 1150 n. 182 (1973) (stating that Tax Court review procedures are comparable to Court of Claims review procedures).

156. *Hebah v. United States*, 456 F.2d 696, 698 (Fed. Cl. 1972).

determined by the opportunity to hear and observe the witnesses.”¹⁵⁷ Next, Justice Ginsburg examines the original meaning of Rule 182 (Rule 183’s predecessor).¹⁵⁸ When Rule 182 was in place, the regular tax judge looked at the special trial judge report on his own; if he disagreed with the report, he would modify the report and publish it.¹⁵⁹ At this time, the special trial judge reports were being published, made part of the appellate record and served on the parties.¹⁶⁰ Parties could check to make sure that “due regard” was given and there was a “presumption of correctness” because they had access to the original report.¹⁶¹

The majority finds it especially important that, when Rule 182 was revised (and renumbered as 183) in 1983, three essential elements were left in: (1) the language requiring a presumption of correction, (2) language requiring due regard, and (3) language requiring that the regular tax court judge “adopt,” “modify,” or “reject [the special trial judge’s report] in whole or in part.”¹⁶² Although the new rule does not state that the report must be served on the parties, it is critical that these other three requirements were left in. Since the modification of the rule, not one instance can be found where the original report is modified or rejected.¹⁶³ It is clear that those adopting these rules intended for the regular tax judge to continue to modify or reject as they did before, the way the tax court is now operating, this intended rule is being ignored.¹⁶⁴

157. *Ballard*, 540 U.S. at 54 (quoting *Stephens*, 60 T.C. at 1150); see *Stone v. Comm’r*, 865 F.2d 342, 345 (C.A.D.C. 1989).

158. *Ballard*, 540 U.S. at 55-56.

159. *Id.* at 56. For two instances where the original reports were modified, see *Rosenbaum v. Comm’r*, 45 T.C.M. 825, 827 (1983) and *Taylor v. Comm’r*, 41 T.C.M. 539 (1980).

160. *Ballard*, 540 U.S. at 56.

161. *Id.*

162. *Id.* (quoting Rule 183(c), 81 T.C. at 1069 n.183). Furthermore, “the findings of fact recommended by the Special Trial Judge shall be presumed to be correct” and “due regard” should be given to the special trial judge’s credibility findings. *Id.*

163. *Id.* (citing *Kanter*, 337 F.3d at 876); cf. *Tr. Of Oral Arg.*, *supra* note 5 at 44.

164. *Ballard*, 540 U.S. at 57.

1. The Collaborative Process

Next, Justice Ginsburg discusses the “novel practice” of the Tax Court judge treating the report as an “in-house draft to be worked over collaboratively by the regular judge and the special trial judge.”¹⁶⁵ Currently, Tax Court judges receive the special trial judge’s report pursuant to Rule 183(b), and treat it “essentially as an in-house draft to be worked over collaboratively by the regular judge and the special trial judge.”¹⁶⁶ There is no Tax Court rule allowing this “joint enterprise,” nor is it explained in any publication, policy statement or interpretive guide.¹⁶⁷ After the collaborative process, the regular Tax Court judge simply agrees and adopts the special trial court decision, which was the situation in *Ballard*.¹⁶⁸

Another reason that this collaborative process is unauthorized and inappropriate is that the Tax Court Rules only refer to *one* opinion of the special trial judge.¹⁶⁹ As the “sole opinion properly ascribed to the special trial judge under the current Rules,” a second, collaborative opinion is not permitted.¹⁷⁰ Further, if the regular Tax Court judge is adding his own opinion to the special trial judge’s report, Justice Ginsberg recognizes that “[o]ne would be hard put to explain . . . how a final decisionmaker . . . would give ‘[d]ue regard’

165. *Id.* Justice Ginsburg states that the Tax Court disregarded the intent of those who drafted Rule 183 and “inaugurated a novel practice regarding the report the special trial judge submits post-trial to the Chief Judge.” *Id.*

166. *Id.* The reason that this practice is new is because, as Justice Ginsburg pointed out, when the parties were able to see the special trial judge report copies, the regular Tax Court judges *independently* evaluated the report and adopted, modified or rejected it in part or in whole. There are at least two cases where it is clear that the report was modified and the parties could see two separate, independent reports. *Id.*

167. *Id.* at 57 n.12 (citing *Kanter*, 337 F.3d, at 876-877 (Cudahy, J., dissenting)).

168. *Id.* at 57-8.

169. *Id.* at 58. The only time this opinion is mentioned is when the Court states that “the Special Trial Judge shall submit a report, including findings of fact and *opinion*, to the Chief Judge.” *Id.* (quoting TAX CT. R. 183(b), 26 U.S.C. App., p. 1619 (emphasis added)).

170. *Id.*

to and 'presum[e] to be correct' an opinion the judge himself collaborated in producing."¹⁷¹

Justice Ginsburg stops short of denigrating the collaborative process. All she is saying is that this process is not permitted under the current rules.¹⁷² She does admit that the collaboration might be efficient.¹⁷³ The majority does not say that changing the original special trial report should be entirely banned. Justice Ginsburg is "confident" that if there is a clerical error that the regular Tax Court judge notices, he could give it back to the special trial judge for correction.¹⁷⁴ Next, the majority explains the legal reasons that "[t]he Tax Court, like all other decisionmaking tribunals, is obliged to follow its own Rules."¹⁷⁵ In an opinion that has very little case law outside of direct case history, the opinion provides two cases to prove that the Tax Court cannot violate their own rules.¹⁷⁶ First, *Service v. Dulles* states that the Secretary of State must follow its Regulations, and, second, *Vitarelli v. Seaton* states that a Secretary is bound by his own regulations. Finally, the opinion also gives a concurring in part and dissenting in part statement that an agency "must be rigorously held to the standards by which it professes its action to be judged."¹⁷⁷

171. *Id.* at 59. The deference rules have little meaning, according to the majority, if the judges are working together to produce an outcome because a judge would not find it necessary to modify or reject his own work.

172. *Id.* (stating that "we find no warrant for [the Tax Court's current practice] in the Rules the Tax Court publishes").

173. *Id.*

174. *Id.* at 59 n.14. In response to Chief Justice Rehnquist's dissent, the majority is stating that it would be appropriate for either the special trial judge to notice an "error of substance" or the regular Tax Court judge to notice "clerical error" and to fix it.

175. *Id.* at 59.

176. *Id.* See *Service v. Dulles*, 354 U.S. 363, 388 (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 (1959) (Secretary bound by regulations he promulgated "even though without such regulations" he could have taken the challenged action. *Id.* at 546).

177. *Ballard*, 544 U.S. at 59 (citing *Dulles*, 354 U.S. at 388 (1957); *Vitarelli*, 359 U.S. at 540).

One of the major aspects that the dissent rests its hat on is that the Tax Court should have the ability to interpret its own rules.¹⁷⁸ In one brief sentence, the majority inadequately dismisses this notion by stating that

“[a]lthough the Tax Court is not without leeway in interpreting its own 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.”¹⁷⁹

It must be assumed that Justice Ginsburg does not even see the collaborative process as a possible interpretation of the Tax Court rules because the history of the rule requires disclosure, while the rules only mention one special trial judge report.¹⁸⁰

2. Appellate Review

The second reason that the majority does not permit the special trial judge to modify the report in collaboration with the regular Tax Court judge is because it “impedes fully informed appellate review of the Tax Court’s decision.”¹⁸¹ Again, the support for this is the consensus that the Tax Court rules require the regular Tax Court judge to give “due regard” to the special trial judge. On review, there must be some way to ascertain whether this “due regard” was actually given. Justice Ginsburg gives additional emphasis to the circumstances of the case at hand; the special trial judge’s factual determinations in a fraud case are essential.¹⁸²

178. *Id.* at 67-73 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist states that the Tax Court should be treated as an executive agency and should have the ability to interpret its own rules. If it interprets its rules to mean that there should be a collaborative process, then the Supreme Court should give deference to that interpretation.

179. *Id.* at 59 (majority opinion).

180. *See supra* notes 124-198.

181. *Ballard*, 544 U.S. at 59.

182. *Id.* at 60. Specifically, the majority states that “[t]he Tax Court’s decision repeatedly draws outcome-influencing conclusions regarding the credibility of Ballard, Kanter, and several other witnesses.” *Id.* The Court provides the following examples: *Investment Research Assoc.*, 78 T.C.M., 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,

The majority quickly rejects the argument that the original report by the special trial judge is an internal draft that should be kept confidential.¹⁸³ Justice Ginsburg states that the fact that Rule 183 does not permit a draft is enough to dismiss this argument.¹⁸⁴ The majority also states that the tax court process of concealing the original report is “anomalous.”¹⁸⁵ The practice of all other tribunals to use hearing officers, including magistrate judges, special masters, and bankruptcy judges requires, by statute, the initial hearing part of the record.¹⁸⁶ The majority asks the question: “[I]f there are policy reasons that dictate transparency for everyone else, why do these reasons not apply to the Tax Court?”¹⁸⁷ The Commissioner argues

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 on fraud than the unfiltered findings of the [special trial judge] who stood watch over the trial.”).

183. *Ballard*, 544 U.S. at 60-61 (citing Brief for Respondent 16-17 (quoting from *United States v. Morgan*, 313 U.S. 409, 422 (1941))). The Respondent is arguing that seeing the draft would be a “probe into the mental processes” of the special trial judge and the regular Tax Court judge. *Id.*

184. *Id.* at 61. *See supra* note 124-198.

185. *Id.* at 62.

186. *Id.* at 64. “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.” *Id.* at 62. *See also* 28 U.S.C. § 636(b)(1)(C) (magistrate judge’s proposed findings must be filed with the court and mailed to the parties); FED. R. CIV. P. 53(f) (special masters); FED. R. BKRTCY. P. 9033(a), (d) (bankruptcy judges); FED. R. APP. P. 10(a) (record on appeal includes the original papers filed in the district court). 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) (1976). *See also* § 706 (the reviewing court shall evaluate the “whole record”).

187. *Ballard*, 544 U.S. at 62 (quoting *Kanter*, 337 F.3d at 874 (Cudahy, J., concurring in part and dissenting in part)). While the Court does point out specific instances where the transparency is required, the actual policy reasons behind the

that the Tax Court does permit the transparency, therefore, it is not “anomalous” because 26 U.S.C. § 7460(b) allows a regular Tax Court judge’s opinion to be kept secret when a full Tax Court reviews that single judge’s opinion.¹⁸⁸ While this argument appears credible, the majority rejects it because the special trial judge report is “markedly” different from the single Tax Court judge report.¹⁸⁹ This is a statutory rule that has been accepted from the creation of the Tax Court;¹⁹⁰ the purpose of the full court review is to resolve legal issues de novo, not factual ones that are essential to the judgment and are to be “presumed correct.”¹⁹¹ Another reason that the full panel is different is that the judges on the panel are equal in rank to the single Tax Court judge that wrote the first opinion, while the special trial judge is inferior.¹⁹² As a judge with equal ranking, each judge on the full panel has the authority to file a dissenting opinion if he disagrees; a special trial judge has no recourse to express his dissatisfaction with a result.¹⁹³ The Court also rejects the Commissioner’s argument

transparency are not laid out. The Court also quotes another opinion that cannot find a reason to permit the secrecy (*Mazza v. Cavicchia*, 15 N.J. 498, 519).

188. *Ballard*, 544 U.S. at 62-63 (citing 26 U.S.C.S. § 7460(b) (1954)). This statute in full reads as follows:

Effect of action by a division. The report of the division shall become the report of the Tax Court within 30 days after such report by the division, unless within such period the chief judge has directed that such report shall be reviewed by the Tax Court. Any preliminary action by a division which does not form the basis for the entry of the final decision shall not be subject to review by the Tax Court except in accordance with such rules as the Tax Court may prescribe. The report of a division shall not be a part of the record in any case in which the chief judge directs that such report shall be reviewed by the Tax Court.

§7460(b).

189. *Ballard*, 544 U.S. at 63.

190. *Id.* (citing to the Revenue Act of 1928, ch. 852, § 601, 45 Stat. 871. This Act was part of the founding rules of the Tax Court). In a full panel judge review, the judges are looking at the legal issues de novo, whereas when a regular Tax Court judge reviews the special trial judge report, they are actually using the factual findings of the special trial judge to determine if it is correct.

191. *Ballard*, 544 U.S. at 63; see also L. LEDERMAN & S. MAZZA, *TAX CONTROVERSIES: PRACTICE AND PROCEDURE* 247 (2000).

192. *Ballard*, 544 U.S. at 64; see also *id.* at 64 n.16.

193. *Id.* at 64; see also *Kanter*, 337 F.3d, at 879-880 (Cudahy, J., concurring in part and dissenting in part).

that the transparency exists in contract dispute resolution panels because the presiding judges are “equal in stature to that of the other panel members” and can therefore file a dissent.¹⁹⁴

Finally, in its conclusion, the Court cautions that it is not settling some of the issues raised in the case; there was enough evidence to reverse and remand the case on the finding that Rule 183 does not permit the special trial judge report to be confidential.¹⁹⁵ First, the taxpayers request that the Court answer whether the appellate review statute requires the Tax Court to operate in the same way that all other courts do, which would mean making the initial special trial judge fact findings part of the record.¹⁹⁶ Second, the taxpayers request that the court address whether the non-disclosure violates due process.¹⁹⁷ The majority express “no opinion” on either of these issues, but the Court does state that the Tax Court might change its rules in the future to permit the collaborative process or keep the report confidential.¹⁹⁸

194. *Ballard*, 544 U.S. at 64 n.16. This argument is not given much weight by the majority which is evidenced by the fact that it is dismissed in a footnote. In their reply brief, the Petitioners spent a great deal of time detailing the similarities.

195. *Id.* at 64. Specifically, the court is not answering (1) whether the appellate review statute requires disclosure of the special trial judge report and (2) whether keeping the special trial judge report secret is a violation of due process.

196. *Id.* The appellate review statute upon which the taxpayers base their argument states:

Jurisdiction.

(1) In general. The United States Courts of Appeals (other than the United States Court of Appeals for the Federal Circuit) shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code.

Id., citing 26 U.S.C §7481(a)(1)(1997).

197. *Ballard*, 544 U.S. at 65. Among the eighteen briefs filed in this case over forty pages discuss the due process issue while clearly the majority “express[es] no opinion” on this issue. *Id.*

198. *Id.*

B. Justice Kennedy's Concurring Opinion

Justice Kennedy, joined by Justice Scalia, wrote the concurring opinion.¹⁹⁹ This concurring opinion is less than two pages long and goes a step further than the majority for the purpose of helping the judges upon remand.²⁰⁰ In the opinion, Justice Kennedy reiterates that deference must be given to the special trial judge's findings, and that the only way that litigants and appellate courts can evaluate whether this deference was given is to publish the special trial judge's report.²⁰¹ The "most natural reading of the text of Rule 183" requires that there is only one special trial judge, not two different reports.²⁰² Further, through the recommit process, the regular tax court judge can send the report back to the special trial judge with instructions to alter the opinion.²⁰³ If the authors of the rules intended for each work to be collaborative, Justice Kennedy argues that they would not have included a method to send the report back to the special trial judge for reconsideration.²⁰⁴

Like the majority, the concurrence recommends that the Tax Court "might design a rule" if it "deems it necessary to allow informal consultation and collaboration between the special trial

199. *Ballard*, 544 U.S. at 65-68 (Kennedy, J., concurring).

200. *Id.* Justice Kennedy agrees with the majority; he states "[t]he 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' and that 'it is the Rule 183(b) report . . . that Rule 183(c) . . . instructs the Tax Court to review.'" *Id.* at 65.

201. *Id.* at 66.

202. *Id.* Here, Justice Kennedy is specifically referring to the word "report" in rule 183(b).

203. *Id.* Under Rule 183(c), stating that "the Tax court judge can 'recommit the report with instructions' to the special trial judge." *Id.* "Recommittal is generally a formal mechanism for initiating reconsideration or other formal action by the initial decision maker." *Id.* (citing, e.g., FED. R. CIV. P. 71(b), which states "The district judge may accept, reject or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions."). Note that Justice Kennedy is using a magistrate as an analogy to prove his point, in that an avenue for recommitment means that there is no room for a collaborative work. Compare this with Justice Ginsburg's opinion, which clearly distinguished a magistrate from the Tax Court's special trial judge methods in the majority opinion. See *supra* notes 124-198.

204. *Id.* at 66-67.

judge and the Tax Court judge.”²⁰⁵ However, it warns the lower court that, on remand, it cannot simply require the regular Tax Court judge to provide a detailed explanation for why they rejected or modified the report.²⁰⁶ Justice Kennedy writes that this reason will not work because he believes it is evident that the Tax Court Rules would not require that deference be given to the special trial judge report without providing a way to “ensure its enforcement.”²⁰⁷

The most unique aspect of the concurring opinion is that Justice Kennedy recognizes that the special trial judge’s report has not been seen, so any discussions regarding the “collaborative process” by the majority or assumptions that the regular Tax Court judge instructed the special trial judge to change the report, which the dissent discusses, are only *speculation*.²⁰⁸

If the court finds that the report was changed inappropriately, it must find a violation of Rule 183 and remedy this situation by taking the special trial judge’s original report, giving it deference and making a final ruling.²⁰⁹ However, if the report was not changed, there is no violation and the fraud assessments should stand.²¹⁰

In all future cases, Tax Court judges must read Rule 183 as requiring that deference be given; as such, there *must* be a method to check that deference is being given. It appears that Justice Kennedy is stating that disclosure is not mandatory if the Tax Court can find another way to make certain deference is actually being given to the original report.²¹¹

205. *Id.* See also *Ballard*, 544 U.S. at 63-64 (majority opinion).

206. *Id.* at 67 (Kennedy, J., concurring).

207. *Id.*

208. *Id.* at 68.

209. *Id.*

210. *Id.* at 67 (Kennedy, J., concurring). Because this is speculation on both the part of the majority and the dissent, all of this entire case could determine that Rule 183 requires that the report not be changed and that it must be disclosed. If it turns out to be the exact same report as the regular Tax Court judge purports that it is, there is no flaw in the procedural steps taken and the judgment must stand.

211. *Id.* This could also be interpreted as stating that the only way that Justice Kennedy and Justice Scalia see that deference can be checked is through disclosure. But, it does appear to show that disclosure is only one method: “[i]ncluding the original findings of fact in the record on appeal would make that possible.” *Id.*

C. Chief Justice Rehnquist's Dissenting Opinion

The former Chief Justice Rehnquist, joined by Justice Thomas joins, authors a strong opposition to the court's determination that Rule 183 requires disclosure.²¹² First, the dissent does not believe that the majority even answered the questions that were certified for review.²¹³ Second, Justice Rehnquist states that the Supreme Court should give deference to the Tax Court because the Tax Court has the right to interpret its own rules.²¹⁴ As discussed above, the majority briefly, and inadequately, addresses these two arguments.²¹⁵

Chief Justice Rehnquist believes that the Tax Court's interpretation of Rule 183 is reasonable and should therefore be accepted.²¹⁶ First, it is reasonable because, if there are changes to the original report, those changes would "presumptively be the result of the [special trial judge's] legitimate reevaluation of the case."²¹⁷

212. *Id.* at 68 n.1 ((Rehnquist, C.J., dissenting) (citing *Kanter Pet. For Cert.* (i)). "This Court does not consider claims that are not included within a petitioner's questions presented." *Id.* There are four questions presented, three of which do not even mention Rule 183. The only one that mentions Rule 183 is asking, as Justice Ginsburg points out, "whether Rule 183 requires the Tax Court to uphold findings of fact made by a special trial judge unless they are 'clearly erroneous.'" Chief Justice Rehnquist also cites *Lopez v. Davis*, which states that the only way that the Supreme Court could tell the Tax Court that they are not following their own rules is by failing to abide by the Supreme Court rules. *Id.* (citing *Lopez*, 531 U.S. at 244 n.6).

213. *Ballard*, 544 U.S. at 68-73.

214. *Id.* Chief Justice Rehnquist states that the Tax Court should be treated as an executive agency and should have the ability to interpret its own rules. If it interprets its rules to mean that there should be a collaborative process, then the Supreme Court should give deference to that interpretation.

215. *See supra* notes 124-198.

216. *Ballard*, 544 U.S. at 69-70 (quoting Brief for Respondent 11). *But see* Justice Ginsburg's statement in the majority opinion:

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.

Id. at 59 (majority opinion).

217. *Id.* at 70 (Rehnquist, C.J., dissenting). *But see* the majority opinion which focuses on the fact that the special trial judges are working as subservient

Second, it is reasonable because Rule 183 was changed by the Tax Court to eliminate the requirement that the report must be sent to the parties, and that the parties can make exceptions to it.²¹⁸

If there are two reasonable interpretations of Rule 183, when deference to the Tax Court is being utilized, the Tax Court's interpretation should be accepted.²¹⁹ In this case, seven Justices believe that it is reasonable to interpret Rule 183 to mean that the special trial judge's report must be checked²²⁰ and two Justices believe that it is reasonable to interpret Rule 183 to mean that the special trial judge's report should be kept secret.²²¹ The majority agrees that "the Tax Court is not without leeway in interpreting its Rules."²²² As Justice Rehnquist argues, "[a]n agency's interpretation of its own rule or regulation is entitled to 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'"²²³

IV. SUBSEQUENT HISTORY AND IMPACT

A. Impact on the U.S. Tax Court

The subsequent action taken since the Supreme Court decided *Ballard* makes it clear that this case has altered and will continue to

officers to the regular Tax Court judges without a protected term limit and therefore are not able to simply make a "legitimate reevaluation." *Id.* at 70 (citing Brief for Respondent 11).

218. *Id.* While the majority and the concurring opinions both acknowledge that the rule was changed, they focus on the fact that the portion requiring deference was left in and therefore, the drafters did not actually want to change any of the requirements of publishing the report. But, neither the majority nor the concurring opinion directly addresses the point that it was taken out and that this affirmative action of taking it out should be given some deference.

219. *Bowles*, 325 U.S. at 410.

220. *Ballard*, 544 U.S. at 65-67 (Kennedy, J., concurring). *See also id.* at 66 (majority opinion).

221. *Id.* at 68-73 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist states that the Tax Court should be treated as an executive agency and should have the ability to interpret its own rules. If it interprets its rules to mean that there should be a collaborative process, then the Supreme Court should give deference to that interpretation.

222. *Id.* at 59 (majority opinion); *see supra* note 215.

223. *Id.* at 68-73 (Rehnquist, C.J., dissenting).

impact the U.S. Tax Court in many ways.²²⁴ First, the much speculated and much anticipated²²⁵ unveiling of the special trial judge's original *Ballard* fact-finding report took place and cases were heard upon remand.²²⁶ Second, the Tax Court changed its rules in reaction to the case.²²⁷ Third, the Tax Court attempted to locate and publish all of the special trial reports that were ultimately decided by a regular Tax Court judge since 1983 to right their wrongs.²²⁸

1. Revealing of the Special Trial Report and Remand

On remand, the Eleventh Circuit required that Special Trial Judge Couvillion's report become part of the record.²²⁹ The Seventh Circuit, which heard the case immediately after the Supreme Court issued its decision, did not order immediate production of the special trial judge report.²³⁰ Rather, the Seventh Circuit, pursuant to Rule 54

224. The subsequent action taken can be seen through the further judicial determinations in the case as well as numerous periodical articles published in reaction to the case. *See, e.g., infra* note 226. The impact is also evidenced by the fact that the following organizations or parties participated in amicus briefs filed with the Supreme Court: the Public Citizen Inc. (2004 WL 1743940, August 2, 2004), the American Civil Liberties Union (2004 WL 1743940, August 2, 2004), the National Federation of Independent Business Legal Foundation (2004 WL 1743944, August 2, 2004), and Professor Leandra Lederman (2004 WL 1748636, August 2, 2004).

225. Since the first decision in this case, *Inv. Research Assoc., Ltd.*, 78 T.C.M. 91, 1999 WL 1313635, was heard by the Tax Court in 1999, the parties involved have been requesting access to the special trial judge report.

226. Upon remand in *Ballard*, Kanter's case was heard by the Seventh Circuit (*Kanter v. Comm'r.*, 406 F.3d 933 (7th Cir., 2005) (per curiam)) (sending the case to the Tax Court on remand). *Ballard's* case was heard by the Eleventh Circuit (*Ballard v. Comm'r.* 429 F.3d 1026 (11th Cir., 2005) (per curiam) (vacating original Tax Court finding because that the special trial judge report was not given deference, sending the case to the Tax Court for remand)).

227. TAX CT. R. 183 (amended Sept. 20, 2005). Although the rule was recently amended, the cases upon remand still reflect Rule 183 as it was written prior to this date. *Ballard*, 429 F.3d at 1030 n.3.

228. Louise Story, *Tax Court Lifts Secrecy, Putting Some Cases in New Light*, N. Y. TIMES, Sept. 24, 2005, at C6.

229. *Ballard*, 429 F.3d at 1031 (11th Cir.) (this court looked at the special trial judge report).

230. *Kanter*, 406 F.3d at 933 was heard on May 9, 2005. The dissenting opinion strongly disagrees with the decision to wait for the order of production of

immediately remanded the case to the Tax Court with instructions to follow the Supreme Court findings, ensuring that production of the special trial judge report is required by the Tax Court.²³¹

When the initial special trial report was revealed, the truth of the matters that had been speculated unfolded as the parties had hoped, but as Judge Dawson feared. It turns out that Ballard and Kentar were correct; Judge Dawson *did modify* the report that Special Trial Judge Couvillion submitted.²³² The original report did not find any

the special trial judge report, stating that “[t]his report must be included in the record, and I see no reason why it cannot be produced without further delay. It was improperly withheld, and that nondisclosure ought to cease -- now.” *Id.* at 934 (Cudahy, J., dissenting).

231. *Id.* at 934 (majority opinion).

232. *Ballard*, 429 F.3d at 1029. The judges in the Eleventh Circuit gave the true “undisclosed history” in the case as shown below (although this is lengthy, the details sheds light on all of the matters speculated upon by the Supreme 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,' 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 report now concluded that Ballard should be liable for the deficiencies in tax asserted against him.

of the taxpayers liable for paying the fraud assessment.²³³ The parties also found out that the “collaborative process” that the majority determined was in conflict with the Tax Court’s own rules, *was actually used*.²³⁴ Judge Dawson and Special Trial Judge Couvillion took the initial findings of fact, met with one another over the time that Judge Dawson had the case assigned to him and changed the findings of fact.²³⁵

The Eleventh Circuit did not just require that the special trial report be published; rather, “[i]n a public exhibition of strong displeasure, the Eleventh Circuit . . . ordered three U.S. Tax Court judges to have nothing further to do with a pending case, demanded a new assignment of the case, and brusquely ordered the entire 19-judge Tax Court to “adhere strictly hereafter” to its own rules.”²³⁶

As a practical matter of these two rulings and the determination of Judge Couvillion, it is likely that Kanter and Ballard will not have to pay the fraud assessments. But, the long term effect of the judgment, after the harsh ruling, is that Tax Court judges will likely give *extreme deference* to the finding of fact of the special trial judges. Because the special trial court is evaluating the witnesses, the Court made it specifically clear that credibility issues should be given the most deference and only changed if “manifestly unreasonable.”²³⁷ In Ballard’s case, the Court required the following actions to be taken.²³⁸

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.

Id.

233 *Id.*

234 *Id.*

235 *Id.*

236. Lyle Denniston, *Tax Court and Three Judges Rebuked*, scotusblog.com, at <http://www.scotusblog.com/moveabletype/archives/2005/10/30-week>.

237. *Ballard*, 429 F.3d at 1031 (citing *Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985) (“Credibility determinations are entitled to great deference, and must not be disturbed unless manifestly unreasonable.”)).

238. This will most likely also be the case in Kanter’s case.

- Nullify the joint report of Cohen, Dawson and Couvillion;²³⁹
- Reinstate Couvillion's original report;²⁴⁰
- Refer the case to a regular Tax Court judge "who had no involvement" in preparing the joint report;²⁴¹
- Give "due regard" to Couvillion's credibility determinations;²⁴²
- Presume that his fact findings are correct "unless manifestly unreasonable;"²⁴³
- "Adhere strictly hereafter to the amended Tax Court rules in finalizing Tax Court opinions; "²⁴⁴ and
- Judges Cohen, Dawson, and Couvillion, "are not to be involved in this new review."²⁴⁵

2. Changes to the Tax Court Rules

In direct response to the Supreme Court decision, the Tax Court modified their Rules "to reflect the dictates of the Supreme Court's opinion."²⁴⁶ The change was *not* to permit secret reports as the Supreme Court suggested might be possible.²⁴⁷ The revised Rule 183 Tax Court now requires service of the special trial judge report.²⁴⁸ This new rule makes it clear that the initial special trial judge reports must be both available to the parties and be part of the appellate record. The notes accompanying the changes to the Tax Court rules state that the new rules require the following changes:

1. The preparation of the recommended findings of fact and conclusions of law of the special trial judge;

239. *Ballard*, 429 F.3d at 1032.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.* at n. 7.

246. *See supra* note 233.

247. *See supra* notes 199-211 (discussing Justice Kennedy's concurrence) and 124-198.

248. US ORDER 05-51; Revision to TAX CT. R. 183, Sept. 20, 2005.

2. The filing of the recommendations;
3. Service of the recommendations on the parties;
4. A reasonable opportunity for the parties to file objections to the recommendations before the case is reassigned to a Presidentially appointed judge for action on the recommendations; and
5. Action on the recommendations by the assigned Presidentially appointed judge in accordance with Rule 183 as amended. The standard for reviewing a special trial judge's recommendations remains unchanged.²⁴⁹

3. Revealing all Special Trial Reports Since 1983

The Tax Court went above and beyond what the Supreme Court required of them to right their wrongs. Judge Gerber, a Tax Court judge, stated that the reason that the Tax Court is looking for ways to fix the problems that *Ballard* revealed is because "[w]e just want to do everything that we can to make sure we are opening the process . . . [w]e're not trying to conceal anything."²⁵⁰ The Tax Court "looked for the trial judges' initial reports in the 923 cases that had been heard by special trial judges but passed on to higher judges for approval since 1983, when the court stopped releasing the trial judges' initial reports."²⁵¹ Only 117 of these special trial judge reports were actually located and sent in the mail to taxpayers. Of the 117 cases that were located, the Tax Court determined that "[t]he initial recommendation and the final decision differed in 4 of the 117 cases."²⁵² Adding the differing report of *Ballard*, the rate of differing reports is around 5%. This means that, of the 804 still missing reports, it is likely that there are thirty-four cases that have a final decision that differs from the initial special trial report. But, without these reports, there is no way of knowing how many changes were actually made.

249. *Id.*

250. Story, *supra* note 228.

251. *Id.*

252. *Id.*

How the tax court process will work in the future is currently under quite a bit of scrutiny; therefore, one might expect some changes to the procedures used in the tax court. A more troubling issue at this point is how the tax court will deal with the cases that were already decided, where the reports were kept secret, but deference was not given to the special trial judge report.²⁵³ While this issue is currently being looked into by the Congressional Ways and Means Committee, Tax Court judges, tax court attorneys, and administrative law professors, do not know “what recourse, if any, parties in these cases have today.”²⁵⁴

In *Ballard*, the changed report was found during the appellate process, so a result change was simple. Norman R. Williams, an administrative law professor at Willamette University College of Law said: “We’re never going to be able to swear those judges under oath and ask them, ‘What went on here? . . . The party’s going to be left in a position of speculating whether it was an open collaborative process versus the tax court judge just dictating the decision.”²⁵⁵ One creative solution recommended by the attorney of one of the taxpayers who had a differing report is to “permit people with differing reports to choose which one they want to be followed.”²⁵⁶ The Tax Court’s willing attitude to follow the mandates of the Supreme Court and take away any aspect of secrecy will most likely lead to creative solutions favoring complete disclosure.

B. Impact on Other Administrative Courts and Agencies.

The Supreme Court granted certiorari of *Ballard* even though there was no split between the circuits. Although it is not possible to know the full reasons the Supreme Court granted certiorari, it is likely that the Court saw that *Ballard*’s impact could be so strong that

253. See generally Story, *supra* note 228.

254. *Id.*

255. *Id.*

256. *Id.*

Josh O. Ungerman, a lawyer representing a couple who received one of the newly released reports, said Congress should permit people with differing reports to choose which one they want to be followed. He said his clients, Douglas P. and Deborah J. Snow, who now live outside Chicago, [wrongly] paid about \$84,000 in taxes and penalties to the I.R.S. in the early 1990’s. *Id.*

“the whole administrative array of the federal government” is affected by its outcome.²⁵⁷ “The implications of this case stretch far beyond the Tax Court context.”²⁵⁸

1. Interpretation of Agency Rules

In balancing between an agency’s ability to have deference and authority to write and interpret its own rules without Article III court interference and a party’s ability to see what their initial findings of fact are so they have confidence in the administrative procedure and are able to make a meaningful appeal, agency deference is lost. The Eleventh Circuit’s decision reflects what most courts will likely take from *Ballard*, that “[t]he Tax Court, like all other decision making tribunals, is obligated to follow its own Rules.”²⁵⁹ What the Eleventh Circuit failed to acknowledge, however, is that the Tax Court felt as though it was following its own rules and had been since 1983. The reality for all other administrative agencies and tribunals is that it “is obligated to follow [the Supreme Court’s interpretation of] its own Rules.”²⁶⁰

A possible solution to interference with agency rule interpretation is to revise and make clear existing and future rules. If agency rules are clear to the agency and to the court, *Ballard* will have little to no effect on the agency.

2. Due Process

The Justices stopped short of ruling on the Due Process issue.²⁶¹ This is certain to come up in the future if either the Tax Court²⁶² or any agency that would like to rewrite its rules to allow an inferior

257. Petition for Writ of Certiorari, *supra* note 6, at 8. Although the case only directly affects the Tax Court by forcing it upon remand to interpret its rules in a particular way, the ability of administrative agencies and courts to make their own rules and interpret them are threatened in this case. Additionally, the public’s confidence in the administrative process is tested by this case as well. *Id.*

258. *Id.*

259. *Ballard*, 429 F.3d at 1030 (quoting *Ballard*, 540 U.S. at 46).

260. *Id.*

261. *Ballard*, 544 U.S. at 73 (citing *Morgan*, 298 U.S. at 478).

262. Based on their reaction to *Ballard*, this does not seem likely.

officer to keep its fact finding determinations secret. The majority, together with the concurring opinion, stated that *if* the Tax Court Rules allowed the initial reports to remain secret, following that rule might not be a due process violation and would therefore be permitted by the Supreme Court.²⁶³

However, the petitioners' argued that it is a violation of the Fifth Amendment guarantee of Due Process if a lower level judge does not reveal their findings of fact.²⁶⁴ To argue that it is not a Due Process violation, the court will likely compare the position of the judge (or employee) to a similar party.²⁶⁵ The closer one can be compared to a magistrate judge in their duties, the more likely it is that there will be a violation of Due Process.²⁶⁶ But, if the position seems more like a law clerk, it will be considered purely an internal deliberation and will not be a violation of Due Process. Some factors a court may look at to find that a lower level judge is actually an "employee" might include: duties, authority to make final decisions, length of position, what appellate procedures are used, and the internal aspects of the job. The closer an agency is to performing "internal deliberation," the less likely there will be a Due Process violation.

Although it is not likely to happen, if the Tax Court does change its rules to allow a special trial judge's report to remain secret, there will likely be Due Process violation. The Supreme Court appeared to compare the special trial judge's responsibilities to a magistrate judge's that *does require a publishing* of lower level reports.²⁶⁷ Further, it does not appear in any of the *Ballard* briefs or opinions that there are any good reasons for keeping the records secret. While there is a strong policy argument to allow secrecy so the Tax Court can interpret its own rules, the argument for secrecy beyond deference was not discussed nor given any weight.

Based on Kennedy's concurrence, it seems practical that an agency might be able to amend its rules to ensure there is not a Due

263. See *supra* notes 199-211 and 124-198.

264. Brief Amicus Curiae of the National Federation of Independent Business Legal Foundation in Support of Petitioners, *Ballard*, 544 U.S. at 40 (No. 03-134) at 6.

265. See *supra*, notes 73-98.

266. *Ballard*, 429 F.3d at 1030 (stating that a special trial court judge is similar to a magistrate judge).

267. See *supra* notes 75-78.

Process violation. One possible way an agency could do this is to require that the inferior fact finder file an affidavit stating that the regular judge's report is actually adopting, modifying, rejecting, or giving deference to its report as required by the agency's rules. As long as there is some assurance that the parties' Due Process is not violated, it seems possible that an agency could adopt rules that are not completely transparent.

C. Societal Impact

While this case will have minimal impact on a person who is not pursuing some type of administrative relief, those who hear or read about the case will likely have more "confidence in the fairness of the entire system of Article I courts and administrative agencies."²⁶⁸ For those who are either part of or are contemplating Tax Court litigation, there will be more reading material available for them and their attorneys. The initial reports of those 104 cases that were found are now available, the 600 plus page report published in *Ballard* is available and all special trial judge initial reports will be available to read in the future. The parties will also feel a sense of relief throughout the proceedings with the lower level judge because they know that they can look at their findings and appeal them. As seen in *Ballard*, there was a great deal of frustration that the parties did not know whether the final decision was a correct one because it was not available to them. Now, the parties can rest easy knowing that they can read and challenge the lower level judge's decision.

V. CONCLUSION

From an administrative agency's perspective, *Ballard* appears to be an unfair case; the right for the Tax Court to interpret its own rules was taken away or at least sufficiently diminished. From the public's perspective, *Ballard* ensures less secrecy and a fair trial. The impact of *Ballard* on administrative agencies and Article I courts will be significant. The amount of deference given to inferior officer's findings of fact will be increased; more work will be created because the tendency will be to publish more than less to remain transparent;

268. Petition for Writ of Certiorari, *supra* note 6, at 8.

agency rules will be interpreted more readily by Article III courts with less deference to the agency interpretation; and Due Process violations of an inferior officer will likely come up in the future as this issue was left undecided. *Ballard* alters the road ahead for all administrative agencies.

