

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CLAUDE M. BALLARD, ET UX., :

4 Petitioners :

5 v. : No. 03-184

6 COMMISSIONER OF INTERNAL :

7 REVENUE; :

8 and :

9 ESTATE OF BURTON W. KANTER, :

10 DECEASED, ET AL., :

11 Petitioners :

12 v. : No. 03-1034

13 COMMISSIONER OF INTERNAL :

14 REVENUE. :

15 - - - - -X

16 Washington, D.C.

17 Tuesday, December 7, 2004

18 The above-entitled matter came on for oral
19 argument before the Supreme Court of the United States at
20 11:09 a.m.

21 APPEARANCES:

22 STEVEN M. SHAPIRO, ESQ., Chicago, Illinois; on behalf of
23 the Petitioners.

24 THOMAS G. HUNGAR, ESQ., Deputy Solicitor General,
25 Department of Justice, Washington, D.C.; on behalf of

1 the Respondent.

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1 P R O C E E D I N G S

2 (11:09 a.m.)

3 JUSTICE STEVENS: The Court will now hear
4 argument in Ballard against the Commissioner of Internal
5 Revenue.

6 Mr. Shapiro.

7 ORAL ARGUMENT OF STEVEN M. SHAPIRO

8 ON BEHALF OF THE PETITIONERS

9 MR. SHAPIRO: Thank you, Justice Stevens, and
10 may it please the Court:

11 Judge Cudahy stated in his dissent in the
12 Seventh Circuit that disclosure of the rule 183 report in
13 this case should be required on both statutory and
14 constitutional grounds. As Judge Cudahy put it, there is
15 no item of more significance in evaluating a Tax Court's
16 decision on fraud than the unfiltered findings of the STJ.

17 JUSTICE O'CONNOR: Mr. Shapiro, can this case,
18 in your view, be decided solely on the statutory question?

19 MR. SHAPIRO: Oh, yes, Your Honor. We believe
20 it can.

21 JUSTICE O'CONNOR: There also are due process
22 allegations, and I'm not sure I even quite understand what
23 the precise due process violation is that's alleged. But
24 I would like you to address both and to tell us, first of
25 all, how it would be resolved solely on a statutory basis

1 from your perspective.

2 MR. SHAPIRO: The readiest ground for decision
3 is the statutory basis, and we believe that the statute is
4 a good means to avoid a complex due process question.

5 There are two statutes that are key here. One
6 is the appellate review statute. The other is the public
7 record statute. The public record statute says all
8 reports of the Tax Court are public records, and we're
9 talking about a report of the Tax Court in this case.

10 The legislative history of that provision shows
11 Congress had the broadest possible intent to make all
12 practices in the Tax Court completely transparent. All
13 steps in the adjudication were supposed to be --

14 JUSTICE O'CONNOR: Well, would that include --
15 if a Tax Court judge had a law clerk, would it include law
16 clerk memos to the judge?

17 MR. SHAPIRO: We -- we don't take that position.
18 It refers to reports of judges, and this is a report of a
19 trial judge who heard the witnesses. The report is
20 presumed correct under rule 183. It's the only
21 independent evaluation of witness credibility --

22 JUSTICE BREYER: Now, why -- why do you say
23 that?

24 MR. SHAPIRO: -- and the only judge --

25 JUSTICE BREYER: Would you elaborate for this

1 reason? Because the briefs and you again today keep
2 talking about that first document. You use the word
3 report.

4 MR. SHAPIRO: Yes.

5 JUSTICE BREYER: Well, to me that's the whole
6 conclusion of the case. I'm prepared to assume, at least
7 for the moment, if you can convince me that that's the
8 report they're talking about, you'd win. But that isn't
9 what the Government says.

10 The Government says that's a piece of paper,
11 preliminary. We -- like my draft. I write drafts all the
12 time. So -- so do trial judges. And he goes and brings
13 the draft to the other two judges and says, let's sit down
14 and talk about it. And they sit down and talk about it,
15 and he changes his mind and writes a different document.
16 And that different document, of course, is totally public.
17 The whole opinion of the Tax Court. There is that
18 document.

19 MR. SHAPIRO: There is only one rule 183 report.
20 Under the rule, it's the report the trial judge prepares
21 and submits to the chief judge at the completion of the
22 trial, which contains his independent credibility
23 findings.

24 JUSTICE BREYER: How do we know that? Now --
25 now, what is the answer specifically in the statute?

1 Let's call it document 1 and document 2. And it really
2 didn't help me that much in the briefs to see document 1
3 continuously labeled with the word report when I thought
4 that's the key question. Is it? Is it that report
5 they're referring to?

6 So now, go ahead.

7 MR. SHAPIRO: Under rule 183(b) there is a
8 report denominated as such. There's no question here it
9 was submitted to the court. If you look at page 114a of
10 the Kanter appendix, it says that the special trial judge
11 submitted a report, as required by rule 183(b). And this
12 case was then referred to Judge Dawson. He had no
13 involvement with the case until this report was given to
14 him.

15 JUSTICE BREYER: Which --

16 MR. SHAPIRO: I'm sorry.

17 JUSTICE BREYER: Which -- which brief --

18 MR. SHAPIRO: Oh. It's the petition for cert.
19 The Kanter petition.

20 JUSTICE GINSBURG: At least --

21 JUSTICE SCALIA: What -- what page did you say?

22 JUSTICE BREYER: What -- what page?

23 MR. SHAPIRO: 114a, 114a. And throughout --

24 JUSTICE GINSBURG: Mr. Shapiro, why don't you
25 simply read the text of 183(b) --

1 MR. SHAPIRO: Yes.

2 JUSTICE GINSBURG: -- which is in the
3 Government's brief at 4a? It says, special trial judge's
4 report. It is the only report to which the Tax Court
5 rules refer.

6 MR. SHAPIRO: That's correct, Your Honor. And
7 it's --

8 JUSTICE SOUTER: And -- and if in fact --

9 MR. SHAPIRO: -- it is presumed correct.

10 JUSTICE SOUTER: -- you rely on the rule, do we
11 even have to resolve the issue of meaning of report in the
12 statute? Can't we simply, from your position, rely on the
13 rule and say you've got to follow your own rules?

14 MR. SHAPIRO: Absolutely. This is a report that
15 must be submitted. It is presumed correct under this
16 rule. It's an independent evaluation of credibility from
17 the only judge who heard the witnesses, and of course,
18 it's part of the record. And it doesn't --

19 JUSTICE SOUTER: So you've really got three
20 arguments. You've got the rule. You've got the statute,
21 and you have due process.

22 MR. SHAPIRO: And it doesn't make the slightest
23 difference that the superior judge caused the subordinate
24 judge to say, I have changed my mind at a later stage in
25 the proceeding, because it is the original report that is

1 presumed correct under the rules.

2 JUSTICE BREYER: All right. Now, what -- what
3 was the page? Please. You're going quite -- and I want
4 to -- because Justice Ginsburg referred to a statement in
5 the Government's brief that you said yes --

6 JUSTICE GINSBURG: No, not the Government's
7 brief. The Tax Court rules.

8 MR. SHAPIRO: That's -- that's appendix 4a.

9 JUSTICE GINSBURG: 4a of the Government's brief.

10 JUSTICE SCALIA: It's the rule.

11 MR. SHAPIRO: Yes, it's the rule itself, 183(b).

12 And it makes it clear that there must be a
13 report filed with the chief judge. The docket here says
14 that that was done.

15 JUSTICE KENNEDY: Can you make the argument that
16 -- maybe you can't -- that the special trial judge can go
17 to the Tax Court judge, with the permission of the chief
18 judge, and say, now, here's what -- kind of what I'm
19 thinking? It's not my report, but here's what I'm
20 thinking. And then the -- the Tax Court judge says, well,
21 why don't you have some more findings on X and Y and Z?
22 He says, okay, and then he goes back. Can you make the
23 argument that that first document is not the report?

24 MR. SHAPIRO: The first -- there is only one --

25 JUSTICE KENNEDY: Well, I guess another way of

1 saying it is, do the rules permit any consultation before
2 the report is submitted? I -- I guess that's my question.

3 MR. SHAPIRO: The rules are silent on that, but
4 Judge Dawson has no involvement in the case until the
5 report is submitted. Then the case is assigned to Judge
6 Dawson, and then he is supposed to review it under a
7 presumptive correctness standard. So it would be
8 surprising if there were consultation of that sort.

9 But what we contend is if there is consultation
10 behind the scenes about credibility determinations, then
11 it is critically important that the report be submitted
12 and made part of the record and not concealed, and that
13 the deferential standard of review be --

14 JUSTICE GINSBURG: Would -- would that problem
15 be overcome if the special trial judge simply -- if his --
16 the proceedings before him were simply videotaped and then
17 the reviewing judge, Judge Dawson in this case, could look
18 at the trial proceedings and would have as much of a
19 notion of the credibility of the witnesses as the special
20 tax judge?

21 MR. SHAPIRO: I suppose that's a possibility,
22 but in Anderson, the Court said absent some procedure like
23 that, the trial judge is uniquely situated to evaluate
24 demeanor and tone of voice, and because of that, great
25 deference has to be given to the independent evaluation of

1 the trial judge. Maybe in a -- in the future the Tax
2 Court would want to use a procedure like that to mitigate
3 the Raddatz problem that they now have.

4 JUSTICE SCALIA: In which case, they -- they
5 might well revise the language of their rule.

6 MR. SHAPIRO: Yes, they -- they might, and --

7 JUSTICE SCALIA: Which currently requires that
8 the finding of facts of the trial judge be presumed to be
9 correct.

10 MR. SHAPIRO: That's correct, and after all, we
11 should remember that the Government was supposed to
12 present clear and convincing evidence of fraud in this
13 case, and if there was a flip-flop of this sort going on
14 behind the scenes, leaving no trace in the record, what
15 could be more important to the reviewing court than to
16 know what had occurred at the first stage and the second
17 stage here? If the trial judge found no underpayment and
18 no fraud, which we have reason to believe he did -- three
19 Tax Court judges stated that to us -- if that was -- that
20 was his finding and he found our witnesses to be credible,
21 then an unexplained overturning of that credibility
22 determination with no trace in the record would surely be
23 a candidate for reversal on appeal.

24 JUSTICE KENNEDY: Let -- let me ask this
25 question, if I may. Suppose the -- a special trial judge

1 hears the witnesses, makes a report. It's assigned by the
2 chief judge to a Tax Court judge, and the Tax Court judge
3 looks it over it and says, you know, before I -- before I
4 really spend a lot of time on this, you really didn't
5 explore these three problems. Would you please do it over
6 again? Is he permitted to do that or is that a violation
7 of the rule that he shall presume the report to be
8 correct?

9 MR. SHAPIRO: Well, we haven't challenged the
10 conversations as such. We think it is -- it is suspect,
11 however. Under Raddatz, if somebody who has not heard the
12 witnesses is telling somebody who has heard the witnesses,
13 I don't agree or I think you may be wrong in your
14 credibility determination, I'd like you to reconsider
15 that, that's a serious Raddatz problem. And the only cure
16 for that is to make the first report part of the record.

17 JUSTICE KENNEDY: I'm asking if it's a violation
18 of -- of the rule.

19 MR. SHAPIRO: The --

20 JUSTICE KENNEDY: Because the -- the rule says a
21 special report shall be presumed to be correct.

22 MR. SHAPIRO: Yes.

23 JUSTICE KENNEDY: And if there's this initial
24 review, he says, you know, I think it's really pretty
25 incomplete until you do X, Y, Z, please do it over again,

1 is that a violation of the rule?

2 MR. SHAPIRO: Well, I think the rule is silent
3 on that, but the spirit of the rule, frankly, is that the
4 STJ does his job. He completes his report. He submits
5 it, and the reviewing judge examines it under a presumed-
6 correct standard in -- in the same orderly fashion that
7 ordinarily occurs when there is an initial judgment from a
8 -- from a trial judge about credibility with deferential
9 review that comes later.

10 But the rule doesn't tell us much about these
11 consultations, and we do submit that if -- if they do take
12 place, as the Government suggests, there's importuning and
13 changing of minds going on through consultations, do this
14 on record. Turn square corners because it would be quite
15 important to the appellate court to know if there was a
16 good reason for the overturning of these credibility
17 determinations.

18 And we -- we've seen that kind of review in the
19 Stone case in the D.C. Circuit, which is very similar to
20 this case. Factually the cases are quite similar. And
21 the reviewing court, Judge Williams, found clear error
22 based on what the rule 183 report stated about witness
23 credibility. There was an elaborate explanation why
24 particular witnesses were credible and incredible, and the
25 court could use that to evaluate the judgment of the Tax

1 Court.

2 JUSTICE SCALIA: Of course, what you're asking
3 us to do would -- would just solve your problem in this
4 case, and -- and in the future, I suppose they could
5 revise rule 183 as simply not to require a report. There
6 -- there's nothing in the statute that requires this
7 report, is there?

8 MR. SHAPIRO: Well, that's true. They could
9 cease using the STJ's, but --

10 JUSTICE SCALIA: Well, they could -- they could
11 use them, but just say, instead of filing a report, he'll
12 consult with the -- with the deciding judge.

13 MR. SHAPIRO: I -- I suppose that could happen.
14 If there is -- if there is no report written, we couldn't
15 contend it has to be disclosed under these statutes, and
16 that -- that might be.

17 But it -- there could be a Raddatz issue in that
18 scenario that you present, Justice Scalia. If one judge
19 heard the witnesses and the other judge didn't hear the
20 witnesses and -- and the -- the superior judge --

21 JUSTICE SCALIA: Well, they confer with each
22 other. Maybe, maybe.

23 MR. SHAPIRO: But it -- it would be -- it would
24 be quite strange to have credibility determinations made
25 by a judge who had never heard from any of the witnesses.

1 JUSTICE BREYER: What happens in cases in
2 agencies, you know, where -- where -- suppose the agency
3 itself or a member thereof is going to make a decision,
4 and there might be other members who would hear the
5 witnesses. And I was thinking of that analogy. It's
6 possible. It happens in the Federal Communications
7 Commission where the staff, you know, consults back and
8 forth in ratemaking cases.

9 MR. SHAPIRO: Oh, yes.

10 JUSTICE BREYER: It's hard to find precisely the
11 analogy, but it seems likely.

12 MR. SHAPIRO: The -- the closest analogy in this
13 Court's decisions is the Morgan II decision.

14 JUSTICE BREYER: Yes, which gives and takes
15 away.

16 MR. SHAPIRO: Now, Morgan II is really on point
17 because there, a subordinate official drafted up findings,
18 proposed findings, didn't serve them on the parties, but
19 did give them to the decision-maker, the agency. And this
20 Court held that was a violation of due process.

21 JUSTICE BREYER: You have to have an opportunity
22 to refute the information that's going to --

23 MR. SHAPIRO: Absolutely.

24 JUSTICE BREYER: Yes.

25 MR. SHAPIRO: And -- and every administrative

1 body that we know of in the Federal courts and in the
2 State system too -- Chief Judge Vanderbilt pointed that out
3 in the Mazza case. Every State in the Union requires
4 disclosure of these administrative law decisions to the
5 parties.

6 JUSTICE BREYER: If you analogize the STJ to the
7 administrative ALJ. But you might also analogize him to a
8 member of the agency itself, and if you make that analogy,
9 it doesn't become so far-fetched, particularly when you
10 look at Morgan as also not allowing you to probe at what's
11 going on.

12 MR. SHAPIRO: Yes. Well, we -- we've avoided
13 suggesting that any depositions should be taken of -- of
14 judicial personnel here. That's not our view. Our view
15 is simply that the report that was prepared -- it was
16 prepared -- should be made part of the record by virtue of
17 two statutes. There is an appellate review statute,
18 Justice O'Connor, that states quite expressly that
19 Congress expected review to take place here just as it
20 does in the district court, to the same degree, to the
21 same extent, and in the same manner. And in the district
22 court, if an adjunct judge makes a finding of fact,
23 whether it's a master or a magistrate or bankruptcy judge,
24 that is always disclosed to the parties.

25 JUSTICE O'CONNOR: Mr. Shapiro, is there any

1 evidence in this record that the special trial judge in
2 fact changed his report beyond the hearsay affidavit?

3 MR. SHAPIRO: We don't know what is contained in
4 that first report. We have heard from three of the
5 judges, including the chief judge of the STJ's, that --
6 that what happened was that Judge Dawson rewrote the
7 credibility findings. Now, we won't know until we see
8 this. That could be wrong. But -- but it should be part
9 of the record for the court of appeals.

10 JUSTICE GINSBURG: Mr. Shapiro, on credibility,
11 which you have been emphasizing, are you overstating the
12 case for it? Because credibility is more than just
13 observing the witnesses' demeanor. I mean, Judge Dawson
14 could have said, yes, they -- these witnesses might have
15 looked honest to the special trial judge, but considering
16 this documentary evidence in the record, it's clear to me
17 that what the witness said on the stand was a lie.

18 MR. SHAPIRO: Well, you'll see in perhaps a
19 dozen situations, he says, I simply don't believe that
20 witness, none of whom he heard. And this is a case where
21 credibility was key. Was there a bribery scheme of the
22 kind that the IRS claimed? Every witness who testified
23 said no, it didn't exist. These are simple investments
24 with the proceeds being paid to the corporations, and yet,
25 the Government's theory was there is some nefarious

1 bribery scheme that every witness denied. And there is no
2 documentary evidence of that. The evidence of the
3 proceeds flowing to these corporations was simply the
4 result of their investing money in real estate deals. And
5 so credibility was the key to this whole case.

6 And the -- the Government, I don't think, can be
7 serious when it tells this Court that this first report is
8 some confidential document, that it's privileged internal
9 deliberative material. For 40 years, the -- the Tax Court
10 made these reports available to the public. It -- they
11 were routinely served on the parties. For 40 years there
12 was no suggestion --

13 JUSTICE KENNEDY: Would -- would you comment on
14 that? I -- I understood from the brief there was a
15 suggestion that if you prevail, we're going to have a huge
16 volume of -- of printed material that we're not troubled
17 with now.

18 MR. SHAPIRO: Oh, yes. That's a post hoc
19 rationale. There was no such explanation when this rule
20 was changed, and there's not a bit of work or a bit of
21 expense resulting from our position. We simply ask for a
22 copy of a report that exists. They can serve it on us
23 electronically. It won't cost them a cent. We're making
24 a very modest request under these statutes and under the
25 Due Process Clause. And there was no explanation --

1 JUSTICE SCALIA: Well, now, wait. Under the Due
2 Process Clause, I assume you would be asking for more than
3 just access to the report. You -- if -- if you're really
4 relying on Morgan II, he who hears must decide, I think
5 you would be saying that after reading the report, you
6 should have the opportunity to argue to the -- to Dawson
7 here, to -- to the Tax Court judge that the report should
8 not be adopted.

9 MR. SHAPIRO: Well, we defer to --

10 JUSTICE SCALIA: Isn't that part of your due
11 process case?

12 MR. SHAPIRO: It -- it really is not. We're
13 asking --

14 JUSTICE SCALIA: You think it satisfies due
15 process just to show you the report, and then --

16 MR. SHAPIRO: To give -- and make it part of the
17 appellate record. We're not asking for any remand to the
18 Tax Court. If the Tax Court doesn't --

19 JUSTICE SCALIA: Well, then -- then you're not
20 relying on Morgan II.

21 MR. SHAPIRO: Well, we -- we just rely on that
22 as an example of the need to disclose this at an
23 appropriate juncture.

24 JUSTICE SCALIA: There wasn't a need to disclose
25 the point that Morgan II made. It was he who hears must

1 decide.

2 MR. SHAPIRO: Well, in Morgan II, the -- the
3 point was that any -- any proposed findings that are
4 drafted up have to be shared with the parties. Now, there
5 they had to be shared with the parties at the
6 administrative level. We're not going that far. If the
7 Tax Court tells us that they don't want to have that layer
8 of review within the Tax Court, they don't want to receive
9 our comments on the initial report, that's fine with us.
10 We want it to be made part of the appellate record so that
11 the judges who are interested in this and believe it will
12 shed a strong light on the issue of clear and convincing
13 evidence can have this be part of the record.

14 And already the Fifth Circuit has overturned the
15 finding of fraud in this very same case.

16 JUSTICE GINSBURG: Do -- do I understand that
17 you would be satisfied if the Court simply looked to --
18 what is it -- 7482(a)(1), the appellate review section,
19 which says that the Tax Court decisions shall be reviewed
20 in the same manner and to the same extent as district
21 court decisions? And that --

22 MR. SHAPIRO: Yes. We'd be satisfied because
23 that is a sufficient basis to say the record has to
24 include the rule 183 report. And it is not up to the
25 trial court to tell the appellate court what's in the

1 record on appeal. It's up to the appellate court to -- to
2 determine what goes into that -- that record. This -- the
3 case in the Second Circuit on that is IBM v. United States
4 where the Second Circuit analyzed rule 10(a) and said it
5 is not the province of the trial court to dictate to the
6 reviewing court what is in that record.

7 And this Court in --

8 JUSTICE GINSBURG: And where is it? It's -- it
9 is specified someplace, but when you review a district
10 court decision in -- in a court of appeals, the --
11 certainly the magistrate's report would be included, but
12 there's someplace where it lists the contents, some rule
13 that lists --

14 MR. SHAPIRO: Oh, yes. It's rule 10(a) and it's
15 -- it's very general. It says that all the original
16 papers in the trial court come before the appellate court,
17 and an original report is an original document submitted
18 in the trial court.

19 And this Court confronted that question in
20 Universal Camera 50 years ago, and the Government made the
21 same arguments then that it's making now and it lost 7 to
22 2 in that case. It -- it said that the report --

23 JUSTICE SCALIA: Institutional memory. Isn't
24 that -- that's a good institutional memory --

25 MR. SHAPIRO: It goes back.

1 (Laughter.)

2 MR. SHAPIRO: The same argument was made that
3 the report is an irrelevance. It's just an aid to the
4 decision-maker, and the decision-maker can do what it
5 wants and has ultimate judgmental power. So there's no
6 need to include that report in the record, and no weight
7 should be given to it.

8 This Court said, we will not adopt an
9 exclusionary rule for the administrative law judge's
10 report. And this is an a fortiori case because this
11 report is presumed correct. In *Universal Camera*, there
12 was no presumption of correctness at all. So that -- that
13 case, you know, goes further than -- than what the Court
14 has to do here.

15 And the Government's argument that -- that
16 somehow this is --

17 JUSTICE SCALIA: That -- that was decided under
18 the APA, wasn't it? I mean, that was an APA case, which this
19 isn't.

20 MR. SHAPIRO: Well, yes, that's true. But, you
21 know, the Court reached out to the APA for guidance in
22 construing the labor laws. The labor laws were silent on
23 this issue, but under the APA, the Court said the general
24 policy is to disclose these reports and we are going to
25 say that that is applicable to the NLRB.

1 Now, the Government says all of this changes the
2 course because the judge changed his mind, but you know,
3 there are so many opinions and orders and reports in the
4 Federal judicial system where a mind is changed and an
5 opinion is suppressed or -- or vacated or replaced and
6 that first opinion is still part of the record. It's a
7 fallacy to say it's not part of the record just because
8 it's been abandoned.

9 For example, if I seek summary judgment in the
10 district court and it's denied and then I ask for
11 reconsideration and it's granted, the opinion has been
12 abandoned, but it's still part of the record. And if I --
13 if an appeal is taken, it's going to be exhibit A in any
14 appeal, and it may result in a reversal.

15 Same thing when a case goes en banc. The panel
16 opinion is vacated, but then when -- when cert is granted,
17 the argument before this Court may convince this Court
18 that the panel was right. Even though it's been
19 abandoned, it's still very important.

20 Or if a jury verdict is set aside -- the -- the
21 district court says, judgment as a matter of law -- on
22 appeal, the jury -- jury verdict may get sustained. So
23 it's just a logical fallacy to say that because somebody
24 has changed his mind, if that's what happened here, that
25 -- that the first report drops out of the record.

1 JUSTICE GINSBURG: Would the -- the Tax Court
2 rule -- now, this 183(c) -- says -- it describes the
3 special trial judge's report, which is submitted to the
4 chief judge, and then the chief judge assigns a Tax Court
5 judge, and then it says that -- that the Tax Court judge
6 may modify it, modify the special trial judge's report, or
7 may reject it in whole or in part. Does the Tax Court
8 ever modify a special trial judge's report? Does it ever
9 reject it in whole or in part?

10 MR. SHAPIRO: Oh, yes, and -- and the remarkable
11 thing is that every time it does that, it recites, we
12 hereby adopt the findings and opinions of the trial judge.
13 Now, in the old days, that was not a problem.

14 JUSTICE GINSBURG: But that's one thing that
15 they can do. They can adopt it, but my question is, do
16 they always adopt and never use -- never use the term
17 modify or reject?

18 MR. SHAPIRO: Oh, no. They -- they do modify
19 and reject. It's just it's hard to determine, when they
20 are doing that. In the old days --

21 JUSTICE SCALIA: They -- they never say so in
22 their opinion.

23 MR. SHAPIRO: They don't --

24 JUSTICE SCALIA: They always say that they adopt
25 the trial judge's report. Don't they?

1 MR. SHAPIRO: Yes. That's entirely correct.

2 And now, in the old days, before they amended
3 the rule, you could compare the two and see what was
4 changed, but now you can't. You can't tell what has been
5 changed.

6 And in this instance, we believe there's been a
7 complete rewrite of that first report, and the appellate
8 courts can't tell what's going on. Was there a reason for
9 doing this? Was deference given? Was some other agenda
10 at work in this decision? No one can tell because it is
11 all off the record.

12 JUSTICE BREYER: What -- what is -- can I ask
13 you a really esoteric administrative law question, which I
14 have never been able to figure out? It's probably
15 relevant, but I -- this is an agency. That's what -- my
16 great tax professor, Ernie Brown, used to say there is no
17 Tax Court. He says, the Board of Tax Appeals shall be
18 known as the Tax Court. What he meant by that is it's not
19 -- it isn't the Tax Court, just known as. So -- so this
20 is an agency, an administrative agency.

21 So I look to the APA for guidance, and the APA,
22 when you look at the section, says this initial decision
23 can be made by a 556-qualified person. Now, a 556-
24 qualified person can include the agency itself or a member
25 of the agency or an ALJ.

1 Then when you to look at what happens in 557,
2 after that presiding employee makes an initial decision,
3 it says you have to give a chance to the party to respond
4 to the initial decision, which you like, in the case where
5 the presiding employee -- presiding person is a
6 subordinate employee. And so, that's what I was just
7 checking here.

8 And so -- so what's supposed to happen where the
9 presiding person under 556 for that initial or tentative
10 decision is not a subordinate employee, but rather, quote,
11 one or more members of the body which comprise the agency?
12 I've never run into that before. Maybe you haven't.
13 Maybe they didn't mean anything by it, but maybe they did.

14 MR. SHAPIRO: Well, I -- I haven't either. But
15 the judge here certainly was subordinate and --

16 JUSTICE BREYER: He was a subordinate employee?

17 MR. SHAPIRO: Yes, he was.

18 JUSTICE BREYER: Rather than a member -- is --
19 is -- if he's a subordinate employee, that's easy. Then
20 the case is easy I think.

21 MR. SHAPIRO: He -- he is a subordinate because
22 as the Government keeps telling us, the Tax Court judge is
23 the only official spokesman for the court. They get to
24 make the final judgment. And the Tax Court judge reviews
25 what the STJ has done.

1 JUSTICE GINSBURG: These -- these --

2 JUSTICE SCALIA: But you're -- you're not
3 asserting that the APA governs this.

4 MR. SHAPIRO: Oh --

5 JUSTICE BREYER: No. I'm just looking --

6 JUSTICE SCALIA: Isn't there an express
7 exception for -- for --

8 MR. SHAPIRO: Yes, and this a court. This is an
9 Article I court, this Court has held. And Congress has
10 created very specific appellate review procedures for this
11 court.

12 JUSTICE GINSBURG: The -- the special trial
13 judge has no tenure, does she?

14 MR. SHAPIRO: That's correct. He -- those
15 judges could be terminated at will, including because
16 there is not sufficient work for the judge. They can be
17 terminated on that basis. And that, we think, colors the
18 analysis here for the reasons Judge Cudahy gave.

19 This is not an independent judge. When he is
20 persuaded by his superior to change his mind, it's obvious
21 that he -- in our view, that he's going to be heavily
22 influenced by that. It's a serious Raddatz problem. The
23 only cure is to make this part of the record and to
24 enforce the rule 183 presumption of correctness, which
25 creates a clear error standard of review.

1 I see my time has run out. May I reserve the
2 rest for --

3 JUSTICE STEVENS: Yes, you may, of course.

4 Mr. Hungar.

5 ORAL ARGUMENT OF THOMAS G. HUNGAR

6 ON BEHALF OF THE RESPONDENT

7 MR. HUNGAR: Justice Stevens, and may it please
8 the Court:

9 The central flaw in petitioners' case is that
10 both of the trial court judges responsible for evaluating
11 the evidence in the record reached the same conclusion
12 regarding all of the factual issues.

13 JUSTICE GINSBURG: Mr. Hungar, before you
14 proceed to your legal argument, I was very curious why the
15 Government is defending this practice because the
16 Government, after all, is on the other side of every case.
17 And aren't there situations where it might be that the
18 special trial judge would call a credibility question in
19 the Government's favor and then the Government loses the
20 case before the Tax Court judge and might like to know,
21 before it goes to the court of appeals, how solid the
22 credibility findings were? I mean, I -- I -- the
23 Government being a party to all these proceedings, why is
24 it satisfied with not knowing what the report of the
25 special tax judge -- special trial judge was?

1 MR. HUNGAR: Justice Ginsburg, we do know what
2 the report of the special trial judge was. It is in the
3 record. Judge Couvillion's name is on his report.

4 JUSTICE GINSBURG: No, it is not the report. It
5 is called an opinion. It isn't even called the report,
6 and if you will read 183(b), that describes the report.
7 Does anything else describe the report? And what is this
8 report? There is a report. It is submitted to the chief
9 judge. What would you call that?

10 MR. HUNGAR: The report is the -- contains the
11 recommended findings of fact and opinion, analysis of the
12 law and application of the law to the fact, of the special
13 trial judge. The report is the findings of fact plus,
14 quote, the opinion.

15 JUSTICE GINSBURG: Now, what is the 183(b)
16 report?

17 MR. HUNGAR: Well --

18 JUSTICE GINSBURG: There --

19 MR. HUNGAR: The -- under rule 183(b), the --
20 the special trial judge submits his report to the chief
21 judge. It is then referred to a Tax Court judge.

22 JUSTICE GINSBURG: So that report, the special
23 trial judge's report, is a document prepared by the
24 special trial judge which he gives to the chief judge.

25 MR. HUNGAR: Correct. But the important thing

1 to understand, Your Honor, is that nothing in the rule
2 precludes, during the course of the deliberative process
3 that then follows, the special trial judge from concluding
4 that he has made a mistake, that he no longer agrees with
5 the -- the stated findings of fact in that -- in that
6 original report, from withdrawing and submitting a
7 corrected report.

8 JUSTICE SOUTER: But that's not the way the rule
9 reads. The rule reads, as I understand it, under (c) that
10 the court itself may accept, reject, or modify. It
11 doesn't say anything about the special trial judge
12 reconsidering and rewriting his report.

13 MR. HUNGAR: It doesn't preclude it either, Your
14 Honor. There's a longstanding practice --

15 JUSTICE SCALIA: Yes, it does because it -- it
16 goes on to say that due regard shall be given to the
17 circumstance that the special trial judge had the
18 opportunity to evaluate and the findings of fact
19 recommended by the special trial judge shall be presumed
20 to be correct. But if those findings of fact are simply
21 the same findings of fact that he agrees with the rest of
22 the -- the panel on, it just makes no sense at all.

23 MR. HUNGAR: The Tax Court judge cannot report
24 in -- in the opinion that is issued by the Tax Court, he
25 cannot say I'm adopting the opinion and findings of the

1 special trial judge if the -- if the Tax Court judge does
2 not agree with those and the -- and the special trial
3 judge adheres to his original decision. The only way it
4 is possible for there to be a change is for the special
5 trial judge himself to determine, in the exercise of his
6 responsibility as a judicial officer, that he made a
7 mistake.

8 JUSTICE SCALIA: What report goes to the chief
9 judge?

10 MR. HUNGAR: Originally the original report goes
11 to the chief judge.

12 JUSTICE SCALIA: That's a report. Is that not a
13 report?

14 MR. HUNGAR: It is a report, Your Honor.

15 JUSTICE SCALIA: Why doesn't that -- why isn't
16 that required to be -- to be made public?

17 MR. HUNGAR: Because if -- because the --
18 because the Tax Court has determined that it will not be
19 made public, that it is part of internal deliberation.

20 JUSTICE SCALIA: It's a report. The statute
21 says that the reports have to be made public.

22 MR. HUNGAR: No, Your Honor.

23 JUSTICE SCALIA: That is a report.

24 MR. HUNGAR: No, Your Honor.

25 JUSTICE SCALIA: And it goes to the --

1 MR. HUNGAR: No, Your Honor.

2 JUSTICE SCALIA: No?

3 MR. HUNGAR: With respect, the tax -- the -- the
4 statute says a report of the Tax Court must be made
5 public. A -- a report --

6 JUSTICE KENNEDY: Well, but the rule -- the rule
7 says that the first report, the document 1, has to be
8 given deference. Whether it's presumed to be correct.

9 MR. HUNGAR: Well, Justice Kennedy, if I may,
10 I'd like first to finish my response to Justice Scalia.

11 JUSTICE KENNEDY: Sure.

12 MR. HUNGAR: The statutes -- the -- the
13 disclosure requirement applies only to reports of the Tax
14 Court. It is perfectly clear that a report, the original
15 report, or any report of a special trial judge is not and
16 cannot be the report of the Tax Court unless it is first
17 adopted and approved by a Tax Court judge, and then goes
18 through the next step of -- of being submitted --

19 JUSTICE O'CONNOR: Well, it's -- it's very hard
20 to understand how appellate review can function if that
21 first report of the special trial judge is never
22 disclosed. I just don't see how the appellate review can
23 function properly.

24 JUSTICE KENNEDY: And how do we know that it was
25 -- that it was presumed to be correct under the rule?

1 JUSTICE O'CONNOR: Yes. How does the appellate
2 court know whether deference, as required by the rules,
3 was given unless the appellate court can see it? It's
4 such a strange procedure.

5 Why, in answer to Justice Ginsburg, does the
6 government take the view it does? Wouldn't you like to
7 see it if it went against you?

8 MR. HUNGAR: We submit, Your Honor, that there
9 is no evidentiary or probative value in an initial
10 conclusion that the -- that the person who reached that
11 conclusion has abandoned, has concluded was wrong.
12 Special Trial Judge --

13 JUSTICE O'CONNOR: Well, the rule --

14 MR. HUNGAR: -- Couvillion rejected --

15 JUSTICE O'CONNOR: -- the rule -- the rule 183
16 does provide for a certain degree of deference to be given
17 to those findings of the special trial judge.

18 MR. HUNGAR: To the recommended findings of the
19 special trial judge. And I submit that if the special
20 trial judge has concluded that his initial recommendations
21 were mistaken because, based upon further consideration as
22 a judicial officer in the exercise of his obligations, he
23 has realized he made a mistake, I submit it would be
24 bizarre to require a Tax Court judge to give some sort of
25 -- of deference to --

1 JUSTICE GINSBURG: Mr. Hungar, do you --

2 MR. HUNGAR: -- abandoned findings.

3 JUSTICE GINSBURG: Do you see somewhat of a
4 problem, that we are not dealing here with the
5 relationship between peers? Judge Dawson is appointed,
6 what, for a 15-year term. The special trial judge is
7 appointed by the Tax Court and his job is at the Tax
8 Court's grace. And if you have compared in your brief
9 that relationship to, say, a discussion among colleagues,
10 I think it's worlds different.

11 MR. HUNGAR: Justice Ginsburg, Judge Dawson
12 actually is a senior judge who was recalled. So he
13 doesn't have the 15-year term protection.

14 But it's true that special trial judges are --
15 are appointed by the chief judge, not by the Tax Court
16 judges, but by the chief judge, so that Judge Dawson
17 wasn't, in a sense, his -- his appointing, employing
18 official.

19 But more to the point, special --

20 JUSTICE GINSBURG: He has had a special -- a --
21 a long term and he is well-known and respected as a Tax
22 Court judge who was appointed, as all other members of the
23 court were appointed.

24 MR. HUNGAR: Well, Judge Couvillion has been a
25 special trial judge, I think, for nearly 20 years.

1 But the point is special trial judges are bound
2 by the code of conduct. The Tax Court has adopted for
3 both Tax Court judges and special trial judges the same
4 code of conduct that applies to Federal judges under
5 Article III, which --

6 JUSTICE GINSBURG: It seems to me --

7 MR. HUNGAR: -- obligates independent decision-
8 making.

9 JUSTICE GINSBURG: It seems to me that it's very
10 much like, if you have to compare it with something, the
11 relationship between a magistrate and a Federal district
12 court judge. The magistrate also hears testimony, makes a
13 report, findings, and a recommendation. What's the
14 difference between those two?

15 MR. HUNGAR: Well, one difference is that the
16 district court judges, as I understand it, appoint the
17 magistrate, not the chief judge.

18 But a more significant difference is that the
19 statute and rules applicable to magistrates require
20 disclosure of their reports and do not treat them as part
21 of the internal deliberative process. The Tax Court has
22 determined that it is inefficient to have disclosure of
23 the original report, then have exceptions and have that
24 whole process followed that they used to follow. They
25 have determined that they will treat the Tax Court --

1 excuse me -- the special trial judge's report --

2 JUSTICE BREYER: So where does it say that?

3 Where does it say that?

4 JUSTICE STEVENS: They're not requiring the --
5 this case doesn't involve the question of whether they can
6 make objections to the finding in -- in the special
7 report. It's just whether it's disclosed.

8 MR. HUNGAR: Yes, Your Honor. But the -- but
9 the Tax Court has determined not to disclose it.

10 JUSTICE STEVENS: No, I understand. But your
11 argument about how it would make the proceeding more
12 cumbersome, it seems to me, is -- is misplaced.

13 MR. HUNGAR: Well, it certainly would be more
14 cumbersome if they followed the procedure that they used
15 to follow, which we submit, although the record is -- they
16 did not specifically state --

17 JUSTICE STEVENS: But they're not asking for
18 that. Am -- am I wrong on --

19 MR. HUNGAR: Yes, that's true, Your Honor. What
20 they're asking for here, what they say they want is merely
21 disclosure of the original report.

22 JUSTICE STEVENS: And it's a particularly strong
23 argument in a case -- in several of the issues. I
24 remember Judge Fromm's opinion turned on the credibility
25 of oral testimony, and in one case, Judge Fromm found the

1 -- the judge here made an erroneous ruling on credibility
2 on one issue, if I remember correctly. And it seems to me
3 that's a case in which it would be particularly relevant
4 to know the reasons pro and con on why credibility
5 determinations were made by the person who heard the
6 witnesses.

7 MR. HUNGAR: But the person who heard the
8 witnesses is Special Trial Judge Couvillion.

9 JUSTICE STEVENS: Has been convinced that he was
10 wrong.

11 MR. HUNGAR: Yes.

12 JUSTICE STEVENS: And the question is, well,
13 what was his -- what was the basis for his original
14 position when you're evaluating whether you've got a valid
15 argument to make on appeal?

16 MR. HUNGAR: Under that rationale, Justice
17 Stevens, every time a district court judge changes his
18 mind, after giving further thought to a case --

19 JUSTICE STEVENS: No, no, no.

20 MR. HUNGAR: -- before he issues his final
21 opinion --

22 JUSTICE STEVENS: Only if he is required by a
23 rule to make certain findings and to deliver a completed
24 report to someone else.

25 MR. HUNGAR: Well, again, the -- the rule does

1 not preclude the practice. It is a common practice --

2 JUSTICE STEVENS: It doesn't forbid it. You're
3 right. It doesn't forbid it in so many words. But I just
4 wonder, does it comport with your normal notions of a fair
5 way to conduct a fair hearing, letting the parties know
6 what the basis for decision was and who thought what about
7 the witnesses and so forth?

8 MR. HUNGAR: Absolutely, Your Honor. If the --
9 in a -- when a -- when a court has a collegial
10 deliberative process involving more than one person that
11 is involved in the decision-making -- certainly this is an
12 unusual process in that -- and there is no identical
13 analog, but we see no due process problem.

14 JUSTICE SOUTER: No. But I don't see what is
15 consistent with your notion of a deliberative process as
16 producing the report and the presumption of correctness in
17 the rule. The rule presumes that some original document,
18 which you are treating as provisional, enjoys a
19 presumption of correctness, and I don't see the
20 consistency between provisionality and deliberate
21 character on the one hand and presumption on the other.

22 MR. HUNGAR: If I may, Your Honor, the rule does
23 not state that the, quote, original report shall receive a
24 presumption of correctness. It doesn't even say that --
25 that any report shall receive a presumption of

1 correctness. It says the findings of fact recommended by
2 the special trial judge.

3 JUSTICE SOUTER: And aren't those findings of
4 fact the findings of fact that are delivered to the chief
5 judge in the report that is made to the chief judge before
6 it is even assigned to a Tax Court judge?

7 MR. HUNGAR: Not if -- not if the tax -- if the
8 special trial judge has abandoned those recommendations,
9 withdrawn those recommendations, and replaced them.

10 JUSTICE SOUTER: But he hasn't abandoned them at
11 the point that he delivers them to the chief judge, and if
12 that's what this is referring to, then the presumption of
13 the -- of -- of correctness necessarily has to apply to
14 whatever the document is that's delivered to the chief
15 judge.

16 MR. HUNGAR: Well, it applies to the report, but
17 I submit that if the special trial judge withdraws in
18 order to correct an error in the report, what he submits
19 as the corrected report is then the, quote, report.

20 JUSTICE KENNEDY: You're -- you're --

21 JUSTICE GINSBURG: Why isn't that explained in
22 the rules, if that's the process?

23 JUSTICE KENNEDY: -- have a condition
24 subsequent. It seems to me that you're saying, Mr.
25 Hungar, that the last sentence of 183 is unenforceable.

1 MR. HUNGAR: The -- the credibility -- the due
2 regard and presumption of --

3 JUSTICE SOUTER: The presumption.

4 MR. HUNGAR: Well, it's important to understand
5 also that, in fact, it would violate the Internal Revenue
6 Code. This rule must be construed to be consistent with
7 the Internal Revenue Code. The Internal Revenue Code
8 makes very clear, and this Court held in Freytag, that the
9 Tax Court judge, not the special trial judge, is the
10 decision-maker, the only finder of fact in these kinds of
11 cases under subsection (b)(4) of the statute. This Court
12 so held in Freytag and the -- and the statute makes that
13 very clear. So it would violate the statute to construe
14 this, as petitioners do, to require some sort of
15 deferential clear error review.

16 JUSTICE SOUTER: So you're saying the rule
17 itself in that respect is invalid?

18 MR. HUNGAR: If construed as petitioners would
19 have it, yes.

20 JUSTICE SOUTER: Well, how else could you
21 possibly construe it? There's no presumption operating at
22 all on your reading.

23 MR. HUNGAR: In the tax context, Your Honor, the
24 -- there is a presumption of correctness that attaches to
25 assessments and deficiency notices issued by --

1 JUSTICE SOUTER: No, but you're saying there is
2 -- there is no presumption of correctness that can operate
3 with respect to the report that goes first to the chief
4 judge because, I understood you to say, to do that would
5 violate the Internal Revenue Code provision that the fact-
6 finder and the only fact-finder is the Tax Court judge.
7 And therefore, I think the implication of what you're
8 saying is that the rule on its face is invalid.

9 MR. HUNGAR: Your Honor, presumption of
10 correctness does not necessarily equate with clear error,
11 deferential review. That's my point.

12 JUSTICE SOUTER: I'm -- I'm not even getting to
13 whatever the standard of review may be. I presume the
14 word presumption means something other than it's there
15 unless you want to change it later after the person who
16 employs you objects to it. It's got to mean something
17 more than that.

18 MR. HUNGAR: What the presumption of correctness
19 means in the tax context, with respect to deficiency
20 determinations and the like, is that the burden of going
21 forward is on the party seeking to change what -- what --
22 the determination that is presumed correct.

23 JUSTICE SOUTER: But there's no party who is
24 seeking to change at this point because the parties don't
25 know what's in it. They're not going forward. This is,

1 as you point out, an internal process that is going on
2 here. So that definition can't apply.

3 MR. HUNGAR: No, Your Honor. If -- there --
4 there are two processes that go on. The Tax Court judge,
5 quite appropriately, we -- we assume and have -- have no
6 reason to disagree, confers with, discusses with the
7 special trial judge. If -- if in the course of that
8 discussion, one or both of them come to the conclusion
9 that something is wrong in the original report and if the
10 special trial judge agrees, the special trial judge has
11 the option of withdrawing his original report, submitting
12 a corrected report, and having the presumption of
13 correctness, whatever it means, apply to his corrected
14 report. If -- if --

15 JUSTICE SCALIA: In -- in that discussion, does
16 the Tax Court judge have to give great weight to the
17 findings of fact of the -- of the special judge?

18 MR. HUNGAR: No, Your Honor, not great weight
19 because, again, that would violate the statute.

20 JUSTICE SOUTER: Any weight?

21 MR. HUNGAR: He is to give due -- the due regard
22 provision we think is essentially precatory, as the -- as
23 the Seventh Circuit said. It reminds the -- the Tax Court
24 judge that he should not lightly set aside the credibility
25 determinations. But again, that's not what happened here.

1 JUSTICE SOUTER: So I -- I think your -- I think
2 your answer then is not that this is invalid. It is
3 simply unenforceable. It is precatory language, looks
4 okay, but there's no way to police it.

5 MR. HUNGAR: It's certainly not enforceable in
6 an appellate court. That's correct.

7 JUSTICE SOUTER: Judicially it cannot be
8 enforced.

9 MR. HUNGAR: That's correct, because otherwise
10 it would violate the statute if it imposed some meaningful
11 limitation.

12 But again, it's important to understand here the
13 Tax Court judge did not exercise his authority in this
14 case to reverse or set aside the special trial judge's
15 findings. He could have done so --

16 JUSTICE GINSBURG: Do they -- do they ever? I
17 mean, this -- this says, this decision -- it's labeled --
18 the -- the court agrees with and adopts the opinion of the
19 special trial judge. Are there Tax Court cases where the
20 Tax Court says, instead of that, the court modifies the
21 decision of the special trial judge or the court rejects,
22 in whole or in part, the report of the special trial
23 judge?

24 MR. HUNGAR: We cite --

25 JUSTICE GINSBURG: Do Tax Court opinions come

1 out that way?

2 MR. HUNGAR: We cite in footnote 4 a small
3 number of cases from prior to the last rule change in
4 which that occurred. In addition, there are at least a
5 couple of cases since the rule change in which the Tax
6 Court judge rejected parts of the opinion, but not the
7 findings. We're not aware of any cases in which the Tax
8 Court judge has rejected the findings, but there are other
9 cases -- Little against Commissioner, 103 T.C. 285; Walker
10 against Commissioner, 101 T.C. 537 -- in which the Tax
11 Court judge expressed a disagreement with a portion of the
12 opinion of the special trial judge and then proceeded to
13 decide the case in the manner he or she thought --

14 JUSTICE GINSBURG: Because if one were just to
15 rule this -- read this rule straight: first, the report
16 that goes to the chief judge, and then it says that the
17 Tax Court judge may modify it, reject it in whole --
18 adopt, modify, or reject in whole or in part. You would
19 expect, if we were having truth in labeling, that
20 whenever, with consultation, without, there's a difference
21 between the two documents, the Tax Court judge, in
22 combination with the special trial judge or without, would
23 say, action on the report -- action on the report, which
24 is the special trial judge's report, is it is modified or
25 it is rejected or it is rejected in part. I mean --

1 MR. HUNGAR: Well, again, that assumes that the
2 -- that the -- the rule compels the interpretation that
3 the special trial judge is prohibited from withdrawing,
4 correcting, and resubmitting his report. I submit it does
5 not compel that interpretation, and the Tax Court --

6 JUSTICE GINSBURG: The rule -- the rule doesn't
7 say anything about this consultation that you've
8 described. And if that's the Tax Court's procedure, why
9 isn't it laid out in the rules so everyone can see it
10 instead of being deceived by reading here is the special
11 trial judge's report, and now what the Tax Court will do
12 is either adopt, modify, or reject in whole or in part?

13 MR. HUNGAR: Well, I don't think it -- I mean, I
14 don't think it's -- it's deceitful, the -- the possibility
15 that a court --

16 JUSTICE GINSBURG: Misleading. Because when I
17 just read this rule cold, that's what I assumed, that we
18 have the initial report and then it goes to the Tax Court
19 judge, and that judge does something with it, and that
20 something may be adopt, it may be modify, it may be reject
21 in whole or in part.

22 MR. HUNGAR: Your Honor, when the Tax Court
23 adopted its present procedures in 1984, it -- it certainly
24 did not do so in as artful a manner as it could have. But
25 the question is whether it violates the statute or due

1 process for it to do what it has done.

2 Let me just -- we've been spending most of our
3 time talking about this issue of whether the Tax Court --
4 the special trial judge is permitted to change his report
5 under rule 183. That's not even one of the questions in
6 the questions presented. The only rule 183 question in
7 the questions presented is whether the rule requires clear
8 error review. We submit the answer to that is no because
9 it would violate the Internal Revenue Code. So this --
10 this question about whether the report permits -- whether
11 the rule permits the report to be changed isn't even one
12 of the questions presented.

13 The courts of appeals upheld the judgment on the
14 premise that it was permissible for the Tax Court judge
15 and the trial -- the special trial judge to engage in the
16 deliberative process and for the special trial judge to
17 revise his findings as he did --

18 JUSTICE STEVENS: I don't think there's any --
19 any question they can change the report, but the one --
20 the one -- I'd like to ask you a question as a matter of
21 information. The first sentence of 183(c) refers to the
22 possibility that the judge to whom the case is assigned
23 may direct the filing of additional briefs to receive
24 further evidence and oral argument. Does it ever happen
25 that before the judge to whom it's assigned decides

1 whether or not to go along with the recommended findings,
2 that he will direct oral argument? Does that ever happen?

3 MR. HUNGAR: I don't know the answer to that,
4 Your Honor. I'm not aware of that, but --

5 JUSTICE STEVENS: Because if he did, it would
6 seem almost necessary for him to disclose to the parties
7 what the report they're arguing about would say.

8 MR. HUNGAR: Again, I -- this is a holdover from
9 the prior version of the rule in which the exceptions
10 process was followed, and again, it may be that had the
11 Tax Court given it further consideration, they might have
12 viewed that unnecessary. But we're not aware of that
13 happening.

14 JUSTICE STEVENS: But it certainly seems to
15 contemplate deliberation by the judge to whom the case is
16 assigned about whether or not to accept the report and
17 deliberation which might be informed from input -- input
18 from the parties. That's a fair reading of the rule, I
19 think.

20 MR. HUNGAR: If --

21 JUSTICE STEVENS: Maybe it's not practiced.

22 MR. HUNGAR: -- if the Tax Court judge so
23 determines, yes. The rule certainly allows that, but it
24 doesn't obviously require that.

25 JUSTICE STEVENS: And if he did then ask for

1 further briefings, do you think that there would then have
2 been a requirement to disclose the report?

3 MR. HUNGAR: Well, presumably it would be a
4 waste of everyone's time unless he -- I don't know that he
5 would have to disclose the report, but he would need to
6 direct their attention to the issue he would like them to
7 brief.

8 JUSTICE STEVENS: It seems to me that the author
9 of this subsection (c) must have contemplated the
10 possibility of disclosure of the report.

11 MR. HUNGAR: Well, again, Your Honor, this
12 language was adopted at a time when they followed the
13 exception --

14 JUSTICE STEVENS: When they followed a different
15 procedure, and the question is to how much -- how much did
16 they intend the -- to change that prior procedure.

17 MR. HUNGAR: Well, we know that the Tax Court
18 has interpreted its rule to permit precisely the practice
19 it followed here because it said so. And it would be
20 quite extraordinary, we submit, for this Court to reverse
21 the Tax Court, which is surely entitled to considerable
22 deference in interpreting its own rules, since, after all,
23 the Tax Court has exclusive statutory authority to
24 promulgate its own rules, and particularly with respect to
25 this issue about whether the special trial judge can

1 change his report, since that was not even one of the
2 questions presented.

3 If I may turn to -- back to the statutory
4 question. Section 7461 requires disclosure of reports of
5 the Tax Court. The special trial judge report is not the
6 report of the Tax Court. Indeed, even a Tax Court judge's
7 opinion and report does not become the report of the Tax
8 Court.

9 JUSTICE KENNEDY: Does the statute you just
10 quoted prohibit the disclosure of other reports if we call
11 this first draft something other than a report?

12 MR. HUNGAR: The statute doesn't --

13 JUSTICE KENNEDY: In other words, would -- would
14 the rule go further than the statute?

15 MR. HUNGAR: The statute does not prohibit the
16 disclosure of other reports, but the rule clearly does not
17 require the disclosure of reports. The Tax Court in 1984
18 amended the rule to make perfectly clear that -- that
19 initial reports of special trial judges are not to be
20 disclosed. The Tax Court said in its orders in this case
21 the reason for that is that those are now internal
22 deliberative processes. The Tax Court has made clear that
23 its rules permit exactly what it's doing here.

24 JUSTICE SCALIA: Mr. Hungar, you started to say
25 that -- that even the opinion of a -- of a Tax Court judge

1 is not a report of the Tax Court.

2 MR. HUNGAR: Yes, Your Honor.

3 JUSTICE SCALIA: How does that work?

4 MR. HUNGAR: Page 2a of the appendix to the gray
5 brief, at the bottom of the page, section 7460(b) provides
6 that the report of the division -- and the Tax Court is
7 now and has for many years been divided into one-judge
8 divisions. They used to sit en banc or --

9 JUSTICE SCALIA: I was -- I was going to ask you
10 what -- what 7461 referred to when it says the Tax Court
11 and its divisions.

12 MR. HUNGAR: Yes.

13 JUSTICE SCALIA: It also is referred to there.

14 MR. HUNGAR: For a brief period of time, they
15 sat in -- in panels.

16 JUSTICE SCALIA: I see.

17 MR. HUNGAR: But they -- the -- the press of
18 work force them to -- to divide into one-judge divisions.

19 JUSTICE SCALIA: So it's a single judge is a
20 division of the Tax Court.

21 MR. HUNGAR: Yes, that's correct.

22 JUSTICE SCALIA: And the publicity of
23 proceedings does say -- it does say that all reports of
24 the Tax Court --

25 MR. HUNGAR: Yes, Your Honor.

1 JUSTICE SCALIA: And all evidence received by
2 the Tax Court and its divisions, meaning its single
3 judges.

4 Well, what happens with -- with a single judge's
5 opinion?

6 MR. HUNGAR: He -- he prepares it and submits it
7 to the chief judge under rule -- under statute -- under
8 the statute 7460(b) where it says the report of the
9 division shall become the report of the Tax Court within
10 30 days after such report by the division, unless the
11 chief judge directs it to be reviewed by the full court.
12 So -- so even a Tax Court judge's opinion is not the
13 report of the Tax Court. Surely the report of the special
14 trial judge is not either.

15 JUSTICE GINSBURG: It's like an en banc. I -- I
16 have written decisions for a panel in my years on the
17 court of appeals, and there's been an en banc and my
18 opinion gets vacated. It's no longer counts for anything.
19 And isn't that exactly what the Tax Court is? They have
20 the --

21 MR. HUNGAR: No, Your Honor. The -- the opinion
22 is not made public. In fact, the statute precludes it
23 from being made -- made a part of the record. The last
24 sentence of that same section 7460(b) at the top of page
25 3a, it says the report of a division shall not be a part

1 of the record in any case in which the chief judge directs
2 that such report shall be reviewed by the Tax Court. And
3 that's a very important point. Congress has mandated by
4 statute essentially the same procedure that the Tax Court
5 follows here.

6 JUSTICE GINSBURG: Oh, no. No, no, no. How
7 often, when there is a decision reviewed by the court, so
8 that the initial judge's decision is changed, does that
9 judge dissent, so all the world knows what that judge's
10 initial position was?

11 MR. HUNGAR: The -- the Tax Court judge
12 certainly has the authority to dissent, just as a special
13 trial judge has the authority and, indeed, the obligation
14 under the code of conduct to refuse to put his name on a
15 -- on a report if he doesn't agree with it. If he doesn't
16 agree with the Tax Court judge's view, he has the
17 obligation, the ethical obligation -- and we presume he
18 follows it -- to say I don't agree. This is my report.
19 If you --

20 JUSTICE GINSBURG: Then he -- then he can
21 publish his -- he can publish his dissent, just as a Tax
22 Court judge can?

23 MR. HUNGAR: No, but he can preclude the Tax
24 Court judge from doing what the Tax Court judge did in
25 this case, which is simply adopting his report. If the --

1 if the special trial judge refuses to change his report --

2 JUSTICE GINSBURG: But then we still won't know
3 what his report is. Yes, he can say, I won't sign this.
4 Tax Court says, fine. This rule says I can reject your
5 findings in whole or in part. I don't need your name on
6 this decision of the Tax Court.

7 MR. HUNGAR: Justice Ginsburg, if -- if that
8 were the case here, obviously our arguments would be more
9 difficult. But that is not what happened here. If --
10 if --

11 JUSTICE GINSBURG: I'm asking you just as the --
12 the judge who disagrees with the -- the full court can
13 publish his dissent, can the special trial judge who
14 disagrees with the Tax Court judge publish his dissent?

15 MR. HUNGAR: In the -- the one case involving a
16 change in the opinion, where the Tax Court judge said, I
17 don't adopt a portion of the opinion of the special trial
18 judge, there was no published opinion of the special trial
19 judge. So I don't believe there's a procedure for the
20 dissent.

21 But the point is the court of appeals --

22 JUSTICE GINSBURG: Has there ever been? Has
23 there ever been?

24 MR. HUNGAR: A published dissent by a special
25 trial judge? Not that I'm aware of.

1 But the point is the court of --

2 JUSTICE GINSBURG: And how -- how often does the
3 -- is there a dissent when there's -- when there's a full
4 court review decision?

5 MR. HUNGAR: Well, there's often a dissent.
6 It's -- it's hard to know from the standpoint of a
7 researcher when -- when it is that the judge who heard the
8 evidence and tried the case is the one who's dissenting,
9 unless they happen to say it in their opinion, because
10 again, there's no original opinion issued by the Tax Court
11 judge who first heard the case. That's kept confidential
12 by statute, which again is an important point.

13 Congress has mandated confidentiality of the
14 initial reports prepared even by Tax Court judges, and it
15 has given the Tax Court plenary authority to promulgate
16 rules governing special trial judges. It is hardly
17 surprising, let alone impermissible under the statute or
18 Due Process Clause, for the Tax Court to follow a similar
19 process for special trial judges.

20 JUSTICE SOUTER: Except that the -- the
21 relationship between the -- the one judge and the full Tax
22 Court is a relationship basically of people who are in the
23 same boat with respect to what they know about or can know
24 about law and what they can know about the evidence and
25 the facts of the case; whereas the relationship between

1 the special trial judge and the judge to whom it is
2 assigned is -- is quite different because only one of them
3 has heard evidence and only one of them is the source of
4 conclusion about fact.

5 MR. HUNGAR: No, Your Honor. It's identical.
6 The -- the full Tax Court --

7 JUSTICE SOUTER: It certainly is not identical
8 in -- in the sense that the -- the Tax Court judge then
9 goes and listens to evidence. He doesn't. That's the
10 whole point.

11 MR. HUNGAR: Well, neither does the full Tax
12 Court when it --

13 JUSTICE SOUTER: Neither does the full Tax
14 Court, but if the full Tax Court is disagreeing with one
15 judge, the one judge and the full Tax Court are in the
16 same boat. They have access to the same material. Their
17 limits are exactly the same in each case. That is not
18 true in the relationship between the single Tax Court
19 judge and the special Tax Court judge. The special Tax
20 Court judge is the only one who has heard evidence and can
21 find facts based upon the evidence that he heard.

22 MR. HUNGAR: No, Your Honor. The -- the tax --
23 the full Tax Court doesn't go back and -- and hold a new
24 trial, just like the individual Tax Court judges --

25 JUSTICE SOUTER: I -- I am quite aware of that.

1 That's not -- that's not the point. I'm -- I'm saying
2 that you cannot draw an analogy between one judge and full
3 Tax Court and use that as an analogy to legitimize the
4 relationship between one judge and a trial master. They
5 are in different positions. They are not in parallel
6 positions.

7 MR. HUNGAR: Well, then if -- if I understand
8 the point you're making, it's a point of the -- the --
9 it's the hierarchy issue, if that's -- if that's the point
10 you're making.

11 JUSTICE SOUTER: It's the knowledge issue. The
12 special Tax Court judge heard somebody.

13 MR. HUNGAR: So did the Tax Court judge --

14 JUSTICE SOUTER: Nobody on the Tax Court did.

15 MR. HUNGAR: No, Your Honor. That's incorrect.

16 JUSTICE SOUTER: In other words, they're --
17 they're sitting hearing witnesses? They are -- they are
18 redoing the trial? Surely not.

19 MR. HUNGAR: Your Honor, in a review -- if a Tax
20 Court judge -- most Tax Court cases are tried by Tax Court
21 judges. Tax Court judges are trial judges, and if a Tax
22 Court judge tries a case --

23 JUSTICE SOUTER: But we are talking about
24 situations in which the trial judge is the special judge.

25 MR. HUNGAR: Well, I'm talking about the full

1 Tax Court, Your Honor. If the full Tax Court reviews an
2 individual Tax Court judge's decision, the Tax Court judge
3 has presided over the trial, heard the evidence, just like
4 the special trial judge here, and then the full Tax Court
5 judge reviews it.

6 That's exactly what happened in the Estate of
7 Varian case, which is in our briefs, out of the Ninth
8 Circuit. The parties complained that they wanted access
9 to the original judge's report because he had been
10 reversed -- been reversed by the full court after trial on
11 an -- on an evidentiary issue, and the Ninth Circuit said
12 no.

13 JUSTICE STEVENS: Mr. Hungar, I think we
14 understand your answer.

15 MR. HUNGAR: Thank you.

16 JUSTICE STEVENS: Mr. Shapiro, you have about 4
17 minutes left.

18 REBUTTAL ARGUMENT OF STEVEN M. SHAPIRO

19 ON BEHALF OF THE PETITIONERS

20 MR. SHAPIRO: The question came up whether rule
21 183 forbids disclosure of this report. The answer is it
22 does not forbid disclosure of the report. It is silent on
23 the point. But the press release the Tax Court issued in
24 1983, coming from the chief judge of the court, said that
25 this simply meant that it would not automatically be

1 disclosed.

2 JUSTICE SCALIA: Why does 7461 require its --
3 its disclosure? Because it does say that the -- it's only
4 the decision of the Tax Court.

5 MR. SHAPIRO: Well --

6 JUSTICE SCALIA: That reports of the Tax Court
7 that have to be disclosed.

8 MR. SHAPIRO: Our view is that of -- of the Tax
9 Court means any report emanating from the Tax Court.
10 That's the literal meaning of that language. It doesn't
11 mean final.

12 JUSTICE SCALIA: Well, that -- that would mean
13 that -- that you would have to make public the -- the
14 reports of a regular Tax Court judge in cases that then go
15 on to the full court. And that's not done, is it?

16 MR. SHAPIRO: There's an exception for the en
17 banc situation because legal issues are addressed en banc,
18 not the factual issues. And there's an opportunity to
19 dissent.

20 JUSTICE SCALIA: Well, but it doesn't matter.
21 It would still be a report of the Tax Court if you don't
22 take that language literally. If you say any report
23 coming out of the institution is a report of the Tax
24 Court, you would have to make public the reports of the
25 individual Tax Court judges, which is not done.

1 MR. SHAPIRO: Oh, we say there's a special
2 statute dealing with the en banc situation that -- that
3 governs in that situation. And that the publicity --

4 JUSTICE SCALIA: Why is that? What -- what
5 statute is that?

6 MR. SHAPIRO: That -- that's the en banc
7 provision that counsel referred to that said that when the
8 case is heard en banc, the trial -- the -- the single
9 judge's report is not made part of the record. Congress'
10 assumption there was that there would be a new -- new
11 report issued. People would be able to dissent if they
12 disagreed. And this process focuses on legal issues.
13 There is no presumption of correctness.

14 JUSTICE KENNEDY: That's not a -- that's not a
15 de novo -- they can rehear matters de novo on the en banc
16 Tax Court, can they not? That's a de novo hearing.

17 MR. SHAPIRO: Yes, but it addresses legal
18 issues. It's not a device to second guess factual
19 determinations, and there's a special statute that deals
20 with that, which does not apply to this STJ situation,
21 where there's a presumption of correctness applicable to
22 what the trial judge does. And there is the general
23 disclosure statute that applies there.

24 JUSTICE BREYER: I don't know if I'm getting --
25 so that's his basic point. The rule doesn't require the

1 disclosure because they've interpreted it differently
2 within their -- within their discretion. Statute
3 doesn't require it and the Constitution doesn't require
4 it. We have to go to the Constitution, I don't see
5 exactly the implications. So I'm nervous.

6 And now, the reports -- he says, go read
7 7460(b). That's what they're talking about. And then --
8 and again, I don't know what I'm getting into once I read
9 it more broadly than that. And what about all evidence
10 received by the Tax Court, including a transcript. Of
11 course, this isn't evidence but neither is a transcript.
12 And -- and so maybe that word evidence can be read more
13 broadly, given the fact that it's to include a transcript
14 of the stenographic report.

15 MR. SHAPIRO: I think you're right, and --

16 JUSTICE BREYER: You think I'm right just
17 suddenly for the for the first time? You have thought of
18 this?

19 MR. SHAPIRO: Well, I -- I think that the intent
20 of this provision -- and I know Your Honor consults the
21 legislative history. The intent was to make all of the
22 steps in the adjudicative process transparent, including
23 the evidence, including the -- the stenographer's report,
24 and all reports from the Tax Court.

25 JUSTICE SCALIA: There's -- there's a very

1 careful use of language. It says all reports of the Tax
2 Court and all evidence received by the Tax Court and its
3 divisions. So it's only the evidence that -- that's
4 received by the individual judges has to be made public,
5 not the reports.

6 MR. SHAPIRO: Well, we believe that the word all
7 is a broad, generic inclusive term that should be applied,
8 as Judge Cudahy stated, to an STJ report that actually has
9 to be submitted to the chief judge and that has legal
10 effect. It's not just a casual document like a law clerk
11 memorandum. It has legally operative effect.

12 Congress' purpose here was very broad, to have
13 transparency, applicable to all the steps along the way in
14 the Tax Court. It was quite clear on that, that there are
15 arbitrary actions at each step of the way. If you look at
16 the Senate report and Congressman LaGuardia's statements,
17 they said secrecy is a vicious practice in this context,
18 and it -- it should be avoided.

19 JUSTICE GINSBURG: But we -- we don't have to
20 get into any of that if we accept your argument about
21 7482(a)(1), that is, the record will be in the same manner
22 and to the same extent as decisions of the district court.

23 MR. SHAPIRO: Absolutely, Your Honor. There --
24 there are three separate bases for ruling in our favor.
25 One is the appellate review statute. The other is the

1 disclosure statute. The third is due process. And due
2 process should inform the construction of these statutes.
3 This Court tries to avoid serious due process issues
4 through its interpretation of legislation. Judge Cudahy
5 suggested that was the right way to decide this case and
6 we agree that it is.

7 We thank the Court.

8 JUSTICE STEVENS: Thank you, Mr. Shapiro.

9 The case is submitted.

10 (Whereupon, at 12:11 p.m., the case in the
11 above-entitled matter was submitted.)

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