

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X

CLAUDE M. BALLARD, ET UX., :  
Petitioners :

v. : No. 03-184

COMMISSIONER OF INTERNAL :  
REVENUE; :

and :

ESTATE OF BURTON W. KANTER, :  
DECEASED, ET AL., :  
Petitioners :

v. : No. 03-1034

COMMISSIONER OF INTERNAL :  
REVENUE. :

- - - - -X

Washington, D.C.  
Tuesday, December 7, 2004

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

APPEARANCES:

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

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

1 the Respondent.

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
STEVEN M. SHAPIRO, ESQ.	
On behalf of the Petitioners	4
THOMAS G. HUNGAR, ESQ.	
On behalf of the Respondent	28
REBUTTAL ARGUMENT OF	
STEVEN M. SHAPIRO, ESQ.	
On behalf of the Petitioners	57

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 too -- Chief Judge Vanderbilt pointed that out in  
3 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: Of course, that -- that was  
18 decided under the APA, wasn't it? I mean, that was an APA  
19 case, which this 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 it 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. 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. The statute  
3 doesn't require it and the Constitution doesn't require  
4 it. If 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.)

12

13

14

15

16

17

18

19

20

21

22

23

24

25