

January 2008

## Tax Appeal: A Proposal to Make the United States Tax Court More Judicial

Leandra Lederman

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### Recommended Citation

Leandra Lederman, *Tax Appeal: A Proposal to Make the United States Tax Court More Judicial*, 85 WASH. U. L. REV. 1195 (2008).  
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# Washington University Law Review

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VOLUME 85

NUMBER 6

2008

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## TAX APPEAL: A PROPOSAL TO MAKE THE UNITED STATES TAX COURT MORE JUDICIAL

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The author filed an amicus brief in support of petitioners in the Supreme Court in the consolidated cases of *Ballard v. Commissioner* and *Estate of Kanter v. Commissioner*. She would like to thank Brad Borden, Bryan Camp, Diane Fahey, Charlie Geyh, Tony Infanti, Jonathan Nash, Christopher Pietruszkiewicz, Rick Pildes, and Elisabeth Zoller for helpful comments on prior drafts of this Article. She is also grateful for helpful discussions with Kim Brooks, Neil Buchanan, Howie Erichson, Joshua Fairfield, Rob Fischman, David Greene, Eric Laity, Mark Newton, Christiana Ochoa, Lauren Robel, and Lawrence Solum; participants in the 2006 Canadian Law & Economics Association meeting; participants in the 2006 Law & Society Association meeting; participants in faculty workshops at Capital, Illinois, Minnesota, and Seton Hall; and participants in the 2008 Michigan Law School Tax Policy Workshop. She also thanks Stephen Brandenburg, Tanner Coulter, David Ford, Kristen Fowler, Chloé Pullman, Amanda Roettger, and Brian Schultz for research assistance; Rebecca Bertoloni-Meli, Ralph Gaebler, Christopher McNeely, and Jennifer Morgan for library assistance; and Erin Cowles for administrative support.

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## INTRODUCTION

Courts are critically important institutions. They preside over private disputes brought before them, oversee much agency action, and even overturn legislation. In short, courts have tremendous power. That power, in turn, calls for acceptance of courts' authority by litigants who submit, voluntarily or involuntarily, to their jurisdiction.

Courts that hear disputes between private citizens and the federal government may particularly need a reputation for procedural fairness because of the possibility that such an institution may be viewed as captured by the governmental party that routinely appears before it. Any indication that such a court is not turning square corners<sup>1</sup> may undermine its legitimacy in the eyes of the public.

The United States Tax Court (Tax Court) is an important example of a court that only hears disputes between private parties and the federal government. Each year, it closes cases worth billions of dollars in the

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1. Cf. *Rock Island, A. & L.R. Co. v. United States*, 254 U.S. 141, 143 (1920) ("Men must turn square corners when they deal with the Government.").

aggregate.<sup>2</sup> Moreover, although taxpayers face a choice of forum, that choice is often more theoretical than real because the Tax Court is the only forum in which to litigate a federal tax case without first paying the amount in dispute.<sup>3</sup> The overwhelming majority—approximately ninety-five percent—of litigated federal tax cases are filed in Tax Court.<sup>4</sup> Accordingly, the public's perception of the Tax Court may also affect its perception of the tax system as a whole, and thereby affect tax compliance.<sup>5</sup>

The Tax Court recently received a lot of attention from the national press<sup>6</sup> in the wake of a United States Supreme Court decision, *Ballard v. Commissioner*, that found the Tax Court's failure to include in the record on appeal the initial findings of fact and opinion in a multi-million dollar tax fraud case anomalous and unwarranted.<sup>7</sup> The Supreme Court's decision in that case ultimately resulted in disclosure of the original factfinding report—a document some were unsure existed because of language the Tax Court used in orders denying taxpayer motions to produce the report.<sup>8</sup> The report, disclosed six years after the Tax Court decision, differed dramatically on the critical issues of fraud and witness

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2. In cases closed in fiscal year 2006, for example, the aggregate tax deficiency was approximately \$7.4 billion. See 1996–2006 U.S. TAX CT. ANN. REP., tbl.4 (on file with author) [hereinafter TAX CT. 1996–2006 REP.].

3. David Laro, *The Evolution of the Tax Court as an Independent Tribunal*, 1995 U. ILL. L. REV. 17, 18.

4. *Id.* The principal reason for the Tax Court's popularity as a forum is that it is the only forum in which to litigate a federal tax deficiency without first paying the amount claimed by the IRS. See Susan V. Sample & Samira A. Salman, *Tax Shelter Penalties: Are They Divisible? Or Does the Taxpayer Have to Pay the Balance Before Litigating?*, 4 HOUS. BUS. & TAX L.J. 447, 448 (2004).

5. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990) (arguing that procedural fairness is critical in maintaining the legitimacy of authority, and that legitimacy affects self-reported compliance with laws); Kent W. Smith, *Reciprocity and Fairness: Positive Incentives for Tax Compliance*, in *WHY PEOPLE PAY TAXES* 223, 243 tbl.2, 244 fig.2, 245 (Joel Slemrod ed., 1992) (finding negative correlation between level of perceived governmental procedural fairness and acceptability of tax evasion).

6. See, e.g., David Cay Johnston, *Court Upholds Evasion Ruling in a Tax Case*, N.Y. TIMES, Feb. 4, 2007, at 23; Maurice Possley, *Tax Court Case Stirs Multiple Questions; Request for Judges' Trial Findings Rebuffed*, CHI. TRIB., July 10, 2005, at C1 [hereinafter Possley, *Tax Court Case Stirs Multiple Questions*]; Maurice Possley, *Tax Court Findings Secretly Changed in at Least 5 Cases*, CHI. TRIB., Sept. 1, 2005, at C1 [hereinafter Possley, *Tax Court Findings Secretly Changed*]; Louise Story, *A Glimpse Inside U.S. Tax Court and How It Made a Decision*, N.Y. TIMES, July 23, 2005, at C4.

7. See *Ballard v. Comm'r*, 544 U.S. 40 (2005). The Tax Court opinion found tax attorney Burton Kanter and two business associates, Claude Ballard and Robert Lisle, liable for over \$30 million dollars in taxes, penalties, and interest. Declaration of Randall G. Dick, *Inv. Research Assocs. v. Comm'r*, 78 T.C.M (CCH) 951 (1999) (No. 43966-85), reprinted in Stephen M. Shapiro, *Kanter Estate Files Supreme Court Brief for Release of Special Trial Judge's Report*, TAX NOTES TODAY, Nov. 30, 2004, available at 2004 TNT 230-11 (LEXIS) [hereinafter Declaration of Randall Dick].

8. See *infra* text accompanying note 152.

credibility from the official opinion that purported to “agree[] with and adopt[]” the report.<sup>9</sup> The events of *Ballard* raise important questions about the Tax Court’s procedures with respect to such fundamental activities as factfinding, rule making, and document retention, as discussed below.<sup>10</sup>

Although management of federal courts is decentralized so that each court is largely self-governing, federal courts are served and overseen by centralized bodies, including the United States Judicial Conference and the Administrative Office of U.S. Courts (AOUSC). These bodies establish policies and procedures for the Article III federal courts,<sup>11</sup> help the courts implement them, and make a single aggregate budget request to Congress.<sup>12</sup> The U.S. Court of Federal Claims, an Article I court<sup>13</sup> that provides a forum for trial-level litigation of claims against the federal government, is treated as part of the judiciary for these purposes.<sup>14</sup>

By statute, the Tax Court is a “court of record”<sup>15</sup> that engages in purely judicial functions, and the Supreme Court has said that it is a “Court of Law” exercising judicial power.<sup>16</sup> Like district-court decisions, Tax Court decisions are appealed to the courts of appeals and are reviewable, on

9. *Inv. Research Assocs.*, 78 T.C.M. (CCH) at 963; compare *infra* text accompanying notes 144–48 (quoting *Inv. Research Assocs.*, 78 T.C.M. (CCH) at 1083–85), with *infra* text accompanying notes 164–65 (quoting Initial Report of Special Trial Judge Couvillion, *Inv. Research Assocs.*, 78 T.C.M. (CCH) 951 (No. 43966-85), reprinted in *Ballard Special Trial Judge Opinion Released to Eleventh Circuit*, TAX NOTES TODAY, June 6, 2005, available at 2005 TNT 107-16 (LEXIS)).

10. See *infra* Part II. These questions may undermine confidence in the Tax Court and encourage tax protestors, which could threaten the federal tax system. See Danshera Cords, *Tax Protestors and Penalties: Ensuring Perceived Fairness and Mitigating Systemic Costs*, 2005 BYU L. REV. 1515, 1518.

11. “Today, . . . the words ‘the federal courts’ and ‘the federal judiciary’ are still commonly used to refer to that set of judges who have life tenure (‘Article III judges’), but the equation is imprecise.” Judith Resnik, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 GA. L. REV. 909, 910 (1990).

12. See 28 U.S.C. § 605 (LexisNexis 2007); *infra* note 114 and accompanying text.

13. See 28 U.S.C. § 171(a).

Those courts created by Congress pursuant to the power granted in article I, section 8, clause 9, and article III have come to be referred to as “constitutional” or “article III” courts, while those created under other powers vested in Congress under article I are referred to as “legislative” or “article I” courts.

*Burns, Stix Friedman & Co. v. Comm’r*, 57 T.C. 392, 394 (1971).

14. See JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS, reprinted in 166 F.R.D. 49, 145 n.17 (1995) (“[T]he Court of Federal Claims is lodged within the judicial branch for administrative purposes.”); see also 28 U.S.C. §§ 610, 2071; Federal Judicial Center, *Courts of the Federal Judiciary*, <http://www.fjc.gov/public/home.nsf/hisc> (last visited Apr. 10, 2008) (listing the Court of Federal Claims in “Courts of the Federal Judiciary,” not among “Federal Courts Outside the Judiciary”).

15. I.R.C. § 7441 (LexisNexis 2007).

16. *Freytag v. Comm’r*, 501 U.S. 868, 889–91 (1991).

certiorari, by the Supreme Court.<sup>17</sup> Yet, Congress has left the Tax Court out of the administrative framework to which most federal courts belong. As a result, it is “neither fish nor fowl”—it is no longer an agency but it is not a member of the judicial branch of government. Thus, the Tax Court is not served by the AOUSC or otherwise subject to the Judicial Code.<sup>18</sup> Yet, because it is not an agency, it is not subject to the Freedom of Information Act (FOIA)<sup>19</sup> or the agency provisions of the Administrative Procedure Act (APA).<sup>20</sup>

This Article argues that rather than leaving the Tax Court to its own devices, Congress should recognize the entirely judicial nature of the Tax Court by making it subject to the AOUSC; the Rules Enabling Act; and, with respect to its rulemaking, the Judicial Conference. These straightforward but important structural changes should decrease the Tax Court’s insularity, increase its accountability, and help reduce inefficiencies. These changes also would help increase the respect accorded the Tax Court.

The Article proceeds in three principal parts. Part I focuses on the fundamental question of the extent to which the Tax Court truly is a court. The Tax Court officially ceased to be an administrative agency in 1969.<sup>21</sup> Yet, in many ways, the Tax Court is still not really a “federal court.” This Part explores some of the ways in which the Tax Court has been overlooked and the unfortunate consequences that result.

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17. I.R.C. § 7482(a)(1). Tax Court cases are reviewable by the courts of appeals “in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury.” *Id.*

18. See LONG RANGE PLAN FOR THE FEDERAL COURTS, *supra* note 14, at 145 n.17 (“[O]ther Article I courts—the United States Tax Court, United States Court of Veterans Appeals, and United States Court of Military Appeals—either exist as independent entities or receive administrative support from the executive branch.”).

19. See *Megibow v. Clerk of the U.S. Tax Court*, 432 F.3d 387, 387 (2d Cir. 2005); *Ostheimer v. Chumbley*, 498 F. Supp. 890, 892 (D. Mont. 1980), *aff’d*, 746 F.2d 1487 (9th Cir. 1984). 5 U.S.C. § 552 provides publicity rules that apply to “[e]ach agency.” The term “agency” is defined, in part, as follows: “‘agency’ means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include . . . the courts of the United States.” 5 U.S.C. § 551(1) (LexisNexis 2007). It appears that the Tax Court is a “court[] of the United States” for this purpose. See *infra* notes 96–97 and accompanying text.

20. See *Robinette v. Comm’r*, 123 T.C. 85 (2004), *rev’d*, 439 F.3d 455 (8th Cir. 2006); *Ewing v. Comm’r*, 122 T.C. 32, 50 (2004) (Thornton, J., concurring) (“Since its enactment in 1946, the APA has never governed proceedings in this Court (or in its predecessor, the Board of Tax Appeals).”), *rev’d & vacated*, 439 F.3d 1009 (9th Cir. 2006).

21. See Harold Dubroff, *The United States Tax Court: An Historical Analysis, Part III: The Revenue Act of 1926—Improving the Board of Tax Appeals*, 40 ALB. L. REV. 253, 257 (1976), reprinted in HAROLD A. DUBROFF, *THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS* 113 (1979).

Part II of the Article discusses areas in which the Tax Court has followed procedures that are unusual in their lack of transparency.<sup>22</sup> Some of these areas became apparent in the fallout from *Ballard v. Commissioner*,<sup>23</sup> the high-profile, multi-million-dollar tax fraud case mentioned earlier, which was decided by the Supreme Court in 2005. Other transparency issues predate *Ballard*.

Part III proposes to remedy an important anomaly in the federal system by treating the Tax Court like other courts, thereby increasing the Tax Court's accountability. This would not require remaking the Tax Court as an Article III court, a change that would entail giving Tax Court judges life tenure<sup>24</sup> and would likely raise controversial issues that are unnecessary for Congress to face.<sup>25</sup> Instead, the Tax Court should be subject to the judicial institutions that already govern courts such as the Article I Court of Federal Claims. Part III also explains the efficiency and other benefits of this proposal.

#### I. IS THE TAX COURT REALLY A COURT?

The Tax Court is based in Washington, D.C., though it conducts trials in cities nationwide.<sup>26</sup> All of the Tax Court's cases involve disputes

22. Transparency is an important attribute for courts. Professor Lynn LoPucki recently argued: "Transparency would transform the court system. Corruption, incompetence, inefficiency, prejudice, and favoritism would first be exposed, and then largely disappear. Public confidence in the system would increase, because the system would become worthy of it." Lynn M. LoPucki, *Court System Transparency 3* (UCLA School of Law Public Law & Legal Theory Research Paper Series, Research Paper No. 07-28, 2007), available at <http://ssrn.com/abstract=1013380>. See also Judith Resnik, *Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are at Risk*, 81 CHI.-KENT. L. REV. 521, 524 (2006) ("Over time and in part through the practice of public display, concepts about accountability and transparency in government decisionmaking, fair treatment between disputants, and respect for ordinary persons moved from the realm of the customary into that of right.").

23. 544 U.S. 40 (2005). In the *Ballard* litigation, the Tax Court found tax attorney Burton Kanter and two business associates, Claude Ballard and Robert Lisle, liable for over \$30 million dollars in taxes, penalties, and interest. Declaration of Randall Dick, *supra* note 7.

24. See U.S. CONST. art. III, § 1.

25. In 1988, the Federal Courts Study Committee proposed breaking the Tax Court up into an Article I trial division with exclusive jurisdiction and an Article III appellate division. FED. COURTS STUDY COMM., REP. OF THE FED. COURTS STUDY COMM. (1990), reprinted in 22 CONN. L. REV. 733, 807-09 (1990). However, five committee members dissented from the proposal, stating, "All segments of the bar intimately connected with the tax litigation system—the Internal Revenue Service, the Treasury Department, the Justice Department, the Tax Court, the Claims Court, and the American Bar Association—have voiced their opposition to this proposal." *Id.* at 809-10. Previous proposals to make the Tax Court an Article III court also met substantial opposition. See *infra* text accompanying notes 59-66.

26. Laro, *supra* note 3, at 23.

between taxpayers and the Internal Revenue Service (IRS).<sup>27</sup> The Tax Court's core jurisdiction is over cases involving an IRS assertion that the taxpayer understated the correct tax liability, resulting in a tax "deficiency."<sup>28</sup> In those cases, the taxpayer has an alternative to Tax Court jurisdiction; by paying the amount in dispute, the taxpayer may pursue the case in a U.S. district court or the Court of Federal Claims.

"In broad outline, pretrial procedure before the Tax Court is similar to that applicable in most trial courts."<sup>29</sup> To invoke the Tax Court's jurisdiction, the taxpayer files a petition.<sup>30</sup> The IRS must file an answer.<sup>31</sup> Discovery is available in Tax Court, though its use is more limited than in the district courts, and the parties are required to stipulate to the facts of the case to the fullest extent possible.<sup>32</sup>

Tax Court trials are bench trials. By statute, the Tax Court has nineteen judges who serve for fifteen-year terms.<sup>33</sup> The judges are presidential appointees,<sup>34</sup> and they come from an array of backgrounds.<sup>35</sup> Judges may assume senior status.<sup>36</sup> In addition, the Chief Judge has the power to appoint Special Trial Judges (STJs), judicial officers who are somewhat analogous to magistrate judges,<sup>37</sup> though they are employees at will.<sup>38</sup>

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27. *Id.*

28. *See id.* at 22; I.R.C. § 6211(a) (LexisNexis 2007) (defining "deficiency"). "In many situations where the taxpayer has filed a timely original return showing a tax liability, the deficiency is the amount by which the taxpayer's true tax liability exceeds the liability shown on the return." Leandra Lederman, "Civilizing Tax Procedure: Applying General Federal Learning to Statutory Notices of Deficiency," 30 U.C. DAVIS L. REV. 183, 185 n.14 (1996) (citing Arthur W. Andrews, *The Use of the Injunction as a Remedy for an Invalid Federal Tax Assessment*, 40 TAX L. REV. 653, 654 n.5 (1985)).

29. Joseph R. Cook & Harold Dubroff, *The United States Tax Court: An Historical Analysis, Part V: Pretrial Procedure*, 41 ALB. L. REV. 639, 640–41 (1977), reprinted in DUBROFF, *supra* note 21, at 218–19.

30. *See* I.R.C. § 6213; TAX CT. R. PRAC. & P. 30, 34. The Tax Court promulgates its own procedural rules. *See* I.R.C. § 7453; *infra* text accompanying notes 276–79.

31. TAX CT. R. PRAC. & P. 30, 36. "The pleading stage of proceedings generally terminates with the Commissioner's responsive pleading, the answer, but occasionally, the taxpayer may be required to reply to allegations in the answer." Cook & Dubroff, *supra* note 29, at 641, reprinted in DUBROFF, *supra* note 21, at 219.

32. *See* TAX CT. R. PRAC. & P. 91 (stipulation requirement); TAX CT. R. PRAC. & P. 70–76 (discovery rules).

33. I.R.C. § 7443(a), (e).

34. *Id.* § 7443(b).

35. *See* United States Tax Court, Judges, <http://www.ustaxcourt.gov/judges.htm> (last visited Apr. 10, 2008) (providing backgrounds of current Tax Court judges, senior judges, and special trial judges).

36. *See* I.R.C. § 7447(c).

37. *See* Kathleen Pakenham, *You Better Shop Around: The Status and Authority of Specialty Trial Judges in Federal Tax Cases*, 103 TAX NOTES 1527, 1531–33 (2004) (comparing the roles of STJs and magistrate judges). As explained further below, by statute, special trial judges have the authority to hear but not decide Tax Court cases involving amounts in excess of \$50,000. *See infra* note 140 and accompanying text.



STJs are permitted to hear any Tax Court case,<sup>39</sup> but they are only authorized to render the decision in a subset of cases.<sup>40</sup> STJs decide most of the “small tax cases,” which are cases with limited amounts in dispute, decided under an informal procedure.<sup>41</sup>

The Court of Federal Claims, one of the other fora available for federal tax litigation, has been described as anomalous<sup>42</sup> because it is an Article I court “lodged within the judicial branch for administrative purposes.”<sup>43</sup> It has been described as having “no clear standing in the structure of courts generally”<sup>44</sup> and “lack[ing] . . . any clear location . . . in the Government’s organizational chart.”<sup>45</sup>

Unfortunately, the Tax Court is in an even more uncertain position. Like the Court of Federal Claims, the Tax Court is not an agency and thus is not subject to FOIA or the agency provisions of the APA.<sup>46</sup> However, unlike the Court of Federal Claims, the Tax Court is not governed by the provisions that apply to most federal courts.<sup>47</sup>

The Tax Court’s evolution from its tenure as an agency informs its status today. From the early days of the Board of Tax Appeals, it endured doubts as to its independence from the IRS.<sup>48</sup> Congress periodically increased its independence and authority, ultimately reconceiving it as an Article I court. Yet, the Tax Court retains vestigial attributes of a noncourt tribunal, and it continues to face allegations of bias in its decision making.<sup>49</sup>

This Part describes the Tax Court’s metamorphosis into a “court of record”<sup>50</sup>—a designation with both symbolic and substantive significance. It also explores how Congress did not allow the Tax Court to complete its

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38. See I.R.C. § 7443A.

39. *Id.* § 7443A(b). Consent of the parties is not required for assignment of a case to a STJ. See *id.*

40. *Id.* § 7443A(c).

41. *Id.* § 7463.

42. See, e.g., LONG RANGE PLAN FOR THE FEDERAL COURTS, *supra* note 14, at 145 n.17; cf. Judith Resnik, *Of Courts, Agencies, and the Court of Federal Claims: Fortunately Outliving One’s Anomalous Character*, 71 GEO. WASH. L. REV. 798, 799 (2003).

43. LONG RANGE PLAN FOR THE FEDERAL COURTS, *supra* note 14, at 145 n.17.

44. See Eric Bruggink, *A Modest Proposal*, 28 PUB. CONT. L.J. 529, 529 (1999).

45. *Id.* at 542 (referring to a consequence of being an Article I court).

46. See *supra* notes 19–20 and accompanying text.

47. See *supra* text accompanying notes 18–20.

48. James Edward Maule, *Instant Replay, Weak Teams, and Disputed Calls: An Empirical Study of Alleged Tax Court Judge Bias*, 66 TENN. L. REV. 351, 354–55 (1999).

49. See *infra* note 117 and accompanying text.

50. I.R.C. § 7441 (LexisNexis 2007).

development, but rather stunted its growth by isolating it from the federal judiciary.

A. *From an Independent Agency to an Article I Court*

The Board of Tax Appeals was created by statute in 1924 as an independent executive agency<sup>51</sup> in response to both the “emergence during World War I [of the federal income and profits taxes] as the preeminent devices for financing the operations of Government”<sup>52</sup> and “the inadequacy of preexisting institutions, both administrative and judicial, for adjudicating in an acceptable manner the disputes growing out of the changed conditions brought on by the new taxes.”<sup>53</sup> For its first two years, decisions of the Board were not final as to tax liability and could be attacked by the losing party in federal district court.<sup>54</sup> In 1926, Congress provided instead for appellate review of Board decisions.<sup>55</sup> Although there has been some question about whether the Board actually constituted an Article I court even while it was denominated an agency,<sup>56</sup> and although the Board was renamed the “Tax Court of the United States” in 1942,<sup>57</sup> the Tax Court did not officially become an Article I court until 1969.<sup>58</sup>

Before 1969, there were a number of unsuccessful efforts to make the Tax Court into an Article III federal court.<sup>59</sup> There were several sources of

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51. Harold Dubroff, *The United States Tax Court: An Historical Analysis, Part II: Creation of the Board of Tax Appeals—The Revenue Act of 1924*, 40 ALB. L. REV. 53, 95–96 (1975), reprinted in DUBROFF, *supra* note 21, at 90.

52. Harold Dubroff, *The United States Tax Court: An Historical Analysis, Part I: The Origins of the Tax Court*, 40 ALB. L. REV. 7, 7 (1975), reprinted in DUBROFF, *supra* note 21, at 1.

53. *Id.* Prior to the creation of the Board of Tax Appeals, the only judicial remedy available to contest IRS action was a suit for refund. *Id.* at 34, reprinted in DUBROFF, *supra* note 21, at 28. Then, as now, full payment of the tax in question was a prerequisite for a refund suit. *Id.* at 39, reprinted in DUBROFF, *supra* note 21, at 33.

54. Dubroff, *supra* note 21, at 260, reprinted in DUBROFF, *supra* note 21, at 116.

55. *Id.* at 262, reprinted in DUBROFF, *supra* note 21, at 118.

56. *Id.* at 257, reprinted in DUBROFF, *supra* note 21, at 113 (“Whether the Board should be considered to have been created as a legislative court in light of subsequent developments in the decisional law, is impossible to answer definitively.”); see also *Stern v. Comm’r*, 215 F.2d 701, 708 (3d Cir. 1954) (“Whether it is a legislative court created by Congress under Article I, section 8, of the Constitution, like the Customs Court, or some other form of judicial agency placed for convenience of housekeeping in the Executive Branch of the Government is, therefore, merely a matter of legal semantics since, whatever it may be called, it is an ‘independent’ judicial agency the work of which is not subject to supervision or review in the Executive Branch of the Government but only by the federal appellate courts.”).

57. Harold Dubroff, *The United States Tax Court: An Historical Analysis, Part IV: The Board Becomes a Court*, 41 ALB. L. REV. 1, 20 (1977), reprinted in DUBROFF, *supra* note 21, at 184.

58. See I.R.C. § 7441 (LexisNexis 2007); Tax Reform Act of 1969, Pub. L. No. 91-172, § 951, 83 Stat. 487, 730.

59. See Dubroff, *supra* note 57, at 20–40, reprinted in DUBROFF, *supra* note 21, at 184–204. One

opposition to Article III status for the Tax Court,<sup>60</sup> the most important of which amounted to “turf wars” over who would be entitled to appear in such a court.<sup>61</sup> One of these was the question of who would represent the government. The Treasury Department apparently wished to continue representing the government in Tax Court and the Justice Department did not wish to do so, but both departments were concerned that the Justice Department would have to take over representation in Tax Court if the court became an Article III court.<sup>62</sup>

The other key question was who would be entitled to represent taxpayers before the court. Nonattorneys were allowed to practice in the Board of Tax Appeals from the time it was established, and there was a concern that Article III status would eliminate the possibility of representation by accountants.<sup>63</sup> In 1948, for example, when hearings were held on a bill to codify Title 28 of the United States Code, which included provisions to make the Tax Court an Article III court, “although it constituted only a small part of the recodification of title 28, most of the hearings were concerned with the question of whether Tax Court practice should be restricted to attorneys.”<sup>64</sup> Ultimately, the provisions that would have made the Tax Court an Article III court and have moved it to Title 28 were stripped from the bill.<sup>65</sup>

The late 1960s saw another effort to make the Tax Court an Article III court. Although the proposal drew support from various groups, “the historical problems persisted, particularly the issue of government representation in Tax Court proceedings.”<sup>66</sup> Ultimately, Congressman Wilbur D. Mills submitted a bill providing Article I status for the Tax

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of these efforts was during the mid-1940s, when the House of Representatives was working on a project to consolidate the statutes relating to the federal judiciary into Title 28 of the United States Code. *Id.* at 21, reprinted in DUBROFF, *supra* note 21, at 185.

60. *Id.* at 20–40, reprinted in DUBROFF, *supra* note 21, at 184–204.

61. See David F. Shores, *Deferential Review of Tax Court Decisions: Dobson Revisited*, 49 TAX LAW. 629, 647 (1996); see also H. Cecil Kilpatrick, *Should the Tax Court Be Made a Court? A Reply to Some Objections*, 9 J. TAX’N 7, 7–8 (1958).

62. See Dubroff, *supra* note 57, at 30–31, reprinted in DUBROFF, *supra* note 21, at 194–95.

63. See *id.* at 32–35, reprinted in DUBROFF, *supra* note 21, at 196–99.

64. *Id.* at 36, reprinted in DUBROFF, *supra* note 21, at 200. One commentator, writing in 1955, stated, “It is a sad commentary upon two great professions that the Tax Court has thus far been denied its just position because of the long-standing feud between tax lawyers and accountants.” Daniel M. Gribbon, *Should the Judicial Character of the Tax Court be Recognized?*, 24 GEO. WASH. L. REV. 619, 621 (1956).

65. See Dubroff, *supra* note 57, at 36, reprinted in DUBROFF, *supra* note 21, at 200.

66. Deborah A. Geier, *The Tax Court, Article III, and the Proposal Advanced by the Federal Courts Study Committee: A Study in Applied Constitutional Theory*, 76 CORNELL L. REV. 985, 993 (1991) (footnotes omitted).

Court.<sup>67</sup> The legislation also renamed the court the “United States Tax Court” (from the Tax Court of the United States), “following the general form by which federal courts are named.”<sup>68</sup> No hearings were held, and the provision became law as part of the Tax Reform Act of 1969.<sup>69</sup>

Thus, in 1969, Congress explicitly made the Tax Court an Article I court.<sup>70</sup> The Tax Court’s activities were already judicial<sup>71</sup> and did not change significantly.<sup>72</sup> Yet, the official designation of the Tax Court as a court had both symbolic and substantive significance. Thurman Arnold wrote in 1935, with respect to the symbolic importance of courts:

Courts are bound by precedent, and bureaus are bound by red tape. . . .

. . . [A] court is a body toward which we take an attitude of respect because we use it to symbolize an idea of impersonal justice. A bureau is a body which has little symbolic function, and which therefore is entitled to no greater respect than are the individuals composing it.<sup>73</sup>

Soon after becoming a court, the Tax Court published an order in the *Federal Register* deleting the chapter relating to the Tax Court from the *Code of Federal Regulations*. The order declared that “publication in the *Federal Register* of the Court’s public notices, orders, rules, and other public documents is no longer within the purview of the Administrative Procedure Act.”<sup>74</sup> In addition, in 1975, the Tax Court finally moved out of the building it shared with the IRS “to its own building on Judiciary Square, near other federal courts and the District of Columbia judiciary.”<sup>75</sup>

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67. *See id.*

68. Dubroff, *supra* note 57, at 49, *reprinted in* DUBROFF, *supra* note 21, at 213.

69. *See Geier, supra* note 66, at 993.

70. The statute states, in relevant part: “There is hereby established, under article I of the Constitution of the United States, a court of record to be known as the United States Tax Court.” I.R.C. § 7441 (LexisNexis 2007).

71. *See Kilpatrick, supra* note 61, at 7.

72. The Tax Court was given the authority to “punish contempt of its authority by fine or imprisonment, and provided that in carrying out its powers the court should have the same assistance as is provided generally to federal courts.” Harold Dubroff, *Federal Taxation*, 1973 ANN. SURV. AM. L. 265, 272 (1973) (citing Tax Reform Act of 1969, Pub. L. No. 91-172, § 956, 83 Stat. 732 (amending I.R.C. § 7456(d))).

73. THURMAN W. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 201–06 (1935).

74. Deletion of Chapter, 35 Fed. Reg. 12,462 (1970) (deleting Chapter 2, Title 26 of the *Code of Federal Regulations*).

75. International Conference on Courts with Tax Jurisdiction: Conference Discussion Agenda: Responses and Materials Provided by the Participants in the International Conference of Courts with Income Tax Jurisdiction, 8 VA. TAX REV. 255, 296 (1988) [hereinafter International Conference on

“The fact that, despite efforts over many years, the court was only able to secure its own courthouse after the 1969 changes is ample evidence of the benefit of its new status.”<sup>76</sup>

## B. *In the Interstices of Government*

### 1. A “Legislative Court”

Although Congress declared the Tax Court to be a court in 1969, it did not make it part of the judicial branch, even for administrative purposes,<sup>77</sup> and did not clarify where it fits within the federal government. The Tax Court’s Article I designation has itself been an important source of questions about its status,<sup>78</sup> including a question as fundamental as whether its structure is constitutional.<sup>79</sup> Nonetheless, although the literal language of Article III vests the “judicial Power of the United States” in courts in which judges have life tenure and compensation that cannot be reduced,<sup>80</sup> it is generally accepted that the Tax Court’s Article I status is constitutionally acceptable.<sup>81</sup>

Courts with Tax Jurisdiction]. Before the move, “[t]he court’s independence from the IRS was not apparent to those taxpayers who had to pass through the corridors of the Service to get to the Tax Court facilities.” Samuel B. Sterrett, *The United States Tax Court: A Tumultuous 20 Years*, 57 TAX NOTES 949, 949 (1992).

76. Dubroff, *supra* note 57, at 51 n.352, reprinted in DUBROFF, *supra* note 21, at 215 n.352; see also Laro, *supra* note 3, at 22 (“In 1974, the Tax Court solidified its independence from the executive branch (and the IRS) by moving its physical location from the National Office of the Internal Revenue Service to its own separate building . . .”).

77. See LONG RANGE PLAN FOR THE FEDERAL COURTS, *supra* note 14, at 145 n.17 (“[T]he United States Tax Court, United States Court of Veterans Appeals, and United States Court of Military Appeals[] either exist as independent entities or receive administrative support from the executive branch.”).

78. See, e.g., Dubroff, *supra* note 72, at 272–85; Leandra Lederman, *Equity and the Article I Court: Is the Tax Court’s Exercise of Equitable Powers Constitutional?*, 5 FLA. TAX REV. 357 (2001); David F. Shores, *Article I Status for the Tax Court*, 25 TAX LAW. 335 (1972).

79. See, e.g., Geier, *supra* note 66, at 985; Daniel L. Ginsberg, *Is the Tax Court Constitutional?*, 35 MISS. L.J. 382 (1963).

80. Article III of the Constitution provides in part:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. CONST. art. III, § 1. Article I courts do not benefit from the life-tenure and salary maintenance protections of Article III. See James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 646 (2004).

81. See, e.g., Diane L. Fahey, *The Tax Court’s Jurisdiction over Due Process Collection Appeals: Is it Constitutional?*, 55 BAYLOR L. REV. 453, 456 (2003) (“Although several lower federal courts have held, without significant analysis, that the Tax Court is constitutional, it is unlikely at this

The odd role that “legislative courts,” such as the Tax Court, occupy in the federal system is exemplified by the Supreme Court’s decision in *Freytag v. Commissioner*.<sup>82</sup> In *Freytag*, the parties consented to the assignment of their case to an STJ after the judge who had originally been handling the case became ill.<sup>83</sup> The taxpayers’ petition for certiorari included the question of whether the Appointments Clause<sup>84</sup>—which allows Courts of Law to appoint inferior officers—allows the Tax Court to appoint STJs.<sup>85</sup>

The Supreme Court held that STJs are inferior officers, and that, accordingly, their appointment is subject to the constraints of the Appointments Clause.<sup>86</sup> The IRS argued that the Tax Court is a “Department.”<sup>87</sup> An amicus argued that the Tax Court is a “Court of Law”; both the IRS and the taxpayers disagreed with that view.<sup>88</sup> A five-member majority of the Court rejected the IRS’s argument and adopted the amicus’s view.<sup>89</sup> Accordingly, the Court found:

The Tax Court exercises judicial, rather than executive, legislative, or administrative, power. . . . By resolving these disputes [between taxpayers and the government], the court exercises a portion of the judicial power of the United States. . . .

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late date that the Supreme Court would ever consider whether the congressional grant of power to the Tax Court to conduct deficiency proceedings is an unconstitutional encroachment on the judicial power by the legislature.”); see also Judith Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581, 610 n.141 (1985); cf. Geier, *supra* note 66, at 1032–33.

Recently, Professor James Pfander argued that the terms “courts” in Article III and “tribunals” in Article I are not really synonymous. Thus, he argues, Congress is empowered to create both Article III “courts” inferior to the Supreme Court and inferior “tribunals” under Article I, of which the Tax Court is one. See Pfander, *supra* note 80, at 650–51, 658 n.53. Professor Pfander’s analysis would eliminate any constitutional issue regarding the Tax Court’s status as an Article I entity. Further discussion of this question is beyond the scope of this Article. The Article assumes that the Tax Court’s structure as an Article I court is constitutionally permissible.

82. 501 U.S. 868 (1991).

83. *Id.* at 871.

84. U.S. CONST. art. II, § 2, cl. 2.

85. See Geier, *supra* note 66, at 996 n.64.

86. *Freytag*, 501 U.S. at 881–82.

87. *Id.* at 884.

88. *Id.* at 884, 885–86.

89. A concurring opinion, written by Justice Scalia and joined by three other Justices, argued both that the Court did not need to reach the Appointments Clause issue, *id.* at 892 (Scalia, J., concurring in part and concurring in judgment), and that the Tax Court is not a “Court of Law” but rather a “Department,” *id.* at 901 (Scalia, J., concurring in part and concurring in judgment).

The Tax Court's function and role in the federal judicial scheme closely resemble those of the federal district courts, which indisputably are "Courts of Law." Furthermore, the Tax Court exercises its judicial power in much the same way as the federal district courts exercise theirs.<sup>90</sup>

Thus, the Supreme Court found that the Chief Judge's appointment of STJs is constitutionally permissible because, for purposes of the Appointments Clause of Article II, the Tax Court is a "Court of Law."<sup>91</sup> Moreover, the Court held that the Tax Court "exercises a portion of the judicial power of the United States,"<sup>92</sup> although the "judicial Power of the United States" is referenced in Article III, not the Appointments Clause.<sup>93</sup> The concurring opinion in *Freytag* was scathing on this point, and concluded that "[t]he judicial power, as the Court uses it, bears no resemblance to the constitutional term of art we are all familiar with, but means only 'the power to adjudicate in the manner of courts.'"<sup>94</sup>

## 2. *Left to Its Own Devices*

The *Freytag* case shows how fundamental questions about the Tax Court's place in the federal system can be. *Freytag* involved constitutional interpretation, but similar questions arise in the statutory arena. For example, is the Tax Court, which was created by Congress, a "court[] established by Act of Congress" for purposes of the Rules Enabling Act?<sup>95</sup>

One scholar has noted that "[l]egislative courts are not generally considered to be 'courts of the United States' within the meaning of section 451 of the Judicial Code, and are presumably not subject to the various provisions relating to the administration of federal courts."<sup>96</sup> Is the

90. *Id.* at 890–91.

91. *Id.* at 890.

92. *Id.* at 891.

93. U.S. CONST. art. III, § 1.

94. *Freytag*, 501 U.S. at 908 (Scalia, J., concurring in part and concurring in judgment). Professor Pfander has argued that his proposed court/tribunal distinction "invites reconsideration" of the application of synonymy in *Freytag*. Pfander, *supra* note 80, at 676 n.158.

95. See 28 U.S.C. § 2071 (LexisNexis 2007). The same question arises with respect to 28 U.S.C. § 457, which provides for disposal of obsolete papers by "any court established by Act of Congress . . . in accordance with the rules of the Judicial Conference of the United States." The definition section located in the same chapter defines "court of the United States," not "court established by Act of Congress." 28 U.S.C. § 451.

96. Shores, *supra* note 78, at 339–40 (footnotes omitted). That section does not currently appear to include the Tax Court within its scope. 28 U.S.C. § 451 provides, in part:

The term "court of the United States" includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the Court of

Tax Court then a “court of the United States” for purposes of exclusion from the ambit of the APA?<sup>97</sup> Most of these questions have generally accepted answers, but not straightforward ones provided by statute or even by regulation. For example, with respect to the APA, the *Attorney General’s Manual on the Administrative Procedure Act* states that the term “courts of the United States” includes the Tax Court.<sup>98</sup>

*a. Practical Arrangements*

A footnote to the legislative history of the 1969 legislation that made the Tax Court an Article I court provided that the Tax Court would not be subject to the AOUSC or the Judicial Conference.<sup>99</sup> The AOUSC “is the central support entity for the judicial branch.”<sup>100</sup> Because the AOUSC does not provide routine service to the Tax Court, the Tax Court generally has to develop its own procedures for issues that have already been addressed centrally by the AOUSC.<sup>101</sup> The inefficiencies this creates are perhaps most obvious in the context of the Tax Court’s travels to approximately seventy-five cities around the country to hear cases.<sup>102</sup> In 1958, while the Tax Court was still formally an administrative agency, one commentator noted that the Tax Court often found it hard to obtain appropriate hearing rooms when it travelled.<sup>103</sup> He argued that “[i]f it were removed from the

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International Trade and any court created by Act of Congress the judges of which are entitled to hold office during good behavior.

28 U.S.C. § 451. The Tax Court’s judges are entitled to hold office for fifteen years, not “during good behavior.” I.R.C. § 7443(e) (LexisNexis 2007).

97. See 5 U.S.C. § 551(1) (LexisNexis 2007).

98. See Robin J. Arzt, *Recommendations for a New Independent Adjudication Agency to Make the Final Administrative Adjudications of Social Security Act Benefits Claims*, 23 J. NAT’L ASS’N ADMIN. L. JUDGES 267, 330–31 (2003) (“The Manual is a part of the legislative history of the APA. The Manual is ‘a contemporaneous interpretation’ of the APA that has been ‘‘given some deference by [the Supreme] Court because of the role played by the Department of Justice in drafting the legislation, and Justice [Tom C.] Clark was Attorney General both when the APA was passed and when the Manual was published.’’’ (footnotes omitted)).

99. S. REP. NO. 91-552, at 304 n.3 (1969).

100. Administrative Office of the United States Courts, <http://www.uscourts.gov/adminoff.html> (last visited Apr. 10, 2008).

101. Some of these procedures may be based on procedures of the AOUSC. See U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE CHIEF JUDGE, UNITED STATES TAX COURT: TAX COURT CAN REDUCE GROWING CASE BACKLOG AND EXPENSES THROUGH ADMINISTRATIVE IMPROVEMENTS 24 (1984), available at <http://archive.gao.gov/d5t1/124125.pdf> [hereinafter GAO REPORT ON TAX COURT BACKLOG] (“Although not under the jurisdiction of the Judicial Conference or the Administrative Office, the Tax Court usually abides by their guidelines for district court judges.”).

102. See TAX CT. R. PRAC. & P. app. III, available at <http://www.ustaxcourt.gov/rules/Appendix3.pdf>.

103. Kilpatrick, *supra* note 61, at 7. In 1950, then–Presiding Judge John W. Kern wrote:



Executive Branch, it could be serviced in this way and many other ways by the [AOUSC], which takes so much of the administrative burden off the other Federal courts."<sup>104</sup>

The problem persisted after the 1969 legislation. A 1984 GAO report recommended that the Tax Court make arrangements with the AOUSC to borrow space when hearing cases outside of Washington, D.C., so as to lower costs.<sup>105</sup> It noted:

The Tax Court has not entered into a working arrangement with the [AOUSC], the agency responsible for the managing of the federal court system, to obtain space where needed. Officials of the Administrative Office informed us that they have made arrangements for some other traveling federal courts, such as the Claims Court, and could also do so for the Tax Court.<sup>106</sup>

*b. Budget Requests*

Article III courts' budgets are requested centrally.<sup>107</sup> By contrast, the Tax Court makes its budget requests directly to Congress,<sup>108</sup> and those

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[W]e have had a problem which has plagued us for many years in obtaining adequate courtroom facilities for our hearings. This has been complicated by the fact that our correspondence in connection with courtrooms has been largely with custodians of Federal buildings who are not concerned about the effective functioning of the Tax Court of the United States. It is obvious that this correspondence . . . is an unsatisfactory method of obtaining courtrooms from local Federal courts.

John W. Kern, *The Process of Decision in the United States Tax Court*, in NEW YORK UNIVERSITY EIGHTH ANNUAL INSTITUTE ON FEDERAL TAXATION 1013, 1015-16 (1950).

104. Kilpatrick, *supra* note 61, at 7.

105. GAO REPORT ON TAX COURT BACKLOG, *supra* note 101, at 19. Internal Revenue Code section 7446 provides:

The times and places of the sessions of the Tax Court and of its divisions shall be prescribed by the chief judge with a view to securing reasonable opportunity to taxpayers to appear before the Tax Court or any of its divisions, with as little inconvenience and expense to taxpayers as is practicable.

I.R.C. § 7446 (LexisNexis 2007).

106. GAO REPORT ON TAX COURT BACKLOG, *supra* note 101, at 20. The Court of Federal Claims (formerly the Court of Claims) is subject to the AOUSC. *See* 28 U.S.C. §§ 604, 610 (LexisNexis 2007).

107. *See* 28 U.S.C. § 605 ("The Director [of the Administrative Office], under the supervision of the Judicial Conference of the United States, shall submit to the Office of Management and Budget annual estimates of the expenditures and appropriations necessary for the maintenance and operation of the courts . . . Such estimates shall be approved, before presentation to the Office of Management and Budget, by the Judicial Conference of the United States, except that the estimate with respect to the Court of International Trade shall be approved by such court and the estimate with respect to the United States Court of Appeals for the Federal Circuit shall be approved by such court.")

108. *See* Dubroff, *supra* note 57, at 51, *reprinted in* DUBROFF, *supra* note 21, at 215; Geier, *supra*

requests are considered by the tax-writing committees.<sup>109</sup> Despite the effort this requires, the Tax Court likely has preferred it this way.<sup>110</sup> Professor Harold Dubroff explains that “the congressional tax committees . . . traditionally have accorded [the Tax Court] sympathetic treatment.”<sup>111</sup>

The Tax Court’s authority to request its budget directly from Congress raises concern. Not only does Congress write the Internal Revenue Code, but the very committees that do so are the ones to which the Tax Court presents its budget requests. This may raise unfortunate questions about the Tax Court’s ability to be entirely objective in its resolution of the cases before it, all of which involve the federal government as a party.<sup>112</sup> Moreover, the Tax Court faces a natural temptation to explain to the tax-writing committees, in support of its budget requests, how well it is enforcing the tax laws. For example, in justifying the Tax Court’s fiscal year 1990 budget, then–Chief Judge Nims said, “During fiscal year 1988, the dollar amount of deficiencies ultimately determined by the Court to be owed by taxpayers was \$1.3 billion, over 46 times the amount of our fiscal

note 66, at 1001 n.77; Theodore Tannenwald, Jr., *The Tax Litigation Process: Where It Is and Where It Is Going*, 44 REC. ASS’N BAR CITY N.Y. 825, 841 (1989). In 1958, then–Chief Judge of the Tax Court, J. Edgar Murdock, explained:

The chief judge is in charge of all administrative matters. . . . [Among other tasks,] budgets must be made up and approved and appropriations obtained. The chief judge is assisted in these and other administrative functions by the clerk of the court and by the administrative officer of the court, each of whom supervises about 30 employees.

J. Edgar Murdock, *Tax Court Is Fulfilling Its Function; No Fundamental Changes Needed*, 8 J. TAX’N 106, 109 (1958).

109. See International Conference on Courts with Tax Jurisdiction, *supra* note 75, at 296 (“The Court primarily deals in Congress with the tax writing committees. Appropriations are by subcommittees handling treasury and general government appropriations—not the judiciary.”).

110. Tannenwald, *supra* note 108, at 840–41 (“The court’s present relations with the Finance and Ways and Means Committees are eminently satisfactory. Moreover, the court presents its own budget directly to Congress . . . .”); see also Dubroff, *supra* note 57, at 51, reprinted in DUBROFF, *supra* note 21, at 215.

111. Dubroff, *supra* note 57, at 51, reprinted in DUBROFF, *supra* note 21, at 215.

112. See, e.g., John A. McGuire, Letter to the Editor, *More on Judicial Bias in the Tax Court*, 55 TAX NOTES 1556, 1556 (1992). One commentator explains the general ethical issue posed by courts funded from revenues they collect:

The concept of the self-supporting courts has ethical implications if the court in any way uses money it generates from judgments to pay its operational expenses. It is beyond dispute that this practice is not consistent with judicial ethics or the demands of due process, and there are relatively few remaining situations of this type. A more common problem is that appropriating bodies sometimes link amount of revenue collected by courts for the public treasury with the level of appropriations, placing pressure on courts to pay their own way . . . .

ROBERT W. TOBIN, NAT’L CTR. FOR STATE COURTS PUB. NO. R-184, *FUNDING THE STATE COURTS: ISSUES AND APPROACHES*, at 50 (1996) (footnotes omitted), available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/financial&CISOPTR=5>.

year 1990 budget request.”<sup>113</sup> The Tax Court made similar statements in support of its budget requests for 1984 through 1989.<sup>114</sup>

Although the Tax Court apparently has not made similar statements in budget requests for years after 1990, the structural issue remains that the Tax Court requests funding directly from the congressional committees responsible for writing the tax legislation that underlies the IRS’s claims that taxpayers owe additional taxes. Professor Deborah Geier has argued that this raises concern because Tax Court judges need to be independent from both Congress and the Executive in their decision making, but Congress has the power to alter the salaries of Tax Court judges.<sup>115</sup>

Questions about the objectivity of the Tax Court may encourage tax protestors and undermine confidence in the tax system, which is antithetical to voluntary compliance.<sup>116</sup> Tax Court judges and others have made a number of efforts over the years to counter allegations of bias on the part of the Tax Court.<sup>117</sup> However, it may be difficult to dispel a perception of bias that is fostered by these structural arrangements without changing the underlying institutional structures.

### 3. *Limited Transparency and Accountability*

One unfortunate effect of the Tax Court’s unusual place in the judicial system is that it lacks a regulatory structure. For example, as indicated

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113. Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1990: Hearing Before the Subcomm. on the Treasury, Postal Serv., and General Government Appropriations of the H. Comm. on Appropriations, 101st Cong. 320–31 (1989) (statement of Hon. Arthur L. Nims, III, Chief Judge, U.S. Tax Court).

114. For example, in the conclusion to his 1987 statement to the Senate Subcommittee on Appropriations for the Treasury, Postal Service, and General Government, then-Chief Judge Sterrett stated, “During fiscal year 1986, the amount of deficiencies ultimately determined by the Court to be owed by taxpayers was \$758,863,980, or about 27 times the amount of our fiscal year 1988 budget request.” *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1988: Hearings on H.R. 2907 Before the Subcomm. on Treasury, Postal Service, and General Government of the S. Comm. on Appropriations*, 100th Cong. 207–22, 215 (1987) (statement of Hon. Samuel B. Sterrett, Chief Judge, U.S. Tax Court), reprinted in *Chief Judge Sterrett Highlights 1986 Act’s Effect on the Tax Court*, TAX NOTES TODAY, Mar. 3, 1987, available at 87 TNT 41–8 (LEXIS). Multiple commentators remarked on the Tax Court’s 1987 statement in this regard. See Melvin A. Coffee, *Tax Court Should Not Be the Sole Forum for Tax Disputes*, 41 TAX NOTES 777, 777 (1988); McGuire, *supra* note 112, at 1556.

115. Geier, *supra* note 66, at 1001 n.77.

116. See Cords, *supra* note 10, at 1518; see also *infra* note 117 (citing articles discussing claims of Tax Court bias).

117. See, e.g., Laro, *supra* note 3, at 18 (“[A] myth has arisen over the years that the court is sometimes predisposed in favor of the government.”); Tannenwald, *supra* note 108, at 827 (referring to “a canard that has existed for a long time, namely that the Tax Court is a pro-government tribunal”); Maule, *supra* note 48, at 425–26 (“The Tax Court is not biased in favor of the IRS. If anything, it might be biased in favor of taxpayers, but that is an issue deserving its own empirical study.”).

above, the Tax Court is subject neither to the regulations of the AOUSC<sup>118</sup> nor to the policies of the Judicial Conference,<sup>119</sup> even though they are designed for federal courts. This limits the Tax Court's accountability. Occasionally, the Tax Court falls between the cracks entirely, leaving it exempt from regulation in areas in which both agencies and other courts are regulated.<sup>120</sup>

One important example involves public access to Tax Court information. Because the Tax Court is no longer an agency, it is not subject to FOIA.<sup>121</sup> Thus, unlike the IRS, for example, it is not required to publish certain documents in the *Federal Register*,<sup>122</sup> make certain others available for public inspection,<sup>123</sup> and release others upon request.<sup>124</sup> In addition, the AOUSC imposes no obligation on the Tax Court to make public any documents, statistics, or data.<sup>125</sup>

The Tax Court has a set of aggregate case statistics that it will release on request. However, the Tax Court's process for releasing these statistics does not follow published guidelines and does not seem to be regularized.<sup>126</sup> Traditionally, such statistics were produced by the

118. See *supra* note 99 and accompanying text; *infra* note 120. In at least one instance, the Tax Court was unable to follow AOUSC regulations, although it wanted to. See Decision of the Comptroller General, Matter Of: U.S. Tax Court—Travel Entitlements of Special Trial Judges, File No. B-215525 (Jan. 17, 1985), available at <http://archive.gao.gov/iglpdf13/126000.pdf> [hereinafter *Travel Entitlements of Special Trial Judges*] (requiring Tax Court, under Code section 7456(c), to apply to STJs the Federal Travel Regulations instead of AOUSC regulations because Tax Court was not in judicial branch). This was later changed by statute. See I.R.C. §§ 7443(d), 7443A(e), 7471(b) (LexisNexis 2007).

119. See S. REP. NO. 91-552, at 304 n.3 (1969); *infra* text accompanying note 254.

120. For example, correspondence between the Tax Court and the Comptroller General of the United States in 1985 reflected a lack of governing rules with respect to artwork in the judges' chambers. The Comptroller General explained:

U.S. Tax Court, a legislative court of record, is not bound by GSA [General Services Administration] regulation on personal convenience items (41 C.F.R. § 101-26.103-2) which applies only to executive branch agencies, nor by an Administrative Office of the United States Courts regulation (Title VIII of the "Guide to Judiciary Policies and Procedures") since the Tax Court is not part of the judicial branch.

Decision of the Comptroller General, Matter Of: Purchase of Decorative Items for Individual Offices at the United States Tax Court 1, 5-6, File B-217869 (Aug. 22, 1985), available at <http://archive.gao.gov/iglpdf16/127736.pdf> [hereinafter *Matter of Purchase of Decorative Items*].

121. See *supra* note 19 and accompanying text.

122. See 5 U.S.C. § 552(a)(1) (LexisNexis 2007).

123. See *id.* § 552(a)(2).

124. See *id.* § 552(a)(3).

125. By contrast, "data assembled by the Administrative Office of U.S. Courts . . . and the Federal Judicial Center . . . include[s] information about every case filed in federal district court and every appeal filed in the twelve non-specialized federal appellate courts." Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis*, 78 NOTRE DAME L. REV. 1455, 1456 (2003).

126. Four of the five annual statistical reports on file with the author (1990, 1993, 1994, and 2005)

“Statistics and Reports Section,”<sup>127</sup> but that Section apparently no longer exists.<sup>128</sup> The Tax Court also does not release a database suitable for research, unlike the AOUSC.<sup>129</sup>

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were issued in different months of the year. *See* 1995–2005 U.S. TAX CT. ANN. REP. (Oct. 12, 2005) (on file with author) [hereinafter TAX CT. 1995–2005 REP.]; STATISTICS AND REPORTS SECTION, UNITED STATES TAX COURT FISCAL YEAR STATISTICAL INFORMATION (Dec. 1994) (on file with author) [hereinafter TAX COURT 1994 REPORT]; STATISTICS AND REPORTS SECTION, UNITED STATES TAX COURT FISCAL YEAR STATISTICAL INFORMATION (Nov. 1993) (on file with author) [hereinafter TAX COURT 1993 REPORT]; STATISTICS AND REPORTS SECTION, UNITED STATES TAX COURT FISCAL YEAR STATISTICAL INFORMATION 1 (Jan. 1991) (on file with author) [hereinafter TAX COURT 1990 REPORT]. The most recent of these reports, which is for 2006, is undated. TAX CT. 1996–2006 REP., *supra* note 2.

The reports also vary in their comprehensiveness. Not counting the cover page, the reports issued in January 1991 and November 1993 each include five pages, but the report issued in December 1994 only contains three pages. The two pages included in the 1993 report but not the 1994 report include tables entitled “Analysis of Cases Closed by Stipulated and Opinion Decisions (By dockets, including Small Tax Cases)” and “Analysis of Cases Closed by Stipulated and Opinion Decisions (By dockets, Small Tax Cases only).” These pages provide the “Govt. Recovery Rate” for each year included in the report, broken out by stipulated decision and opinion decision for each year. The reports released in 2005 and 2006 each contain nine pages. *See* TAX CT. 1995–2005 REP., *supra*; TAX CT. 1996–2006 ANN. REP., *supra* note 2.

127. *See* TAX COURT 1994 REPORT, *supra* note 126; TAX COURT 1993 REPORT, *supra* note 126; TAX COURT 1990 REPORT, *supra* note 126.

128. The Tax Court’s telephone directory on its website does not list a “Statistics and Reports Section.” *See* United States Tax Court, Telephone Numbers, <http://www.ustaxcourt.gov/phone.htm> (last visited Apr. 10, 2008). The 2006 set of statistics makes no reference to such a section. *See* TAX CT. 1996–2006 REP., *supra* note 2.

129. *See* Peter W. Martin, *Online Access to Court Records—From Documents to Data, Particulars to Patterns* 26–27 (Cornell Law School Research Paper No. 08-003, 2008), available at <http://ssrn.com/abstract=1107412> (describing and critiquing the database). *Cf.* Eisenberg & Schlanger, *supra* note 125. Professor Lynn LoPucki has pointed out:

Effective public oversight requires access not just to the content of court documents, but to the *patterns* in courts’ activity.

To reveal the patterns of court activity, someone must extract court data from documents, combine them with data from other sources, and process them into the statistics, graphs, tables, and other visual displays that would render them intelligible.

LoPucki, *supra* note 22, at 3.

The Tax Court has a docket-inquiry system on its website, but the documents referenced there, such as petitions and motions, cannot be downloaded. *See* United States Tax Court Docket Inquiry, <http://www.ustaxcourt.gov/docket.htm> (last visited Apr. 10, 2008). Tax Court opinions (Division and Memorandum Opinions starting September 25, 1995, and Tax Court Summary Opinions starting January 1, 2001) can be searched and downloaded. *See* United States Tax Court, Opinions Search, <http://www.ustaxcourt.gov/UstcInOp/asp/HistoricOptions.asp> (last visited Apr. 10, 2008). The Tax Court has also announced that “[o]rders issued or entered and oral findings of fact or opinion (bench opinions) delivered after March 1, 2008, will also be available to the public through the Court’s Internet Web site without registration for electronic access.” Press Release, U.S. Tax Court, Amendments to the Rules of Practice and Procedure Adopted 1 (Jan. 15, 2008), available at <http://www.ustaxcourt.gov/press/011508.pdf>.

By contrast:

PACER (Public Access to Court Electronic Records) is an access service run by the Administrative Office of the United States Courts. Through PACER, you can access the case

Congress did not intend the Tax Court's proceedings to be opaque. It is required by statute to have open proceedings and published reports,<sup>130</sup> reflecting a concern for transparency that dates back to the creation of the Board of Tax Appeals.<sup>131</sup> Although these provisions relating to Tax Court trials and opinions are important and useful, they focus on cases, and are thus limited in their scope. They do not cover, for example, Tax Court rule making or policy making, or the release of aggregate data on Tax Court decision making.

Currently, the Tax Court's principal source of oversight is the appellate review process.<sup>132</sup> That oversight is necessarily case specific, not

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and docket data maintained by more than 187 federal courts—9 appellate, 89 district and 89 bankruptcy courts and the Court of Federal Claims.

Nancy Henry, *Federal Dockets on the Net*, LAW PRAC. MGMT., Jan.–Feb. 2001, at 24, 24. One scholar notes:

So far as public access is understood as referring only to the records of discrete proceedings, the online system created by the Administrative Office of the U.S. Courts and Judicial Conference of the United States opens an unprecedented vista. Anyone knowing the parties, approximate date, and court can find and retrieve full docketing information and increasingly all filed documents for the case. Full transcripts are coming. There is a charge. The interface could be friendlier. One has to register. But whether compared with the degree of openness previously furnished by hardcopy records or that available in the states, the federal online system lets in an unprecedented amount of light producing a high degree of visibility.

Martin, *supra*, at 25.

130. See I.R.C. §§ 7459, 7461, 7462 (LexisNexis 2007).

131. See Dubroff, *supra* note 51, at 67–71, reprinted in DUBROFF, *supra* note 21, at 61–65. The legislative history of the creation of the Board of Tax Appeals reflects a concern about the consequences of secrecy that were thought to be allayed by adoption of the predecessor of what is now section 7461:

To the minority it seems inconceivable that any controversy existing between the Government and a taxpayer should be adjudicated and finally determined in a star chamber proceeding.

The minority will, therefore, propose an amendment to the bill which will provide that all such proceedings, records, and evidence in connection therewith shall be public.

S. REP. NO. 68-398, pt. 2, at 12 (1924) (statement of Sen. Jones).

132. The Government Accountability Office (GAO), formerly the General Accounting Office, has issued occasional reports on the Tax Court. See, e.g., GAO REPORT ON TAX COURT BACKLOG, *supra* note 101. That report was issued “[a]t the request of the Chairman, Subcommittee on Treasury, Postal Service and General Government, Senate Committee on Appropriations.” Letter from William J. Anderson, Dir., U.S. Gen. Accounting Office, to Hon. Howard A. Dawson, Jr., Chief Judge, U.S. Tax Court, in GAO REPORT ON TAX COURT BACKLOG 3, *supra* note 101. A search of the GAO website for documents containing the phrase “Tax Court” in the title, not limited by date, retrieved six documents spanning 1970 to 1989. The other five reports include a one-page letter relating to a review of settlement of Tax Court accounts, Letter from George L. Egan, Jr., Acting Reg'l Manager, Wash. Reg'l Office, General Accounting Office, to Hon. William M. Drennen, Chief Judge, U.S. Tax Court (Aug. 31, 1970), available at <http://archive.gao.gov/f0202/092875.pdf>; another one-page letter, relating to an audit and evaluation of payroll and leave records and procedures, Letter from D. L. Scantlebury, Reg'l Manager, Wash. Reg'l Office, Gen. Accounting Office, to Hon. William M. Drennen, Chief Judge, U.S. Tax Court (Oct. 14, 1970), available at <http://archive.gao.gov/f0202/092844.pdf>; *Travel Entitlements of Special Trial Judges*, *supra* note 118; *Matter of Purchase of Decorative Items*, *supra* note 120; and Statement of Jennie S. Stathis, Director, Tax Policy and

systemwide, and is limited to the information in the record before the appellate court. It is very difficult for appellate courts to exercise oversight over events that occur outside of the record on appeal. That is particularly true for systemic procedures such as rule making and the setting of internal policies relating to the release of information and the like. In addition, the possibility of appellate oversight has no application to the numerous Tax Court cases that are decided under the small tax case procedure,<sup>133</sup> a process that requires waiver of appellate review.<sup>134</sup>

Congress certainly is capable of overseeing the Tax Court; the Oversight Subcommittee of the House Ways and Means Committee investigated events related to *Ballard v. Commissioner*, which is discussed further in Part II.<sup>135</sup> However, Congressional investigations are not designed to provide routine guidance and oversight.

## II. A LOOK AT THE TAX COURT'S INSULARITY

Although the Tax Court appears in many ways similar to other courts, at times its behavior has surprised observers. Most critiques of the Tax Court involve issues in which the Tax Court has lacked the transparency that is customary for a court, which limits its accountability.<sup>136</sup> This Part divides these issues into those relating to transparency in the court's decision making, and those relating to the Tax Court's process for promulgating the procedural rules that apply to its cases.

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Administration, Issues Before the Subcommittee on Oversight, Committee on Ways and Means, House of Representatives, on Administration's Fiscal Year 1990 Budget Proposals for IRS and the Tax Court (Apr. 4, 1989), available at <http://archive.gao.gov/t2pbat15/138401.pdf>.

133. See TAX CT. 1995–2005 REP., *supra* note 2, tbls.1 & 2 (showing 24,551 cases filed in 2005, of which 13,571 were small tax cases).

134. See I.R.C. § 7463(b).

135. See Crystal Tandon & Karla L. Miller, *Judges' Statements on Kanter, Ballard Provoke Dismay*, 108 TAX NOTES 394, 395 (2005) ("As previously reported, the House Ways and Means Oversight Subcommittee is conducting an investigation to learn more about the Rule 183 process employed by the Tax Court in *Ballard*.").

136. Courts have both transparent and opaque procedures. See *Legal Theory Lexicon 015: Transparency*, [http://lsolum.typepad.com/legal\\_theory\\_lexicon/2003/12/legal\\_theory\\_le\\_1.html](http://lsolum.typepad.com/legal_theory_lexicon/2003/12/legal_theory_le_1.html). We generally expect courts to follow transparent procedures when issue of deference or independence of decision makers is involved. See *infra* note 188 and accompanying text. We also expect transparency in contexts in which a lack of transparency would permit shirking, such as whether or not a judge participated in rendering a particular decision. See *infra* text accompanying notes 222–28. The author thanks Larry Solum for suggesting these contexts.

## A. Transparency Issues in the Decision-Making Process

### 1. The Events of Ballard: Confidential Procedures Exposed

*Ballard v. Commissioner*, the high-profile case mentioned above that ultimately went to the Supreme Court, involved several consolidated cases.<sup>137</sup> Three of the taxpayers litigating against the IRS's claim of tax fraud were Burton Kanter, a well-known tax lawyer and adjunct law professor; Claude Ballard, a Prudential Insurance Co. of America (Prudential) real estate executive; and Tom Lisle, who "headed the division responsible for lending money and buying and building real estate for Prudential."<sup>138</sup>

In the Tax Court, the cases were assigned to STJ D. Irvin Couvillion to decide under Tax Court Rule 183.<sup>139</sup> Rule 183 provides procedures implementing a statutory provision that authorizes the Chief Judge to assign tax deficiency cases involving large dollar amounts to STJs to hear but not decide.<sup>140</sup> As then worded, Rule 183 required that, in such a case, "the Special Trial Judge shall submit a report, including findings of fact and opinion, to the Chief Judge, and the Chief Judge will assign the case to a Judge or Division of the Court."<sup>141</sup> Tax Court Judge Howard A. Dawson, Jr., a senior judge,<sup>142</sup> was assigned to review STJ Couvillion's report.

#### a. The Tax Court's First Official Opinion

The Tax Court's 1999 opinion, issued by Judge Dawson, stated, "The Court agrees with and adopts the opinion of the Special Trial Judge, which is set forth below."<sup>143</sup> It found:

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137. In Tax Court, the consolidated cases were known as *Inv. Research Assocs. v. Comm'r*, 78 T.C.M. (CCH) 951 (1999). The Tax Court's 1999 decision was appealed to three Circuits, under three different names. See *Ballard v. Comm'r*, 321 F.3d 1037 (11th Cir. 2003); *Estate of Kanter v. Comm'r*, 337 F.3d 833 (7th Cir. 2003); *Estate of Lisle v. Comm'r*, 341 F.3d 364 (5th Cir. 2003). For ease of reference, the case is referred to as *Ballard*, its name in the Supreme Court. See *Ballard v. Comm'r*, 544 U.S. 40 (2005) (deciding the consolidated cases of *Ballard* and *Estate of Kanter*).

138. *Inv. Research Assocs.*, 78 T.C.M. (CCH) at 969.

139. TAX CT. R. PRAC. & P. 183.

140. STJs do not have authority to make the court's decision in cases involving tax deficiencies in excess of \$50,000. See I.R.C. § 7443A(b), (c) (LexisNexis 2007). In such cases, after trial, the STJ will issue a report that amounts to a draft opinion. Under Tax Court Rule 183, the Chief Judge will assign a regular Tax Court judge to review the report and enter the decision of the court. See TAX CT. R. PRAC. & P. 183.

141. TAX CT. R. PRAC. & P. 183(b), reprinted in 93 T.C. 972 (1989).

142. See I.R.C. § 7447(c) (retired judges on recall).

143. *Inv. Research Assocs. v. Comm'r*, 78 T.C.M. (CCH) 951, 963.



Kanter entered into arrangements pursuant to which he would use his business and professional contacts . . . to assist individuals and/or entities in obtaining business opportunities or in raising capital for business ventures. Kanter established a complex organization of corporations, partnerships, and trusts to receive, distribute, and disguise the payments from these arrangements.<sup>144</sup>

The Tax Court further explained that some of the payments came from a group of individuals that the parties called “the Five.”<sup>145</sup>

The opinion found “[t]he record . . . replete with several indicia of Kanter’s fraud.”<sup>146</sup> It listed numerous examples, including its view that “Kanter’s testimony at trial was implausible, unreliable, and sometimes contradictory” and thus not credible.<sup>147</sup> Accordingly, the Tax Court held that Kanter had committed fraud and the IRS had “proven by clear and convincing evidence that Kanter underpaid his taxes for each of the years at issue attributable to transactions related to the Five.”<sup>148</sup>

When the Tax Court’s opinion was released, tax attorney Randall G. Dick, who represented Kanter, “said he thought that [it] sounded as if it had been written by two people. He said a friend, Julian I. Jacobs, a judge on the tax court, and, later, a special trial judge, Peter J. Panuthos, told him that the final opinion had reversed Judge Couvillion’s initial findings.”<sup>149</sup> The taxpayers then filed a series of motions requesting the STJ’s report or inclusion of the report in the record on appeal, each of which the Tax Court denied.<sup>150</sup>

With their third motion, the taxpayers included an affidavit from Mr. Dick stating, in part, that he had been told by Tax Court judges that

substantial sections of the opinion were not written by Judge Couvillion, and that those sections containing findings related to the credibility of witnesses and findings related to fraud were wholly

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144. *Id.* at 970.

145. *Id.*

146. *Id.* at 1083.

147. *Id.* at 1085.

148. *Id.* at 1083.

149. Louise Story, *Secrecy Is Lifted in Some Tax Court Trials*, N.Y. TIMES, July 12, 2005, at C1.

150. See, e.g., Tax Court Order, *Inv. Research Assocs.*, 78 T.C.M. (CCH) 951 (No. 43966-85), reprinted in *Tax Court Order Denying Request for Access to STJ Report*, TAX NOTES TODAY, Feb. 2, 2001, available at 2001 TNT 23-30 (LEXIS) [hereinafter *Tax Court Order Denying Third Motion*] (denying taxpayers’ third motion requesting access to the STJ Report); Tax Court Order, *Inv. Research Assocs.* (No. 43966-85), reprinted in *Tax Court’s Original Order Denying Motion for Access to STJ Report*, TAX NOTES TODAY, Feb. 2, 2001, available at 2001 TNT 23-31 (LEXIS) (denying taxpayers’ motion of April 20, 2000).

contrary to the findings made by Judge Couvillion in his report. The changes to Judge Couvillion's findings relating to credibility and fraud were made by Judge Dawson.<sup>151</sup>

The Tax Court's order denying this motion also seemed to deny the events described in Dick's affidavit; the order stated in part:

Judge Dawson states and Special Trial Judge Couvillion agrees, that, after a meticulous and time-consuming review of the complex record in these cases, *Judge Dawson adopted the findings of fact and opinion of Special Trial Judge Couvillion*, that Judge Dawson presumed the findings of fact recommended by Special Trial Judge Couvillion were correct, and that Judge Dawson gave due regard to the circumstance that Special Trial Judge Couvillion evaluated the credibility of witnesses.<sup>152</sup>

The taxpayers appealed the Tax Court's decision. Because the individual taxpayers were located in three different Circuits, the decision was appealed to the Courts of Appeals for the Fifth, Seventh, and Eleventh Circuits.<sup>153</sup> In each Circuit, the taxpayers raised the issue of the nondisclosure of the STJ's report. And, in each case, the Court of Appeals agreed with the Tax Court on that issue. In *Ballard* and *Estate of Kanter*, each Court of Appeals found that the record demonstrated that the report adopted in the Tax Court's opinion was STJ Couvillion's report.<sup>154</sup> Each court further found, in the words of the Eleventh Circuit, that "[e]ven assuming Dick's affidavit to be true and affording Petitioners-Appellants all reasonable inferences, the process utilized in this case does not give rise to due process concern."<sup>155</sup>

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151. Declaration of Randall Dick, *supra* note 7.

152. Tax Court Order Denying Third Motion, *supra* note 150 (emphasis added). The order was signed by then-Chief Judge Wells, Judge Dawson, and STJ Couvillion. Judge Wells served as chief judge from June 1, 2000, to May 31, 2004 (in addition to a brief term as chief judge in 1997). *See* United States Tax Court, Judge Thomas B. Wells, <http://www.ustaxcourt.gov/judges/wells.htm> (last visited Apr. 10, 2008).

153. *See* I.R.C. § 7482(b)(1) (LexisNexis 2007) (venue for appeal from Tax Court decisions).

154. *Ballard v. Comm'r*, 321 F.3d 1037, 1042–43 (11th Cir. 2003) (“[T]he record as presented to us clearly reveals that the report adopted by the Tax Court is Special Trial Judge Couvillion’s report.”), *rev’d*, 544 U.S. 40 (2005); *Estate of Kanter v. Comm'r*, 337 F.3d 833, 841 (7th Cir. 2003) (“[W]e accept as true the Tax Court’s statement that the underlying report adopted by the Tax Court was in fact Special Trial Judge Couvillion’s.”), *rev’d sub nom.* *Ballard v. Comm'r*, 544 U.S. 40 (2005).

155. *Ballard*, 321 F.3d at 1042; *see also Estate of Kanter*, 337 F.3d at 840 (“[T]his purportedly quasi-collaborative process would not offend our notions of fundamental fairness, nor would due process require the inclusion of the report in the appellate record to preserve the fairness of our

In *Estate of Lisle*, the third of the three decisions, the Fifth Circuit followed its sister Circuits on the STJ report issue and adopted their reasoning. Accordingly, the court found no due process violation.<sup>156</sup> However, the Fifth Circuit reversed the Tax Court's finding of fraud, which substantially lowered the tax and penalty amounts.<sup>157</sup> Although the taxpayers petitioned for certiorari in *Ballard* and *Estate of Kanter* on issues involving the treatment of the STJ's report, neither the taxpayers nor the IRS petitioned for certiorari in *Estate of Lisle*.

*b. The Secret Report*

The Supreme Court granted certiorari in *Ballard* and *Estate of Kanter* and, in 2005, the Court held that the Tax Court was not entitled to exclude the report from the record on appeal, under the language of the version of Tax Court Rule 183 that existed at that time.<sup>158</sup> In the majority opinion, written by Justice Ginsburg,<sup>159</sup> the Court stated:

[N]o statute authorizes, and the current text of Rule 183 does not warrant, the concealment at issue. We so hold, mindful that it is routine in federal judicial and administrative decisionmaking both to disclose the initial report of a hearing officer, and to make that report part of the record available to an appellate forum. A departure of the bold character practiced by the Tax Court—the creation and attribution solely to the special trial judge of a superseding report composed in unrevealed collaboration with a regular Tax Court judge—demands, at the very least, full and fair statement in the Tax Court's own Rules.<sup>160</sup>

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review.”). In the Seventh Circuit, Judge Cudahy filed a long opinion dissenting on this issue. *See Estate of Kanter*, 337 F.3d at 874–88 (Cudahy, J., concurring in part and dissenting in part).

156. *Estate of Lisle*, 341 F.3d 364, 384 (5th Cir. 2003).

157. *See id.* at 367.

158. *See Ballard*, 544 U.S. at 65.

159. The late Chief Justice Rehnquist dissented, joined by Justice Thomas. *Id.* at 68–73. Justice Kennedy filed a concurrence in which Justice Scalia joined. *Id.* at 65–68.

160. *Id.* at 46–47 (emphasis added). The Supreme Court also issued a warning to the Tax Court:

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

*Id.* at 65.

The Supreme Court remanded the matter to the Seventh and Eleventh Circuit Courts of Appeals.<sup>161</sup> Over the IRS's opposition, the Eleventh Circuit granted the taxpayers' motion to supplement the record with STJ Couvillion's original report and ordered the Tax Court to produce the report within fourteen days.<sup>162</sup> The Tax Court did so, and subsequently also served a copy of the report on the parties and included it in the record of each case.<sup>163</sup>

The original report, which, like the Tax Court's 1999 opinion, was quite lengthy, reached the opposite holding from the Tax Court opinion on the critical issue of fraud. It stated, in part:

On the record presented, the Court cannot find or conclude that respondent's claimed kickback schemes existed or, if such schemes did exist, that there was fraud in connection with the reporting and payment of Federal income taxes on the income generated through the purported schemes. . . . Indeed, various witnesses associated with "The Five" expressly denied making kickback payments in return for Ballard and/or Lisle's help in directing business to them.<sup>164</sup>

On the issue of the fraud penalty, the report concluded, in language sharply contrasting with the Tax Court's official opinion:

Respondent has not established that there was an underpayment of tax by any of the petitioners arising out of what respondent derisively described throughout the trial of this case as "kickback schemes" wherein moneys were exacted as a condition for doing

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161. *Id.*

162. See Eleventh Circuit Order, *Ballard v. Comm'r*, 429 F.3d 1026 (11th Cir. 2005) (No. 01-17249), *on remand from Ballard*, 544 U.S. 40 (2005), *reprinted in Court Orders Addition of Special Trial Judge's Report to Record in Ballard Case*, TAX NOTES TODAY, May 24, 2005, *available at* 2005 TNT 99-26 (LEXIS) (ordering Tax Court to produce STJ Couvillion's original report). The Seventh Circuit, in a 2-1 opinion with Judge Cudahy again dissenting, denied the taxpayers' motions and remanded the case to the Tax Court. See *Estate of Kanter v. Comm'r*, 406 F.3d 933, 934 (7th Cir. 2005).

163. See Tax Court Order, *Estate of Kanter v. Comm'r*, 93 T.C.M. (CCH) 721 (2007) (No. 712-86), *reprinted in Tax Court Reinstates Trial Judge's Report in Kanter*, TAX NOTES TODAY, Dec. 23, 2005, *available at* 2005 TNT 246-16 (LEXIS); Statements of Judges Cohen, Dawson & Couvillion, *Estate of Kanter v. Comm'r*, 93 T.C.M. (CCH) 721 (2007) (No. 21555-91), *reprinted in Tax Court Releases Judges' Clarifying Statements in Kanter, Ballard*, TAX NOTES TODAY, July 22, 2005, *available at* 2005 TNT 140-19 (LEXIS) [hereinafter Clarifying Statements].

164. Memorandum Findings of Fact and Opinion of STJ Couvillion, *Ballard v. Comm'r*, 429 F.3d 1026 (11th Cir. 2005) (No. 01-17249), *reprinted in Ballard Special Trial Judge Opinion Released to Eleventh Circuit*, TAX NOTES TODAY, June 6, 2005, *available at* 2005 TNT 107-16 (LEXIS) [hereinafter STJ Opinion].

business, and that such moneys constituted income that was no[t] reported by petitioners. . . . There is no[] showing that taxes were evaded or avoided on any of the payments made by “The Five”. Quite the contrary, respondent’s witnesses, including its own agents, testified that all of the payments by “The Five” had been reported on Federal income tax returns, and the taxes due thereon had been paid. . . . The Court . . . does not consider [certain] transactions [the IRS cited as indicative of fraud] as even rising to the level of suspicion of fraud.<sup>165</sup>

Thus, the document that the Courts of Appeals had not had the opportunity to see reflected the finding by the trier of fact that the taxpayers had *not* committed fraud. Moreover, unlike the official opinion, the report referred several times to Mr. Kanter’s testimony as credible.<sup>166</sup> The Courts of Appeals’ lack of knowledge of these findings and conclusions of the trier of fact likely hampered their review, particularly of the facts.<sup>167</sup>

In fact, after seeing the report, the Court of Appeals for the Eleventh Circuit stated, “It is obvious now that the withholding of Special Trial Judge Couvillion’s original report did, in fact, impede the process of appellate review.”<sup>168</sup> It ordered the Tax Court to reinstate the STJ’s original report and assign the case to a judge who had no prior involvement in the case, “who shall give ‘due regard’ to the credibility determinations of Judge Couvillion, presuming that his fact findings are correct *unless manifestly unreasonable*.”<sup>169</sup>

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165. *Id.* (emphasis added). The IRS bears the burden of proving fraud by clear and convincing evidence. I.R.C. § 7454(a) (LexisNexis 2007); TAX CT. R. PRAC. & P. 142(b).

166. See STJ Opinion, *supra* note 164.

167. On appeal without the STJ’s original report, all three circuits upheld the Tax Court’s 1999 decision. See *supra* text accompanying notes 153–56. By contrast, once the Eleventh Circuit had that report, it reversed the Tax Court’s 2007 decision (which, like the 1999 decision, had reached the opposite result from the report on the critical issue of fraud), and directed the Tax Court to adopt the STJ’s original report. See *Ballard v. Comm’r*, 2008 U.S. App. LEXIS 7373 (11th Cir. 2008). Similarly, in *Stone v. Commissioner*, 865 F.2d 342, 344 (D.C. Cir. 1989), where the STJ report that disagreed with the Tax Court’s official opinion was included in the record, the Court of Appeals remanded the matter “for computation of tax in accordance with the findings of the Trial Judge.” *Id.* The Tax Court’s 2007 opinion in *Ballard* and the Eleventh Circuit’s reversal of it are discussed further *infra* at text accompanying notes 170–75. *Stone* is discussed further *infra* at text accompanying notes 250–52.

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

169. *Id.* (emphasis added). This is a strong statement that seems to apply a nontraditional standard of review. See Christopher M. Pietruszkiewicz, *Conflating Standards of Review in the Tax Court: A Lesson in Ambiguity*, 44 HOUS. L. REV. 1337, 1375 (2008). However, on appeal from the Tax Court’s 2007 decision, the Eleventh Circuit appeared to equate its “manifestly unreasonable” test with the

Judge Haines decided the case on remand.<sup>170</sup> To the surprise of some,<sup>171</sup> his opinion in the case did not adopt the STJ's original report, but instead found that Kanter and Ballard committed fraud.<sup>172</sup> The Tax Court's 2007 opinion is much more transparent than its 1999 opinion, however. The 2007 opinion notes which findings of fact are new, and it documents "departures from the recommended findings of fact in the STJ report . . . [with] a comment either in the text or in the margin (including appropriate citations of the record)."<sup>173</sup> It also explains that even if "the Five" did not know about the alleged kickback scheme, as STJ Couvillion found, that does not necessarily mean that there was no such scheme.<sup>174</sup> Most important, the inclusion of the STJ's original report in the record has empowered the Courts of Appeals to do a thorough review on appeal. In fact, the Court of Appeals for the Eleventh Circuit recently reversed the Tax Court's 2007 decision, finding that Judge Haines did not give adequate deference to the findings of the trier of fact, STJ Couvillion.<sup>175</sup>

*c. Revelation of the Collaborative Process*

After the original report in *Ballard* was released and served on the parties, then-Chief Judge Gerber took the unusual step of issuing an order that served on the parties to *Estate of Lisle* statements on behalf of STJ Couvillion, Judge Dawson, and Judge Mary Ann Cohen, who had been the

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familiar "clearly erroneous" standard of review. See *Ballard*, 2008 U.S. App. LEXIS 7373, at \*13-\*16.

In 2005, the Court of Appeals for the Fifth Circuit followed the lead of the Eleventh Circuit, remanding to the Tax Court with instructions that quoted from the Eleventh Circuit's 2005 opinion. See *Estate of Lisle v. Comm'r*, 431 F.3d 439, 439-40 (5th Cir. 2005) (per curiam).

170. See *Estate of Kanter v. Comm'r*, 93 T.C.M. (CCH) 721 (2007). The opinion was rendered in all three cases, which were consolidated on remand before Judge Haines. See *id.* at 729.

171. See Michael H. Plowgian, Svetoslav S. Minkov & T. Wesley Brinkley, *Federal Taxation*, 57 MERCER L. REV. 1115, 1120 (2006) ("Given that all of the primary witnesses in the case are now deceased, it seems unlikely that Special Trial Judge Couvillion's findings will be overturned in the Tax Court on remand."); Sheryl Stratton, *Tax Court Finds Fraud on Second Run Through Kanter/Ballard*, 114 TAX NOTES 624, 626 (2007) ("It would be 'a gross understatement' to say that Steve Brown of Martin, Brown & Sullivan in Chicago, who is counsel for the Ballards and the Lisle estate, was surprised by the new opinion. He had predicted the odds of the Tax Court's entering an opinion resembling the one entered on February 1 at zero.")

172. *Estate of Kanter*, 93 T.C.M. (CCH) 721 (2007).

173. *Id.* at 736.

174. The Five knew that Kanter was using his influence with Ballard and Lisle to obtain business opportunities for them with Prudential, for which they were compensating Kanter with a finder's fee, but they may not have known if Kanter was sharing the finder's fee with Ballard and Lisle (the alleged kickbacks). See *id.* at 744-45.

175. *Ballard*, 2008 U.S. App. LEXIS 7373, at \*74.

Chief Judge at the time of the Tax Court opinion in *Ballard*.<sup>176</sup> The statements explained the collaborative process that had occurred between STJ Couvillion's completion of the original report and the Tax Court's release of its official opinion, as well as the events that led up to that collaboration.

In her statement, Judge Cohen explained that she had initially referred STJ Couvillion's report to Judge Dawson.<sup>177</sup> After Judge Dawson told her that he could not adopt the report and Judge Jacobs declined to review it because of his friendship with one of the taxpayers' attorneys, Judge Cohen read the report "to see if I could adopt it myself."<sup>178</sup> She explained:

I concluded that the facts found did not, in my view, support the proposed opinion. I scheduled a meeting with Judge Dawson and Judge Couvillion for the purpose of deciding how to proceed. The day before the scheduled meeting, Judge Couvillion notified my office that he was withdrawing the report. It was then agreed that he and Judge Dawson would conduct a further review of the record and submit a further report.<sup>179</sup>

Judge Couvillion added, "After discussion between myself and Judge Dawson, on September 1, 1998, I requested that the report I submitted be withdrawn for further consideration. The original report was returned to me soon after that time."<sup>180</sup> According to the statements of the judges, Judge Couvillion and Judge Dawson then "worked together on each of the many issues."<sup>181</sup> Judge Dawson explained that "[t]here were communications, consultations, discussions, cross reviews, and modifications. It was a collaborative judicial deliberation and process."<sup>182</sup> Judge Cohen added:

I was aware that Judge Dawson and Judge Couvillion were collaborating on a revised report. The revised report was received in my office in October 1999. After I reviewed it, I concluded that it was much more persuasive than the initial report, and I authorized its release as a memorandum opinion.<sup>183</sup>

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176. See Clarifying Statements, *supra* note 163.

177. *Id.* (statement of Judge Cohen).

178. *Id.*

179. *Id.*

180. *Id.* (statement of STJ Couvillion).

181. *Id.*

182. *Id.* (statement of Judge Dawson).

183. *Id.* (statement of Judge Cohen).

The *Ballard* case thus revealed a collaborative decision-making process that had previously been hidden, and which the Supreme Court found inconsistent with a Tax Court rule that did not expressly provide for such a procedure. In her post-*Ballard* statement about the Tax Court's actions on STJ Couvillion's report, Judge Cohen also declared that "[w]hat occurred was the collegial process used with all reports of judicial officers of the Tax Court."<sup>184</sup> Yet, the Tax Court's statement in over 900 Rule 183 cases that it "agrees with and adopts the opinion of the Special Trial Judge, which is set forth below"<sup>185</sup> had been taken at face value by tax lawyers—including in prior Supreme Court litigation<sup>186</sup>—until the *Ballard* litigation unfolded.<sup>187</sup> Note that the standard Rule 183 statement referred to the "opinion of the Special Trial Judge," not a collaborative opinion.

Collaboration between the trial judge and reviewing judge is inconsistent with the deference called for in Rule 183. Rule 183 calls for a process in which the two judges act independently of each other. In addition, deference and independence are both contexts that require transparency, to assure that deference was given and independence was preserved.<sup>188</sup> Moreover, if the reviewing judge's role is analogous to the role of an appellate judge—a view the cases interpreting the "due regard"

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184. *Id.*

185. *Estate of Kanter v. Comm'r*, 337 F.3d 833, 839 (7th Cir. 2003); *see also id.* at 876 (Cudahy, J., concurring in part and dissenting in part) ("[I]n the 880-plus Tax Court decisions since 1983 that I could find that involved an STJ report, the Tax Court judge purported to agree with and adopt the opinion of the STJ in every instance."); Possley, *Tax Court Findings Secretly Changed*, *supra* note 6 ("In all, there were more than 900 cases over the past two decades in which a lower level trial court judge handled a case and made a finding that was reviewed by a Tax Court judge who issued the official court opinion.").

186. *See Freytag v. Comm'r*, 501 U.S. 868, 872 n.2 (1991); *see also infra* text accompanying notes 203–07.

187. *See Ballard v. Comm'r*, 544 U.S. 40, 58 n.13 (2005) ("The Tax Court's post-1983 process for reviewing special trial judge reports appears not to have been comprehended, even by cognoscenti, prior to the airing it has received in these cases." (citing Stephanie Francis Cahill, *Tax Judges Decide Cases They Do Not Hear*, 37 ABA J. E-Report 3 (Sept. 27, 2002) (reporting tax attorney Gerald Kafka's statement that "[w]hen this case surfaced, a lot of people scratched their heads"))).

188. *See supra* note 136. The Supreme Court's reaction to the Tax Court's practice points to the deference rationale for transparency: "One cannot tell whether, as Rule 183(c) requires, the final decision reflects '[d]ue regard' for the special trial judge's 'opportunity to evaluate the credibility of [the] witnesses,' and presumes the correctness of that judge's initial factfindings." *Ballard*, 544 U.S. at 46.

The Court also alluded to the independence rationale: "The Tax Court's practice of not disclosing the special trial judge's original report, and of *obscuring the Tax Court judge's mode of reviewing that report*, impedes fully informed appellate review of the Tax Court's decision." *Id.* at 59–60 (emphasis added); *see also Estate of Kanter*, 337 F.3d at 880 n.6 (Cudahy, J., concurring in part and dissenting in part) ("The judicial independence of finders of fact . . . is a structural principle. . . . [P]roviding access to the STJ's original report would allow for judicial independence without compromising the procedures of the Tax Court.").



standard of Rule 183 would support<sup>189</sup>—the communications between the judges arguably should be disclosed to the parties.<sup>190</sup>

## 2. *Events Occurring Outside the Record*

The judges' post-*Ballard* statements also revealed that events had occurred outside the official record of the case. In a footnote in its *Ballard* opinion, the Supreme Court quoted an order referring to a "reassignment" it called "enigmatic."<sup>191</sup> The order, which was dated December 15, 1999, "reassigned [the cases] from Special Trial Judge D. Irvin Couvillion to Judge Howard A. Dawson, Jr., for disposition."<sup>192</sup> December 15, 1999 was the same day the Tax Court issued its opinion in that case.<sup>193</sup> The Supreme Court noted, "Judge Dawson rendered the final decision of the Tax Court on the same day the case was 'reassigned' to him. Had he faced a recast Rule 183(b) report, it is doubtful that he could have absorbed and acted upon it so swiftly."<sup>194</sup>

The judges' statements helped clear up confusion about that order. In his statement, Judge Dawson explained that STJ Couvillion submitted his report to the Chief Judge on June 23, 1998, and "[a]fter preliminary review in the Chief Judge's office, the report was referred to me on July 14, 1998, by the Chief Judge for review and adoption if I agreed with it."<sup>195</sup> Judge Dawson further explained that, after working with STJ Couvillion on the report in the collaborative process described above:<sup>196</sup>

189. See *Ballard*, 2008 U.S. App. LEXIS, at \*13-\*16 (11th Cir. 2008) (adopting approach of *Stone v. Comm'r*); *Stone v. Comm'r*, 865 F.2d 342, 344 (D.C. Cir. 1989) ("[W]e are persuaded that the language of the Tax Court Rule applicable to this case (and still applicable under a different number) sought to establish the relatively high level of deference that the phrase 'clearly erroneous' entails."); *id.* at 347 ("[W]e take a brief detour to note, but not resolve, a conflict over the exact role of an appellate court where it confronts conflicting decisions by an initial fact-finder and an intermediate court, with the clearly erroneous standard governing both stages of review."). *Stone* is discussed further below. See *infra* text accompanying notes 250–52.

190. Cf. Model Code of Judicial Conduct Canon 3(B)(7) cmt. ("If communication between the trial judge and the appellate court with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication should be provided to all parties.").

191. *Ballard v. Comm'r*, 544 U.S. 40, 54 n.10 (2005).

192. *Id.* (quoting App. to Kanter Pet. for Cert. 113a–114a). The order further stated, "After the Special Trial Judge submitted a report . . . these cases were referred to Judge Dawson on September 2, 1998, for review and, if approved, for adoption." *Id.* (internal quotation marks omitted). According to Judge Dawson, the date of September 2, 1998, specified in the order was incorrect; it was actually September 2, 1999. See *Clarifying Statements*, *supra* note 163 (statement of Judge Dawson).

193. See *infra* text accompanying note 201.

194. *Ballard*, 544 U.S. at 54 n.10.

195. *Clarifying Statements*, *supra* note 163 (statement of Judge Dawson) (footnote omitted).

196. See *supra* text accompanying notes 176–82.

On September 2, 1999, I began a final review of Special Trial Judge Couvillion's new report. On October 25, 1999, I adopted the new report and submitted it to Chief Judge Cohen. On November 4, 1999, the Chief Judge approved the report with some modifications and directed that it be filed as a Memorandum Opinion. On December 15, 1999, Chief Judge Cohen by Order reassigned the cases to me for decision, and the new report, with some technical corrections recommended by the Reporter's Office, was officially filed . . . on that date.<sup>197</sup>

Thus, the official record of the case, including the docket entries, failed to reflect the initial assignment of the matter to Judge Dawson,<sup>198</sup> who explained that it occurred on July 14, 1998.<sup>199</sup> The docket entries for the case also do not reflect the "referral" to Judge Dawson referred to in the order, which related to the revised, collaborative report, and which Judge Dawson explained occurred on September 2, 1999.<sup>200</sup> The docket entry system merely reflects, as its first assignment of the case to Judge Dawson, a "reassignment" from Judge Couvillion (who had been assigned the case in 1994) on the date the opinion was issued in 1999.<sup>201</sup> Any other assignments to Judge Dawson apparently occurred informally.<sup>202</sup>

Interestingly, in *Freytag*, which was also a Rule 183 case and also had a voluminous record,<sup>203</sup> the Supreme Court noted that:

Special Trial Judge Powell filed his proposed findings and opinion with the Tax Court on October 21, 1987; that on that day the Chief

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197. Clarifying Statements, *supra* note 163 (statement of Judge Dawson) (footnote omitted).

198. For example, the Tax Court Docket Inquiry for docket number 16421-90 (Claude M. and Mary B. Ballard) reflects assignment of the case to STJ Couvillion on January 7, 1994, and the next assignment as the December 15, 1999 reassignment to Judge Dawson. Docket, *Ballard v. Comm'r*, 78 T.C.M. (CCH) 951 (1999) (No. 16421-90) [hereinafter *Ballard* Tax Court Docket Inquiry]. In *Ballard*, the Supreme Court noted, "The post-trial proceedings in the case are not fully memorialized in either the Tax Court's docket records or its published orders, but certain salient events can be traced." *Ballard v. Comm'r*, 544 U.S. 40, 49 (2005).

199. See Clarifying Statements, *supra* note 163 (statement of Judge Dawson).

200. See *id.* at n.1 (statement of Judge Dawson); see also *supra* note 192 (quoting order's statement that "these cases were referred to Judge Dawson on September 2, 1998, for review and, if approved, for adoption").

201. See, e.g., *Ballard* Tax Court Docket Inquiry, *supra* note 198.

202. In *Ballard*, the Supreme Court noted, "Had Judge Dawson turned back the report after first receiving it, an order recommending the case to Judge Couvillion 'with instructions,' Rule 183(c), should have memorialized that action." *Ballard*, 544 U.S. at 54 n.10. It appears from the subsequent statement of Judge Dawson that he did "turn back the report after first receiving it," without that action being reflected in the record. *Id.*

203. *Freytag v. Comm'r*, 501 U.S. 868, 871 n.1 (1991). *Freytag* involved "approximately \$1.5 billion in losses allegedly realized in a tax shelter scheme." *Id.* at 871. *Freytag* is discussed in more detail at text accompanying notes 82-94, *supra*.

Judge issued an order reassigning the litigation to himself for disposition; and that on that same day the Chief Judge adopted the opinion of Judge Powell. Indeed, the opinion, including its appendix, covers 44 pages in the Tax Court Reports.<sup>204</sup>

Accordingly, in *Freytag*, as in *Ballard*, the case was reassigned to the reviewing judge on the same day the Tax Court's opinion, adopting the STJ's report, was issued. In *Freytag*, the Supreme Court noted, "At oral argument . . . counsel observed that Judge Powell 'sometime in the preceding 4 months had filed a report with the Chief Judge of the tax court.'" <sup>205</sup> However, a docket inquiry on the Tax Court's website for the *Freytag* case reflects assignment to STJ Powell on November 5, 1986 and an order reassigning the case to Judge Sterrett on October 21, 1987, the day the Tax Court's opinion was issued.<sup>206</sup> It does not contain any intervening notation of the filing of a report or a previous assignment to Judge Sterrett.<sup>207</sup>

The events in *Freytag* suggest that sometime in the four months after the final briefs were filed, STJ Powell submitted to then-Chief Judge Sterrett a report, the submission of which is not reflected in the official record. That report might have been assigned by the Chief Judge to another judge to review or might have been assigned by the Chief Judge to himself from the first submission of the report; the record is silent as to which judge originally received the report.

The events surrounding the case reassignments in both *Ballard* and *Freytag*—cases decided approximately twelve years apart in the Tax Court<sup>208</sup>—reveal that some of the assignments of judges occurred outside the official record. Moreover, they are not the only cases in which this occurred. Another Rule 183 case, *Erhard v. Commissioner*,<sup>209</sup> involved an argument that the reviewing judge may have improperly "rubber stamped" the STJ's report, rather than reviewing it.<sup>210</sup> The docket inquiry system for *Erhard* reflects assignment of the case to STJ Gussis on January 19, 1988

204. *Id.* at 872 n.2 (citations omitted).

205. *Id.* The Court resolved the argument that the STJ actually decided the case, contrary to the statutory requirement that a regular judge do so, by stating, "We are not inclined to assume 'rubber stamp' activity on the part of the Chief Judge." *Id.*

206. See Docket Inquiry, *Freytag v. Comm'r*, 89 T.C. 849 (1987) (No. 4934-82), *aff'd*, 501 U.S. 868, available at <http://www.ustaxcourt.gov/Docket.htm>.

207. See *id.* The immediately preceding docket entry is from four months earlier, on June 22, 1987, and refers to "STIPULATION re: reassignment to S.T. Judge Powell. (file per judge)." *Id.*

208. *Freytag*, 89 T.C. 849 (1987); *Inv. Research Assoc. v. Comm'r*, 78 T.C.M. (CCH) 951 (1999).

209. 46 F.3d 1470 (9th Cir. 1995), *cert. denied*, 516 U.S. 930 (1995).

210. *Freytag*, 501 U.S. at 872 n.2; *Erhard*, 46 F.3d at 1476.

and an “ORDER that case is reassigned to Judge Scott” on July 1, 1991, the same day the Tax Court’s memorandum opinion in that case was issued.<sup>211</sup> Once again, there is no record in the docket inquiry system of an intervening report or assignment.

A check of a number of other pre-*Ballard* opinions in cases tried under Rule 183 reveals similar reassignment to the reviewing judge on the date the opinion was entered.<sup>212</sup> Apparently the submission of STJ’s report to the Chief Judge and assignment of the case to a reviewing judge at that time was not routinely memorialized in the record of the case.<sup>213</sup> Yet, any practice in this regard was not published in the Tax Court’s rules.

### 3. 900 Cases, 117 Reports

The events in the *Ballard* litigation raised the question of how many other Rule 183 cases, decided since the rule was changed in 1983 to eliminate transparency, as discussed below,<sup>214</sup> involved changes between the original report of the STJ who presided over the trial and the Tax Court opinion that “adopted” it. The Oversight Subcommittee of the House Ways and Means Committee<sup>215</sup> and the *Chicago Tribune* requested copies of the original reports in other cases tried under Rule 183.<sup>216</sup> The *Tribune* reported that out of more than 900 cases in which a STJ had issued a report adopted by the Tax Court, only 117 original reports could be located.<sup>217</sup>

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211. See Docket Inquiry, *Erhard v. Comm’r*, 62 T.C.M. (CCH) 1 (1991) (No. 39473-85), *aff’d* 46 F.3d 1470 (9th Cir. 1995).

212. See, e.g., Docket Inquiry, *Hylar v. Comm’r*, 89 T.C.M. (CCH) 766 (2005) (No. 10839-04); Docket Inquiry, *Hitchen v. Comm’r*, 88 T.C.M. (CCH) 471 (2004) (No. 1827-95); *Bernal v. Comm’r*, 120 T.C. 102 (2003) (No. 930-02); Docket Inquiry, *Armstrong v. Comm’r*, 114 T.C. 94 (2000) (No. 7267-98); Docket Inquiry, *Yuen v. Comm’r*, 112 T.C. 123 (1999) (No. 16025-98). *Rosenbaum v. Comm’r*, 45 T.C.M. (CCH) 825 (1983), *rev’d sub. nom. Stone v. Comm’r*, 865 F.2d 342 (D.C. Cir. 1989), discussed *infra* in text accompanying notes 245–49, was not found in the Tax Court’s docket inquiry system, probably because of the age of the case.

213. This practice changed following *Ballard*. For example, the docket inquiry for *Butner v. Commissioner*, 93 T.C.M. (CCH) 1290 (2007) (No. 21334-03), reflects “RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW, S.T. Judge” on October 21, 2005; a January 23, 2006 “ORDER that case is reassigned to Judge Chiechi”; and entry of decision on May 31, 2007.

214. See *infra* text accompanying notes 253–56.

215. See Tandon & Miller, *supra* note 135, at 395–96.

216. Possley, *Tax Court Case Stirs Multiple Questions*, *supra* note 6.

217. See Possley, *Tax Court Findings Secretly Changed*, *supra* note 6; see also Sheryl Stratton, *Tax Court Chief Judge Speaks Out on Ballard Procedure*, 108 TAX NOTES 1510, 1512 (2005) [hereinafter Stratton, *Chief Judge Speaks Out*]. Out of the 117 disclosed STJ reports, five, including the one in *Ballard*, reflected differences between the original findings and the Tax Court’s opinion. See Possley, *Tax Court Findings Secretly Changed*, *supra* note 6; Sheryl Stratton, *In Ballard’s Wake, Tax*

*Tax Notes* reported that the reason so many of the original factfinding documents in these cases could not be located was that the Tax Court treated them as the private papers of the STJs.<sup>218</sup> “After the rule change in 1983, no one at the Tax Court, including the STJs, considered the initial draft something that the public would see, according to Judge Gerber. Each judge was permitted to choose his or her own retention policies . . . .”<sup>219</sup>

Thus, because the pre-*Ballard* version of Rule 183 omitted the provisions that had required STJ reports to be served on the parties and included in the record, as discussed below,<sup>220</sup> but did not address record-keeping procedures, the Tax Court established an unpublished internal guideline. The Tax Court’s chosen policy was one that did not provide for systematic preservation of the original reports, and no outside oversight was exercised over that decision.

#### 4. Other Transparency Issues

The issues revealed in the *Ballard* litigation were not the first to reflect a lack of transparency by the Tax Court in areas in which courts generally have transparent procedures. Historically, for example, when the Tax Court reviewed opinions in court conference, the judges’ votes on those opinions were not disclosed.<sup>221</sup> The Tax Court’s practice at one time was such that even the identity of the judges who had participated in conference review of a particular case was not always apparent, as a 1954 Court of Appeals opinion points out:

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*Court Releases Initial Reports*, 108 TAX NOTES 1230, 1232 (2005) [hereinafter Stratton, *Ballard’s Wake*].

Then-Chief Judge Gerber reportedly explained:

A thorough search was made, including inquiries of retired judicial officers, and all computers were searched for electronic copies . . . . Most of the 117 are relatively contemporaneous, in that many judges and STJs tended to discard their deliberative materials after the decisions in those cases become final . . . . Judge Dawson, who was one of the principal reviewing and adopting judges, maintained all of those documents since May 2001, when the issue of the status of the STJs’ reports became prominent . . . .

Stratton, *Chief Judge Speaks Out*, *supra*, at 1512.

218. Stratton, *Ballard’s Wake*, *supra* note 217, at 1232.

219. *Id.*

220. See *infra* text accompanying notes 253–56.

221. Harold Dubroff & Dan S. Grossman, *The United States Tax Court: An Historical Analysis, Part VI: Trial and Post-Trial Procedure*, 42 ALB. L. REV. 191, 242 (1978), reprinted in DUBROFF, *supra* note 21, at 358 (“Although the court has always indicated in its published reports whether a decision has been subject to conference review, full publication of the votes of the members has not been required.”) (footnotes omitted).

[I]n this case at least fifteen of the sixteen judges must have participated since seven of them dissented from the decision which the court entered. The record discloses the names of twelve of these judges but neither we nor the parties know from the record how many others participated or who they were.<sup>222</sup>

The Court of Appeals further explained that judicial norms require disclosure of the names of the judges who participated in a particular decision. “Only thus can the parties know whether a quorum of qualified judges has decided their controversy.”<sup>223</sup>

Nonetheless, despite periodic study of the issue and consideration of proposals for including in the record the names or numbers of judges participating or not participating in the decision, that information remained confidential for decades.<sup>224</sup> In 1955, the recommendation of a special committee that those judges who did not participate in the court’s discussion and did not vote on the case be identified was not approved.<sup>225</sup> One of the reasons was that “objections to exposing the internal operations were raised, and notwithstanding the interest of the bar and others in the views of the judges on questions before the court, it was believed that practice by the court should not be affected by such interest or speculation.”<sup>226</sup> The issue was reconsidered in 1969, when the Tax Court statutorily became an Article I court but, even then, the Tax Court did not change its practice.<sup>227</sup>

Finally, in 1984, then-Chief Judge Dawson announced that this information would be published. “The reasons for the change were that the ‘publication of such information is a traditional function of the judicial process’ and that the vote in conference is an official act of which the public is entitled to be informed.”<sup>228</sup> Thus, the change was made fifteen years after the Tax Court officially became a court.

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222. *Stern v. Comm’r*, 215 F.2d 701, 706–07 (3d Cir. 1954); see also Dubroff & Grossman, *supra* note 221, at 243, *reprinted in* DUBROFF, *supra* note 21, at 359 (discussing this issue and the *Stern* case).

223. *Stern*, 215 F.2d at 706.

224. Dubroff & Grossman, *supra* note 221, at 242–43, *reprinted in* DUBROFF, *supra* note 21, at 358–60.

225. *Id.* at 243–44, *reprinted in* DUBROFF, *supra* note 21, at 359–60.

226. *Id.* at 244, *reprinted in* DUBROFF, *supra* note 21, at 360.

227. *Id.*

228. Harold Dubroff & Charles M. Greene, *Recent Developments in the Business and Procedures of the United States Tax Court, Part Five: Court Conferences*, 52 ALB. L. REV. 147, 148 n.10 (1987) (citing 2A LAURENCE F. CASEY, FEDERAL TAX PRACTICE § 8.37 (Supp. 1988)).

A more recent example is the Tax Court's former practice of keeping from the public both the opinions and the files in "small tax cases"<sup>229</sup> (S cases), even though the Tax Court's opinions and evidence, with limited exceptions for trade secrets and the like, are required by statute to be available to the public.<sup>230</sup> S cases are decided, generally by STJs, under a more informal procedure than the court's regular cases.<sup>231</sup> Cases eligible for the procedure are generally those with no more than a certain amount of money in controversy.<sup>232</sup>

*Tax Notes* reported, in part, that practitioners "point out that the IRS is provided the summary opinions but the general public is not, and that that gives the IRS an undue litigation advantage. The IRS is able to assess the Tax Court's reaction to certain issues and arguments based on information unavailable to the taxpayer."<sup>233</sup> Because decisions in S cases are not appealable, appellate courts can exercise no oversight over the S case process. To its credit, the Tax Court did eventually make the S case opinions and files available to the public, apparently in response to criticism of its nondisclosure practice.<sup>234</sup>

### B. Rule-Making Procedures

The Tax Court is empowered by statute to promulgate its own rules of practice and procedure. Internal Revenue Code section 7453 provides, in relevant part: "Except in the case of proceedings conducted under section 7436(c) or 7463, the proceedings of the Tax Court and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Tax Court may prescribe."<sup>235</sup> Section

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229. See Leandra Lederman, *Tax Court S Cases: Does the 'S' Stand for Secret?*, 79 TAX NOTES 257 (1998).

230. I.R.C. § 7461 (LexisNexis 2007).

231. See *id.* §§ 7443A(b), 7463; TAX CT. R. PRAC. & P. 170.

232. The dollar cap was increased from \$10,000 to \$50,000 in 1998. See Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3103, 112 Stat. 685, 731 (1998). Currently, about half of the Tax Court's docket consists of S cases. See *supra* note 132.

233. David Lupi-Sher, *Small Tax Court Cases—Has Their Time Come?*, 83 TAX NOTES 614, 617 (1999).

234. See *id.* ("S-case files (as distinguished from just the opinions) are open for public inspection and have been for about a year . . ."). Currently, Tax Court regular and memorandum opinions from September 25, 1995, are available on the Tax Court's website. Summary opinions are available beginning January 1, 2001. See United States Tax Court Opinions Search, <http://www.ustaxcourt.gov/UstcInOp/asp/HistoricOptions.asp> (last visited Apr. 10, 2008).

235. I.R.C. § 7453. Much of the language regarding the Tax Court's authority to make its own procedural rules can be traced back to the original 1924 statute that authorized the Board of Tax Appeals, predecessor of the Tax Court. See Dubroff, *supra* note 51, at 95, reprinted in DUBROFF, *supra* note 21, at 89 ("[T]he statute . . . stated that 'proceedings of the Board and its divisions shall be

7463(a) provides that for small tax cases, “[n]otwithstanding the provisions of section 7453, such proceedings shall be conducted in accordance with such rules of evidence, practice, and procedure as the Tax Court may prescribe.”<sup>236</sup> Thus, the Tax Court has the statutory authority to prescribe its own procedural rules for both regular and small tax cases. From the first days of the Board of Tax Appeals, the procedural rules generally conformed to those applicable in formal judicial proceedings.<sup>237</sup>

### *1. The Pre-1984 Transparent Procedure for Resolving Large Cases Tried by Special Trial Judges*

As indicated above,<sup>238</sup> tax deficiency cases involving large dollar amounts are cases that STJs are authorized to hear but not decide.<sup>239</sup> Prior to 1983, Tax Court Rule 182 set forth procedures applicable to large cases assigned to STJs.<sup>240</sup> That Rule, which was modeled after a Court of Claims rule,<sup>241</sup> required the Special Trial Judge to “file his report, including findings of fact and opinion.”<sup>242</sup> The report was then served on the parties, each of whom had an opportunity to file “a brief setting forth any exceptions of law or of fact to that report.”<sup>243</sup>

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conducted in accordance with such rules of evidence and procedure as the Board may prescribe.” (quoting Revenue Act of 1924, Pub. L. No. 68-176, ch. 234, § 900(h), 43 Stat. 253, 337 (1924)). One of the first acts of the Board of Tax Appeals was to write rules of practice and procedure so that taxpayers would know how to proceed with appeals. *Id.* at 94, reprinted in DUBROFF, *supra* note 21, at 88–89. Although the statute also provided that the Board prescribe its own rules of evidence, the Board chose instead “to adopt judicial rules of evidence.” DUBROFF, *supra* note 21, at 95.

236. I.R.C. § 7463. Section 7436(c) provides, in part, with respect to employment tax cases involving less than \$50,000 in dispute for each calendar quarter, that “[a]t the option of the petitioner, concurred in by the Tax Court or a division thereof before the hearing of the case, proceedings under this section may (notwithstanding the provisions of section 7453) be conducted subject to the rules of evidence, practice, and procedure applicable under section 7463.” § 7436(c)(1).

237. Dubroff, *supra* note 51, at 95, reprinted in DUBROFF, *supra* note 21, at 89–90.

238. See *supra* note 140 and accompanying text.

239. STJs generally do not have authority to make the court’s decision in cases involving amounts in excess of \$50,000. See I.R.C. § 7443A(b), (c); see also *supra* note 140.

240. See TAX CT. R. PRAC. & P. 182 (1979) (redesignated 1983), reprinted in 71 T.C. 1214 (1979).

241. See 60 T.C. 1150 (1973) (“This rule is intended to make the use of commissioners more effective, and to provide procedures more comparable to those which obtain in the Court of Claims.”). This is probably not a coincidence. “In authorizing the use of commissioners in the Tax Court, Congress evidently had in mind the similar practice of the Court of Claims, since the same travel and subsistence allowances were provided for.” Edward N. Polisher, *Tax Court Commissioners*, 28 TAXES 413, 413–14 (1950).

242. TAX CT. R. PRAC. & P. 182 (1979) (redesignated 1983), reprinted in 71 T.C. 1214 (1979).

243. *Id.* The rule provided, in relevant part:

(b) *Special Trial Judge’s Report*: After all the briefs have been filed by all the parties or the time for doing so has expired, the Special Trial Judge shall file his report, including his findings of fact and opinion. A copy of the report shall forthwith be served on each party.



Under this version of the rule, which made apparent to the parties and the Court of Appeals any changes between the report served on the parties and the opinion of the Tax Court, there rarely were any such changes.<sup>244</sup> The notable exception is *Rosenbaum v. Commissioner*,<sup>245</sup> a 1983 Tax Court case involving large deficiencies and additions to tax for fraud. In that case, both the taxpayer and the IRS filed exceptions to the report.<sup>246</sup> The reviewing judge, who did not see the witnesses,<sup>247</sup> agreed with the IRS's objection to the STJ's finding that the taxpayers, Stone and Rosenbaum, had no fraud liability.<sup>248</sup> The Tax Court opinion states, in part: "The record is replete with evidence of fraud. A merely cursory review of the record reveals no less than nine strong indicia of fraud, which apply to either Stone, or Rosenbaum, or both."<sup>249</sup>

*Rosenbaum* was reversed on appeal.<sup>250</sup> The Court of Appeals for the D.C. Circuit explained:

The Tax Court called no witnesses but reviewed the exhibits and 6000 pages of testimony accumulated by the Trial Judge. Declining to credit the testimony of Stone and Rosenbaum, it rejected the Trial Judge's report . . . .

In the face of these divergent fact findings, the scope of the Tax Court's review of the Trial Judge is critical. . . . [W]e are persuaded that the language of the Tax Court Rule applicable to this case . . . sought to establish the relatively high level of deference that the

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(c) *Exceptions*: Within 45 days after service of the Special Trial Judge's report, a party may file with the Court a brief setting forth any exceptions of law or of fact to that report. Within 30 days of service upon him of such brief, any other party may file a brief in response thereto.

*Id.*

244. "From 1976 to 1983, for example, there were only *six* cases, out of approximately 680 decisions, in which the Tax Court did not adopt the opinion of the STJ, and only *one* case in which the Tax Court 'reversed' the STJ." Brief for Respondent at 17–18, *Ballard v. Comm'r*, 544 U.S. 40 (2005) (No. 03-184), reprinted in *Justice Files Supreme Court Brief in Kanter, Ballard Cases*, TAX NOTES TODAY, Nov. 30, 2004, available at 2004 TNT 230-14 (LEXIS). "In 14 (out of approximately 680) other cases, the Tax Court adopted the opinion of the STJ with modifications that were, in most instances, described as 'minor.'" *Id.* at 18 n.4.

*Rosenbaum v. Commissioner*, 45 T.C.M. (CCH) 825 (1983), *rev'd sub nom. Stone v. Comm'r*, 865 F.2d 342 (D.C. Cir. 1989), which was decided by the Tax Court in 1983, is a case that could be described as involving a "reversal" of the STJ. See *infra* text accompanying notes 245–49.

245. 45 T.C.M. (CCH) 825.

246. See *id.* at 827.

247. See *id.*

248. *Id.* at 875.

249. *Id.*

250. See *Stone v. Comm'r*, 865 F.2d 342 (D.C. Cir. 1989).

phrase “clearly erroneous” entails. By contrast, the Tax Court described its review of the Trial Judge’s report in terms that suggest it saw the standard of review as falling somewhere between de novo review and a mild presumption in favor of the correctness of the Trial Judge’s decision.<sup>251</sup>

The Court of Appeals found “the Tax Court’s rejection of the Trial Judge’s findings to have been clearly erroneous in light of the deference that the Tax Court owed the Trial Judge. Accordingly [it] *reverse[d] and remand[ed] for computation of tax in accordance with the findings of the Trial Judge.*”<sup>252</sup> Thus, on appeal, the findings and decision of the trier of fact were sustained, despite the different view of the reviewing judge, a regular judge of the Tax Court. This contrasts with the initial result in the *Ballard* litigation—in which the Courts of Appeals did not know the STJ’s initial findings (or even know that those findings were later revised)—and in which all three Courts of Appeals affirmed the Tax Court’s 1999 decision.

## 2. *Why Was a Nontransparent Procedure Adopted?*

In 1983, the Tax Court adopted amendments to Rule 182 (which became Rule 183). The revised rule read, in part, as follows:

(b) *Special Trial Judge’s Report:* After all the briefs have been filed by all the parties or the time for doing so has expired, the Special Trial Judge shall submit his report, including the findings of fact and opinion, to the Chief Judge, and the Chief Judge will assign the case to a Division of the Court.

(c) *Action on the Report:* The Division to which the case is assigned may adopt the Special Trial Judge’s report or may modify it or may reject it in whole or in part, or may direct the filing of additional briefs or may receive further evidence or may direct oral argument, or may recommit the report with instructions. Due regard shall be given to the circumstance that the Special Trial Judge had the opportunity to evaluate the credibility of the witnesses, and the finding of fact recommended by the Special Trial Judge shall be presumed to be correct.<sup>253</sup>

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251. *Id.* at 344.

252. *Id.* (emphasis added).

253. TAX CT. R. PRAC. & P. 183 (1983), *reprinted in* 81 T.C. 1069 (1983).

The Tax Court did not fully explain the reason for the amendment. The explanatory note merely stated, in part, without elaboration, “The prior provisions for service of the Special Trial Judge’s report on each party and for the filing of exceptions to that report have been deleted.”<sup>254</sup> The note does not mention an additional, subtle but important, change in the rule: the word “file” with respect to the STJ’s action on the report was changed to “submit.”<sup>255</sup> The change apparently had the effect of taking the report out of the record on appeal by removing it from the ambit of Federal Rule of Appellate Procedure 10.<sup>256</sup>

The Tax Court also did not solicit comments from the public generally on that or other amendments to its rules made at that time,<sup>257</sup> although “[c]omments were solicited from the private and public tax bar concerning the Tax Court’s proposed changes to Rule 183.”<sup>258</sup> In addition, as the Supreme Court pointed out in *Ballard*,<sup>259</sup> the actual changes in Tax Court practice that followed the amendments to Rule 183 were not apparent from the amendments themselves or the accompanying explanatory note.

In a 1987 article, Professor Harold Dubroff and Charles Greene explained that the Tax Court first saw an opportunity to gain expediency by eliminating the opportunity of the parties to file objections to STJ reports in cases involving \$2,500 or less that were not decided under the more informal S case procedure (although they were eligible for that procedure):

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254. TAX CT. R. PRAC. & P. 183 note (1983), reprinted in 81 T.C. 1070 (1983).

255. See Leandra Lederman, *Transparency and Obfuscation in Tax Court Procedure*, 102 TAX NOTES 1539, 1540 (2004). Compare TAX CT. R. PRAC. & P. 183(b) (1983) (stating that “the Special Trial Judge shall submit a report . . . to the Chief Judge”) with TAX CT. R. PRAC. & P. 182(b) (1979) (stating that “the Special Trial Judge shall file his report”).

256. See Lederman, *supra* note 255, at 1540. In his dissent in *Ballard*, then-Chief Justice Rehnquist, who argued that “[t]he Tax Court’s compliance with its own Rules is a matter on which we should defer to the interpretation of that court,” *Ballard v. Comm’r*, 544 U.S. 40, 68 (2005) (Rehnquist, C.J., dissenting), also noted this change. *Id.* at 69 & n.2 (Rehnquist, C.J., dissenting).

When Rule 183 was amended in 2005 in response to *Ballard*, the word “submit” was changed back to “file”; Rule 183(b) now reads, “After all the briefs have been filed by all the parties or the time for doing so has expired, the Special Trial Judge shall file recommended findings of fact and conclusions of law and a copy of the recommended findings of fact and conclusions of law shall be served in accordance with Rule 21.” TAX CT. R. PRAC. & P. 183(b).

257. See *infra* text accompanying notes 277–79 (describing change to that effect that took place in 2005).

258. Stratton, *Chief Judge Speaks Out*, *supra* note 217, at 1511 (comments attributed to then-Chief Judge Gerber).

259. *Ballard*, 544 U.S. at 57 (“Nowhere in the Tax Court’s Rules is this joint enterprise described.”); *id.* at 57 n.12 (“Nor does any other Tax Court publication, such as an interpretive guide or policy statement, suggest that the 1983 amendments to Rule 183 altered the internal process by which the Tax Court judge reviews the special trial judge’s findings.”).

[T]he court [thereby] eliminated the unnecessary restraints on judicial time and attention that could arise if one or both parties objected to the report of a special trial judge in a case involving a small amount of tax. Moreover, by eliminating the time-consuming procedures in cases not exceeding the \$2,500 limitation, the authority of special trial judges was made consistent in cases involving small amounts of tax, regardless of whether the case was conducted under the small tax case procedure. In cases involving amounts exceeding the \$2,500 limitation, however, the procedures for service on the parties and for filing party exceptions continued to apply.<sup>260</sup>

The next paragraph of the article explains that, subsequently, “[i]n 1983, the procedures for service of the reports of special trial judges were completely eliminated. Moreover, the ability of parties to file briefs objecting to the report of a special trial judge was also eliminated unless the court otherwise directs.”<sup>261</sup> The Dubroff and Greene article does not explain why, in 1983, the procedure for service on the parties and the filing of objections was abolished for all cases to which it would otherwise have applied (not just those involving \$2,500 or less). Perhaps this was because the note to amended Rule 183 provides no explanation of why the rule was changed.<sup>262</sup>

Certainly, elimination of the process of serving the report on the party and allowing the opportunity for exceptions may have helped expedite cases. However, the prioritization of expediency over transparency and party participation does not carry the same force in large cases as it might in small ones. In particular, the consistency justification that was applied to cases involving amounts up to \$2,500 does not, by its terms, apply to cases involving larger amounts.<sup>263</sup>

Most important, the elimination of additional briefs or Tax Court process did not need to also entail eliminating the report from the record on appeal.<sup>264</sup> In fact, removing the provision for serving the report on the

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260. Harold Dubroff & Charles M. Greene, *Recent Developments in the Business and Procedures of the United States Tax Court, Part One: The Tax Court Docket*, 52 ALB. L. REV. 33, 64 (1987).

261. *Id.* (footnote omitted).

262. *See supra* text accompanying notes 254–55.

263. The consistency rationale might even be questioned in small-dollar cases not tried under the small tax case procedure. The small tax case procedure is designed to be expeditious and relatively informal, and its use is elective. *See Geier, supra* note 66, at 986; INTERNATIONAL CONFERENCE ON COURTS WITH TAX JURISDICTION, *supra* note 75, at 304.

264. The same is true for the explanation Judge Gerber gave during his recent term as Chief Judge, which relates to expediency in trying large numbers of cases:

parties and allowing them to file exceptions, in and of itself, probably would not have kept the report out of the record on appeal. Rather, it was the subtle change of the word “file” to “submit” that accomplished this change.<sup>265</sup> This critical change was not mentioned in the note to the amendments to the rule, although it probably is not obvious on an initial reading of the rule.<sup>266</sup>

Randall Dick has suggested that the Tax Court changed its rule because of its experience with the reviewing judge’s reversal of the STJ’s factfinding in the *Rosenbaum* case.<sup>267</sup> The Tax Court’s opinion in *Rosenbaum* was issued in late February of 1983,<sup>268</sup> and the Tax Court adopted its amended rule in early September of 1983.<sup>269</sup> By bringing the Rule 183 process behind closed doors, the Tax Court eliminated public knowledge of subsequent disagreements between the STJ and the reviewing judge of the type that occurred in *Rosenbaum*. The Tax Court also limited its exposure to the possibility of reversal on that basis. Judge Cudahy, dissenting in *Estate of Kanter*, commented, “[O]f course, an appellate-style procedure such as that typical in all other areas of federal administrative adjudication would facilitate challenges, whether made by the taxpayer or by the Commissioner. The previous procedure may well have been abrogated for exactly this reason.”<sup>270</sup>

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Following an explosion in the court’s docket (from 17,000 cases in the mid-1970s to more than 80,000 cases in 1983), a large portion of the approximately 40,000 new cases filed annually were being handled by the newly expanded ranks of STJs . . . . In an attempt to streamline the handling of those cases, Rule 183 was modified to reduce the number of briefs required by the parties, and to, “in effect, treat the STJs, for purposes of review and issuance of their opinions, in the same manner as presidentially appointed judges” . . . .

Stratton, *Chief Judge Speaks Out*, *supra* note 217, at 1511 (quoting Judge Gerber).

Tax Court statistics show 58,333 cases pending in fiscal year 1983. Dubroff & Greene, *supra* note 260, at 35 tbl.1 (reproducing U.S. TAX CT. FISCAL 1987 ANN. REP.); *see also* TAX COURT 1990 REPORT, *supra* note 126, at 1. The number of cases filed and pending increased each year by about 5,000 to 10,000 cases from 1983 to 1986; there were 83,686 cases pending in 1986. *See* Dubroff & Greene, *supra* note 260, at 35 tbl.1 (reproducing U.S. TAX CT. FISCAL 1987 ANN. REP.). In 1987, the number of cases filed and number of dockets pending began to decrease. *See id.* at 34–35; TAX COURT 1990 REPORT, *supra* note 126, at 1.

265. *See supra* text accompanying notes 255–56.

266. *See id.*

267. Randall G. Dick, *Further Thoughts on Tax Court Special Trial Judge Reports*, 90 TAX NOTES 1253, 1253 (2001).

268. *See id.*

269. *See* TAX CT. R. PRAC. & P. 2(a) (1983), *reprinted in* 81 T.C. 1045 (1983).

270. *Estate of Kanter v. Comm’r*, 337 F.3d 833, 879 (7th Cir. 2003) (Cudahy, J., concurring in part and dissenting in part).

### 3. *Post-Ballard Rule Making*

In response to the Supreme Court's decision in *Ballard*, the Tax Court amended Rule 183, returning to its pre-1983 procedure under which the report of the STJ in a case decided under Rule 183 is included in the record and served on the parties, who are given an opportunity to file objections to it.<sup>271</sup> However, it remains to be seen how much the now-transparent Rule 183 procedure, which is a discretionary alternative to assignment of large-dollar cases to regular judges,<sup>272</sup> will be used. Use of Rule 183 declined during the *Ballard* controversy,<sup>273</sup> and one tax controversy scholar was quoted as commenting that "[o]ne likely effect is that the Tax Court will avoid risking a repeat of this situation by reducing, if not eliminating, assignments of regular cases to special trial judges."<sup>274</sup> *Tax Notes* also reported that Tax Court Judge Goeke stated that, with the Tax Court's current inventory comparatively low, "it is unlikely a special trial judge would be assigned to cases similar in magnitude to *Kanter* and *Ballard*."<sup>275</sup>

In *Ballard*, the Supreme Court not only held that the Tax Court's collaborative factfinding process did not comply with its own rule, it also critiqued the Tax Court's rule-making procedures, which, at the time, occurred without a public notice-and-comment process.<sup>276</sup> The Court commented, "Although the Tax Court solicits comments on proposed rule changes from the American Bar Association's Section on Taxation, the

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271. See TAX CT. R. PRAC. & P. 183. Rule 183 now provides, in part:

Within 45 days after the service of the recommended findings of fact and conclusions of law, a party may serve and file specific, written objections to the recommended findings of fact and conclusions of law. A party may respond to another party's objections within 30 days after being served with a copy thereof. The above time periods may be extended by the Special Trial Judge.

*Id.*

272. See I.R.C. § 7443A(b)(7) (LexisNexis 2007).

273. "The number of Rule 183 cases has steadily decreased, with only about six pending, including the *Ballard* group, at the time of the Supreme Court's opinion earlier this year, [Chief Judge Gerber] said." Stratton, *Chief Judge Speaks Out*, *supra* note 217, at 1512.

274. See Sheryl Stratton, *Original Tax Court Report Found No Fraud by Kanter, Ballard*, 107 TAX NOTES 1216, 1219 (2005) (reporting statement of tax professor Steve Johnson).

275. Audrey Nutt, *Judges Discuss Electronic Filing Program, Impact of Ballard Changes*, TAX NOTES TODAY, May 8, 2006, available at 2006 TNT 88-8 (LEXIS).

276. *Ballard v. Comm'r*, 544 U.S. 40, 46 n.1 (2005). The purpose of providing public notice of a new or changed rule and an opportunity for comment "is to encourage public participation in the rulemaking process." Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack Of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1728 (2007).

court apparently does not publish its proposals to, or accept comments from, the general public.”<sup>277</sup>

After *Ballard*, the Tax Court issued a press release citing the Supreme Court’s comments on its rule-making process. In the press release, the Tax Court proposed revising Rule 1, in part, as follows:

When new rules or amendments to these rules are proposed by the Court, notice of such proposals and the ability of the public to comment shall be provided to the bar and to the general public and shall be posted on the Court’s Internet Web site. If the Court determines that there is an immediate need for a particular rule or amendment to an existing rule, it may proceed without public notice and opportunity for comment, but the Court shall promptly thereafter afford such notice and opportunity for comment.<sup>278</sup>

The Tax Court adopted the amended Rule in September 2005.<sup>279</sup>

### III. MAKING THE TAX COURT MORE JUDICIAL: A TWO-PART PROPOSAL

As discussed above, the Tax Court currently is treated neither as an agency nor as a true court.<sup>280</sup> It thus lacks the accountability those institutions experience. Yet, there is no compelling reason the Tax Court should be less accountable than other governmental institutions. Treating the Tax Court as either a court or an agency would provide it with more accountability than it has now. However, given the purely judicial nature of the Tax Court, as recognized by the Supreme Court in *Freytag*<sup>281</sup> and evidenced by its statutory designation as a “court of record,”<sup>282</sup> it is hard to

277. *Ballard*, 544 U.S. at 46 n.1 (citation omitted).

278. Press Release, Tax Court, Proposed Amendments to the Rules of Practice and Procedure Announced 1–2 (TAX CT. R. PRAC. & P. 1(b)) (July 7, 2005), available at <http://www.ustaxcourt.gov/press/070705.pdf> [hereinafter Tax Court Press Release of July 7, 2005].

279. See Press Release, Tax Court, Amendments to the Rules of Practice and Procedure Adopted (Sept. 21, 2005) (adopting language cited above, as Rule 1(c)), available at <http://www.ustaxcourt.gov/press/092105.pdf>.

The Rule does not require the Tax Court to respond to comments, as agencies must. Cf. 5 U.S.C. § 553(c) (LexisNexis 2007) (“After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.”); § 553(e) (“Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.”).

280. See *supra* text accompanying notes 18–20.

281. *Freytag v. Comm’r*, 501 U.S. 868, 891 (1991) (“The Tax Court exercises judicial power to the exclusion of any other function. It is neither advocate nor rulemaker.”).

282. I.R.C. § 7441 (LexisNexis 2007).

consider the Tax Court anything but a court. It should be treated as such, for the sake of its litigants and the institution itself.

Although the Tax Court has eventually responded when a specific nontransparent procedure has been criticized, a system that requires nontransparent processes to be uncovered has an inherent and fundamental flaw. That is, although some opacity, such as the pre-1998 failure to release *S* case opinions, is obvious and can thus draw criticism that may result in change, some practices that the affected parties might object to if they knew of them may never be discovered. Even the *Ballard* litigation, which led to multiple revelations about Tax Court practices, only resulted in those disclosures because attorney Randall Dick was suspicious of the Tax Court's opinion, and he contacted judges who were willing to speak to him outside of the official proceedings. Such ad hoc oversight is insufficient to assure procedural fairness.

With small statutory changes, Congress can continue the process of including the Tax Court in the judicial fold. The changes involve (1) adding the Tax Court to the list of courts served by the AOUSC, and (2) making the Tax Court subject to the Rules Enabling Act, so its rule making is overseen by the Judicial Conference. These amendments would bring increased accountability to the Tax Court and decrease its insularity. These proposals are discussed, in turn, below.

*A. Making the Tax Court Subject to the Administrative Office of U.S. Courts*

The AOUSC works “under the supervision and direction of the Judicial Conference of the United States.”<sup>283</sup> “The Administrative Office [(AO)] conducts financial audits, program audits, reviews, assessments, and evaluations to promote effectiveness, efficiency, and economy in both AO and court operations.”<sup>284</sup>

The AO is . . . the principal support entity for the Judicial Conference of the United States, the chief administrative policymaker for the federal courts. . . . Through its twenty-two committees, the Conference performs a wide range of statutory responsibilities. It routinely surveys conditions of business in the

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283. 28 U.S.C. § 604(a) (LexisNexis 2007).

284. 2005 ANNUAL REPORT OF THE DIRECTOR, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 40 (2005), available at <http://www.uscourts.gov/library/dir rpt05/2005Annualreportslim.pdf> [hereinafter 2005 ANNUAL REPORT OF THE AOUSC].



courts, suggests uniform management procedures, supervises the director of the Administrative Office, and drafts legislation.<sup>285</sup>

Bringing the Tax Court within the ambit of the AOUSC merely requires adding the Tax Court to the list of courts in 28 U.S.C. § 610, for which the AOUSC performs its enumerated duties. That simple change would increase the accountability of the Tax Court.<sup>286</sup> It would also reduce the need for the Tax Court to duplicate initiatives or solve problems that have already been resolved for the federal courts by the AOUSC, thereby increasing the efficiency of the federal government. For example, such a change would remove the Tax Court's burden of finding federal court space in which to sit when it rides circuit; the AOUSC is well positioned to arrange such space in the courts it already serves.<sup>287</sup>

The change would also mean that the Tax Court would no longer make its budget requests directly to Congress<sup>288</sup> but instead would make them centrally, along with the federal courts currently subject to the AOUSC. That would eliminate the Tax Court's need to ask for funding from the entity that enacts the Internal Revenue Code. That procedural change would, in turn, increase the Tax Court's appearance of impartiality, and, along with the Tax Court's increased accountability, should increase public confidence in the independence of the Tax Court.

In addition to increasing the Tax court's accountability, making the Tax Court subject to the AOUSC would signal its parity with other federal courts. These effects should help foster norms of greater transparency in

285. John W. Winkle III, *Interbranch Politics: The Administrative Office of U.S. Courts as Liaison*, 24 JUST. SYS. J. 43, 45 (2003) (footnotes omitted).

286. By statute, the AOUSC is required, among other duties, to:

(2) Examine the state of the dockets of the courts; secure information as to the courts' need of assistance; prepare and transmit semiannually to the chief judges of the circuits, statistical data and reports as to the business of the courts;

(3) Submit to the annual meeting of the Judicial Conference of the United States, at least two weeks prior thereto, a report of the activities of the Administrative Office and the state of the business of the courts, together with the statistical data submitted to the chief judges of the circuits under paragraph (a)(2) of this section, and the Director's recommendations, which report, data and recommendations shall be public documents.

(4) Submit to Congress and the Attorney General copies of the report, data and recommendations required by paragraph (a)(3) of this section . . . .

28 U.S.C. § 604(a)(2)-(4). Section 604(a) provides the list of duties for the Director of the Administrative Office. However, section 602 provides, in part, that "[t]he Director may delegate any of the Director's functions, powers, duties, and authority (except the authority to promulgate rules and regulations) to such officers and employees of the judicial branch of Government as the Director may designate . . ." § 602(d).

287. See *supra* text accompanying notes 101-06.

288. See *supra* text accompanying notes 108-10.

the Tax Court, increase the respect accorded to the Tax Court, and lessen even further any lingering impression that the Tax Court is biased in favor of the government.<sup>289</sup> Moreover, the change would be real, not merely symbolic.<sup>290</sup>

Of course, there would be some cost in having the AOUSC provide services and oversight to an additional court. However, the number of Tax Court judges (nineteen judges provided for by statute, plus senior judges and STJs—currently thirty judges in all<sup>291</sup>) is small in comparison to the number of judges on the courts the AOUSC already serves.<sup>292</sup> After an initial transition period, any additional costs for the AOUSC should be more than outweighed by the benefits of avoiding the duplication or omission of important procedures.

An alternative to bringing the Tax Court under the aegis of the AOUSC would be to create a new body, such as an oversight board, to supervise the Tax Court, much as Congress did with respect to the IRS in 1998.<sup>293</sup> However, that approach would be costly and inefficient compared to using a structure that is already in place and already provides services and oversight to federal courts.

### *B. Making the Tax Court Subject to the Rules Enabling Act*

Federal courts have the power to promulgate local rules.<sup>294</sup> Under the Rules Enabling Act, “[a]ny rule prescribed by a court, other than the Supreme Court, under subsection (a) [of section 2071] shall be prescribed only after giving appropriate public notice and an opportunity for comment.”<sup>295</sup> In addition, district court and circuit court rules are subject to oversight. Section 2071(c) provides:

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289. See *supra* note 117 and accompanying text.

290. Cf. Leandra Lederman, *Taxpayer Rights in the Lurch: A Response to Professor Johnson*, 88 TAX NOTES 1041, 1041 (2000) (criticizing “taxpayer bill of rights” legislation that is more symbol than substance).

291. See United States Tax Court, Judges, *supra* note 35.

292. Judith Resnik, *History, Jurisdiction, and the Federal Courts: Changing Contexts, Selective Memories, and Limited Imagination*, 98 W. VA. L. REV. 171, 191–92 (1994) (“Counting only life tenured, authorized, non-vacant judgeships and including those judges who have taken ‘senior status,’ the federal life tenured judicial strength . . . [as of 1994] numbers over 1,100. . . . When one also includes the fourth tier (the magistrate and bankruptcy judges) within the federal courts, the federal judicial strength grows to more than 1,850.”). Cf. ADMINISTRATIVE OFFICE OF U.S. COURTS, AUTHORIZED JUDGESHIPS, available at <http://www.uscourts.gov/history/tablek.pdf> (listing for 2002, 848 authorized Article III judgeships plus 10 temporary Article III judgeships, an increase from 1994).

293. See Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 1001(a)(3), 112 Stat. 685, 689 (1998); I.R.C. § 7802 (LexisNexis 2007).

294. See 28 U.S.C. § 2071(a) (LexisNexis 2007); FED. R. CIV. P. 83(a)(1); FED. R. APP. P. 47.

295. 28 U.S.C. § 2071(b). Interestingly, an argument can be made that, for this purpose, the term

(1) A rule of a district court prescribed under subsection (a) shall remain in effect unless modified or abrogated by the judicial council of the relevant circuit.

(2) *Any other rule prescribed by a court other than the Supreme Court under subsection (a) shall remain in effect unless modified or abrogated by the Judicial Conference.*<sup>296</sup>

The Judicial Conference, among other things, is required to “review rules prescribed under section 2071 of [title 28] by the courts, other than the Supreme Court and the district courts, for consistency with Federal law.”<sup>297</sup>

“court” includes the Tax Court. Section 2071(a) reads, “The Supreme Court *and all courts established by Act of Congress* may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.” 28 U.S.C. § 2071(a) (emphasis added). Section 2071(b) does not define the term “courts” or “courts established by Act of Congress,” nor are those terms defined for the purpose of that chapter. If interpreted literally, the phrase “court[] established by Act of Congress” would include the Tax Court.

Title 28 does reflect the possibility of different courts being covered by different provisions. For example, 28 U.S.C. § 610, the definitional section for the chapter relating to the AOUSC, states:

*As used in this chapter* the word “courts” includes the courts of appeals and district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, the United States Claims Court, and the Court of International Trade.

*Id.* § 610 (emphasis added). That definition does not apply to section 2071 because section 2071 is in a different chapter than section 610 is.

The Tax Court has stated that the Rules Enabling Act does not apply to it. *See* Tax Court Press Release of July 7, 2005, *supra* note 278, at 3 (citing Judicial Improvement and Access to Justice Act, Pub. L. No. 100-702, § 405, 102 Stat. 4642, 4652 (1988) (codified in scattered sections of 28 U.S.C.)). The Judicial Improvement and Access to Justice Act amended the Rules Enabling Act by adding new versions of 28 U.S.C. §§ 2071–2074 and 2077(b), and repealing § 2076, *see* Pub. L. No. 100-702, §§ 401, 403, 102 Stat. 4642, 4648–51 (1988). The Act also stated that “[t]he amendments made by this title shall not affect the authority of the Tax Court to prescribe rules under section 7453 of the Internal Revenue Code of 1986.” Pub. L. No. 100-702, § 405, 102 Stat. 4642, 4652 (1988). Section 405 of the Judicial Improvement and Access to Justice Act does not address any other aspect of rule making, such as providing notice of proposed amendments to the rules and an opportunity for public comment, or the ability of the Judicial Conference to modify or abrogate a rule.

296. 28 U.S.C. § 2071(c) (emphasis added).

297. 28 U.S.C. § 331. The “circuit judicial councils . . . govern the affairs of the individual judicial circuits.” Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary’s Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1175 (1996).

[The] numerous, expert committees [of the Judicial Conference of the United States] develop policies ranging across a broad spectrum. . . . [One] area is the rules of practice and procedure that govern federal court litigation. Numerous Conference committees study the admiralty, appellate, bankruptcy, civil, criminal and evidentiary rules and formulate suggestions for improvements which the Supreme Court usually adopts.

Carl Tobias, *The Chief Justice and the Judicial Conference*, <http://jurist.law.pitt.edu/forumy/2005/09/chief-justice-and-judicial-conference.php> (last visited Apr. 10, 2008).

Tax Court rule making could be structured to add oversight beyond the minimal publicity now afforded by notice-and-comment rulemaking, while continuing to benefit from the court's specialized expertise. This could be accomplished by adding the Tax Court to the list of courts subject to the AOUSC, as proposed above, and amending 28 U.S.C. § 2071(a) to read: "The Supreme Court and all courts established by Act of Congress, *including the United States Tax Court*, may from time to time prescribe rules for the conduct of their business."<sup>298</sup>

Were this proposal enacted, the Tax Court's rule making would be subject to the same provisions of the Rules Enabling Act that already govern the Court of Federal Claims.<sup>299</sup> Like the Tax Court, the Court of Federal Claims is not a member of the Judicial Conference.<sup>300</sup> In addition, the statutes authorizing each of the two courts to make their own procedural rules are very similar.<sup>301</sup>

The proposed amendment would make the Tax Court's proposed rules expressly subject to 28 U.S.C. § 2071(b), which would statutorily require the Tax Court's rules to be made public, with an opportunity for public comment.<sup>302</sup> This would ensure that the Tax Court could not amend Rule 1 to remove the notice procedures. In addition, it would make the Tax Court subject to 28 U.S.C. § 2071(c)(2), which allows the Judicial Conference to modify or abrogate the rules promulgated by courts other than the

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298. The proposed additions to 28 U.S.C. § 2071(a) are in italics. In order to eliminate possible ambiguity, Code sections 7453 and 7463(a) could be amended to include the phrase "subject to the provisions of 28 U.S.C. § 2071(a)."

299. See 32B AM. JUR. 2D *Federal Courts* § 2223 (2007). 28 U.S.C. § 2071 refers to "all courts established by Act of Congress." 28 U.S.C. § 2071(a); see also *id.* § 2071(b)–(e). That includes the Court of Federal Claims. See *id.* § 610. Public Law 102-572 provides that "[r]eference in any other Federal law or any document to . . . the 'United States Claims Court' shall be deemed to refer to the 'United States Court of Federal Claims.'" Pub. L. No. 102-572 § 902(b), 106 Stat. 4506, 4516 (1992).

300. Only Article III judges may attend the Judicial Conference. See 28 U.S.C. § 331. Although the Court of Federal Claims is not a member of the Judicial Conference, under the Rules Enabling Act, the Judicial Conference is empowered to oversee its rule-making processes. See 32B AM. JUR. 2D *Federal Courts* § 2223 (2007).

301. Compare 28 U.S.C. § 2503(b), with I.R.C. § 7453 (LexisNexis 2007). Admittedly, there is some awkwardness in having the Judicial Conference oversee courts—such as the Court of Federal Claims—that are not represented there. However, the alternatives of either no oversight at all or creation of a separate, and thus costly, oversight structure pose greater problems. Ideally, all courts overseen by the Judicial Conference should belong to it; Article I status should not preclude membership. Article I judges, such as bankruptcy judges, already serve on Judicial Conference committees. See Lloyd D. George, *From Orphan to Maturity: The Development of the Bankruptcy System During L. Ralph Mechem's Tenure as Director of the Administrative Office of the United States Courts*, 44 AM. U. L. REV. 1491, 1492 (1995) ("Bankruptcy judges now participate on most Judicial Conference committees and have a voice in issues that affect them.").

302. For clarity, 28 U.S.C. § 2071(f) could be amended to read as follows (added language in italics): "No rule may be prescribed by a district court *or the United States Tax Court* other than under this section."

Supreme Court.<sup>303</sup> The Judicial Conference would accordingly be required to review the Tax Court's rules "for consistency with Federal law."<sup>304</sup> That oversight would help foster confidence in the Tax Court's rule-making procedures. Following *Ballard*, that public confidence is particularly important.

### *C. Implications of the Proposal*

Each of the proposal's two major components would be straightforward, cost-effective, and beneficial. Although these proposed statutory amendments, were they enacted, likely would not occasion major changes in the day-to-day functioning of the Tax Court, they should help foster evolution in the court. Making the Tax Court subject to the same institutions that govern other courts would signal that the Tax Court is not an outlier that may depart from judicial norms. This would indicate that Congress expects the Tax Court to act like other courts and that its behavior is being monitored by institutions very familiar with such norms.

One important aspect of this proposal is that it does not require transforming the Tax Court into an Article III court. Although not inconsistent with this proposal, that is a separate and likely controversial issue,<sup>305</sup> and unnecessary to achieve the purposes of this proposal. The AOUSC already has authority with respect to certain Article I courts, including the Court of Federal Claims<sup>306</sup> and the bankruptcy courts,<sup>307</sup> which are adjuncts to the district courts.<sup>308</sup> Moreover, the AOUSC already has experience with respect to specialty courts. In addition to the Court of Federal Claims and the bankruptcy courts, the Court of International Trade is subject to the AOUSC.<sup>309</sup>

Similarly, there is no reason that the Rules Enabling Act cannot apply to specialty courts or Article I courts that make their own procedural rules.

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303. Professor Sisk has described the Judicial Conference's power to modify or abrogate a Circuit Court's rule as "little known, and seldom invoked." Gregory C. Sisk, *The Balkanization of Appellate Justice: The Proliferation of Local Rules in the Federal Circuits*, 68 U. COLO. L. REV. 1, 51 (1997). However, providing the Judicial Conference with the power to modify or abrogate Tax Court rules would provide new oversight and accountability for the Tax Court.

304. See 28 U.S.C. § 331.

305. See *supra* text accompanying notes 59–64.

306. See 28 U.S.C. § 610; *supra* note 14 and accompanying text.

307. See 28 U.S.C. § 604(a)(13) (duties of director include laying "before Congress, annually, statistical tables that will accurately reflect the business transacted by the several bankruptcy courts, and all other pertinent data relating to such courts").

308. The Judicial Conference also studies the bankruptcy rules to recommend improvements. Tobias, *supra* note 297.

309. See 28 U.S.C. §§ 604, 610. It is also a member of the Judicial Conference. See *id.* § 331.

As discussed above, the Rules Enabling Act already applies to the Court of Federal Claims, a specialty Article I court that has a rule-making statute closely resembling the Tax Court's rule-making statute.<sup>310</sup> The proposal also would not require the statutes governing the Tax Court to be moved from Title 26 to Title 28, although that, too, would not be antithetical to it.

Another important aspect of this proposal is that the combined changes should have a greater effect on the Tax Court's evolution than if either change were made in isolation. Making both changes would result in accountability in a range of contexts that would include, but not be limited to, the Tax Court's rule making. As the Tax Court becomes accustomed to greater transparency and oversight of its activities, it should become less insular.

These incremental changes would not preclude further change or broader reform. Congress could take additional steps to bring the Tax Court more completely within the ambit of the Judicial Code. For example, it could add the Tax Court to 28 U.S.C. § 460, which currently makes "General Provisions Applicable to Courts and Judges"<sup>311</sup> applicable to the Court of Federal Claims and the territorial courts.<sup>312</sup> Similarly, Congress could add the Tax Court to 28 U.S.C. § 363, which requires the Court of Federal Claims and certain other specialized courts to develop procedures for the filing, investigation, and resolution of complaints relating to judges' conduct.<sup>313</sup> In addition, if new oversight mechanisms, such as an inspector general,<sup>314</sup> are added for the federal courts, the Tax Court should be included in the list of courts within the purview of that mechanism.

#### CONCLUSION

The Tax Court is anomalous. Although it is solely a judicial tribunal and not an administrative agency, it is not an Article III federal court. Worse yet, it seems to have fallen into a gap between the branches of government so that it experiences the disciplining effect of neither the provisions—such as the APA and FOIA—that are applicable to agencies,

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310. See *supra* note 301 and accompanying text.

311. See 28 U.S.C. ch. 21.

312. See *id.* § 460 (rendering applicable 28 U.S.C. §§ 452–459, 462).

313. *Id.* § 363.

314. See Judicial Transparency and Ethics Enhancement Act of 2007, H.R. 785, 110th Cong. (proposing an "Inspector General" for the Judicial Branch); cf. Diane M. Hartmus, *Inspection and Oversight in the Federal Courts: Creating an Office of Inspector General*, 35 CAL. W. L. REV. 243 (1999).

nor the bodies or provisions—such as the AOUSC, the Judicial Conference, and the Rules Enabling Act—applicable to federal courts.

*Ballard v. Commissioner*<sup>315</sup> was an important case, and not just for what it showed about the collaborative process the Tax Court used to arrive at a result that differed from the findings of the STJ who presided over the trial. *Ballard* also provided a window into otherwise opaque processes of a largely self-governing body. Examination of both the events surrounding the *Ballard* case and other actions for which the Tax Court has been criticized reveals the problems that can arise when a court is isolated from the rest of the judiciary and does not experience routine oversight other than through the appellate review process. That isolation can limit the internalization of judicial norms. In addition, events that go on outside that process—or are kept out of the record—are largely invisible even to affected parties.

Because the Tax Court truly is a court, with solely judicial functions, it is most appropriate to treat it as one. As such, it should be subject to the AOUSC. That office can then “conduct program audits, reviews, assessments, and evaluations.”<sup>316</sup> with respect to the Tax Court, and help oversee and facilitate such activities as data collection and the Tax Court’s rule-making processes. The Court of Federal Claims, an Article I court that also has jurisdiction over certain federal tax cases and promulgates its own procedural rules, already is subject to the AOUSC. Adding the Tax Court to the list of courts served by that body therefore would not be a radical change in law, much less require making the Tax Court an Article III court. The Tax Court’s rule-making process should also be brought in line with that of the Court of Federal Claims, which is required by statute to have an open process, and the rules of which are subject to modification by the Judicial Conference.

These changes would have both substantive significance and symbolic value. Substantively, the Tax Court would gain support and guidance in areas in which it previously fended for itself, as well as increased accountability. Symbolically, Congress would be signaling that the Tax Court is not an outsider to the judicial system. This should help bring the Tax Court the recognition as a court that it deserves, thereby increasing its effectiveness.

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315. 544 U.S. 40 (2005).

316. 2005 ANNUAL REPORT OF THE AOUSC, *supra* note 284, at 278.