

**THE RECLUSIVE REPORT:  
THE TAX COURT DENIES DUE  
PROCESS BY NOT DISCLOSING  
SPECIAL TRIAL JUDGE REPORTS  
TO LITIGANTS**

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**Abstract**

[a.1] The Tax Court uses Special Trial Judges as adjuncts in a manner similar to the District Court's use of Magistrate Judges and the Court of Federal Claims' prior use of Trial Judges. One similarity is that when not authorized to make the court's final decision, the Special Trial Judges and Magistrate Judges compile reports of their findings of fact and conclusions of law. These reports are reviewed by a Tax Court or District Court judge. While the Magistrate Judge reports are made available to District Court litigants, since 1984 Special Trial Judge reports are deliberately withheld from the litigants in the Tax Court by virtue of a change in the Tax Court Rules of Practice and Procedure. Moreover, pursuant to a recent Eleventh Circuit decision, the Special Trial Judge and Tax Court judge can collaborate in the drafting of the report. As a result, the litigants are unable to view or object to the contents in the report, do not know whether the report has been altered, and cannot ascertain the Special Trial Judge's viewpoint, compromising the parties' right to due process. By comparing the status and authority of Special Trial Court Judges to Magistrate Judges and Court of Claims Judges, this paper argues for a change in this practice in Tax Court.

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## I. INTRODUCTION

[I.1] Some Tax Court memorandum opinions contain the following language: “the Court adopts and agrees with the opinion of the Special Trial Judge.” Such opinions often incorporate the work and report of Special Trial Judges without any further analysis.<sup>1</sup>

[I.2] Generally, Special Trial Judges act as judicial assistants to regular Tax Court judges and aid in the hearing and disposition of a variety of proceedings. At times Special Trial Judges have authorization to make the Tax Court’s final decision with respect to the proceeding. When not so authorized, a Special Trial Judge compiles a report which resembles a judicial opinion.<sup>2</sup> A regular Tax Court judge then reviews the report and has the discretion to adopt and incorporate the report as its final decision.<sup>3</sup>

[I.3] In the past, the Tax Court furnished a copy of the report to the litigants prior to entering the final decision.<sup>4</sup> The litigants then had the opportunity to object to the report. Since 1984, however, the report’s contents have remained a secret to the litigants.<sup>5</sup> The appellate courts have upheld this secretive practice. The Eleventh Circuit recently upheld this practice again, but also found that a Special Trial Judge and reviewing Tax Court judge may collaborate in determining the contents and conclusions of the Special Trial Judge’s report prior to adopting the report as Tax Court judge’s final decision.<sup>6</sup>

[I.4] By comparing the status and authority of Special Trial Judges to Magistrate Judges and Court of Federal Claims judges, this paper analyzes the rule that prevents the litigants from accessing or objecting to the report of the Special Trial Judge.

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<sup>1</sup> Stephanie F. Cahill, *Tax Judges Decide Cases They do not Hear*, 1 No. 37 A.B.A.J. E-REPORT 3 (2002). This article reports on an attorney’s review of 700 memorandum opinions dating back to 1994, which found that none of those opinions noted any change from the Special Trial Judge’s report.

<sup>2</sup> *Id.*

<sup>3</sup> [Tax Court Rule 183\(c\) \(2003\)](#).

<sup>4</sup> Cahill, *supra* note 2.

<sup>5</sup> *Id.*

<sup>6</sup> [Ballard v. Comm’r](#), 321 F.3d 1037, 1043 (11th Cir. 2003), *rehearing en banc denied*, 67 Fed. Appx. 590, – F.3d –, 2003 WL 21205050 (May 5, 2003), *petition for cert. filed*, 72 U.S.L.W. 3129 (Aug. 4, 2003).

## II. STATUS OF THE JUDGES

### A. JUDGES WHO HEAR TAX CONTROVERSIES

[II.A.1] Federal civil tax controversies may arise following the Internal Revenue Service's review, audit, and assessment of additional taxes upon a taxpayer.<sup>7</sup> The courts that hear these tax controversies are the District Court, Tax Court, and the Court of Federal Claims. Because each of these courts has different jurisdictional requirements, the taxpayer has the ability to select the forum for litigation.<sup>8</sup> The taxpayer makes her selection based on whether she chooses to pay the contested tax before commencing litigation.<sup>9</sup> If the taxpayer chooses to pay the contested tax, she may seek a refund in the District Court or Court of Federal Claims.<sup>10</sup> If the taxpayer chooses not to pay the contested tax, she may contest that asserted tax liability in the Tax Court.<sup>11</sup>

[II.A.2] Due to these varying jurisdictional requirements, the types of judges who hear tax controversies also vary. The judges of the Tax Court have a background in tax law and only hear tax proceedings.<sup>12</sup> The judges of the Court of Federal Claims hear money claims founded upon federal law or contracts with the United States, of which one-quarter are tax proceedings.<sup>13</sup> As a result, the judges of the Court of Federal Claims generally have some background in tax law.<sup>14</sup> In contrast, the judges of the District Court hear a broad range of diversity and federal question cases and likely have no background in tax law.<sup>15</sup>

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<sup>7</sup> Daniel M. Schneider, *Assessing and Predicting who Wins Federal Tax Trial Decisions*, 37 WAKE FOREST L. REV 473, 476 (2002).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Steven C. Salch, *Choice of Forum in Tax Litigation*, ALI-ABA COURSE OF STUDY MATERIALS 559, 565 (2002).

<sup>13</sup> *The History of the Court of Federal Claims*, available at <<http://www.uscfc.uscourts.gov/USCFChistory.htm>> (last modified June 4, 2001).

<sup>14</sup> Salch, *supra* note 13 at 566.

<sup>15</sup> *Id.*

[II.A.3] The Tax Court and District Court may appoint additional judges to assist them. These judges are known as “Special Trial Judges” in the Tax Court and “Magistrate Judges” in the District Court.<sup>16</sup> The predecessor to the Court of Federal Claims used “Trial Judges” who performed similar functions as Special Trial Judges and Magistrate Judges.<sup>17</sup>

## B. CONSTITUTIONAL STATUS

[II.B.1] Federal courts established by Congress pursuant to Article I of the United States Constitution are known as legislative courts or Article I courts. Only controversies involving public rights can be assigned to these courts.<sup>18</sup> Such controversies generally arise between the government and others.<sup>19</sup> Article I courts include administrative agencies, courts for claims against the United States, territorial courts, and military courts.<sup>20</sup> Some of the well-known Article I courts include the Tax Court, the Court of Federal Claims and the Bankruptcy Court.<sup>21</sup> Judges of Article I courts are known as Article I judges and hold office (during good behavior) for a limited time period.<sup>22</sup>

[II.B.2] In contrast to the Article I courts, federal courts established by Congress pursuant to Article III of the United States Constitution are known as constitutional courts or Article III courts. Controversies involving both public and private rights may be assigned to Article III courts.<sup>23</sup> Some of the well-known Article III courts include the Supreme Court, the Court of Appeals, and the District Court.<sup>24</sup> Judges of Article III courts are known as Article III judges and hold office for life tenure during good behavior without reduction of their compensation.<sup>25</sup>

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<sup>16</sup> *Id.* at 565.

<sup>17</sup> *See generally*, WILSON COWEN, ET AL., UNITED STATES COURT OF CLAIMS: A HISTORY PART TWO 95 (1978).

<sup>18</sup> *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69-70 (1982).

<sup>19</sup> *Id.* at 69.

<sup>20</sup> Ellen E. Sward, *Legislative Courts, Article III, and the Seventh Amendment*, 77 N.C.LREV 1037, 1043 (1999).

<sup>21</sup> 32 Am. Jur. 2d., Federal Courts § 6 (2003).

<sup>22</sup> *Id.*

<sup>23</sup> *See Northern Pipeline Const. Co.*, 458 U.S. at 69-70.

<sup>24</sup> 32 Am. Jur. 2d., Federal Courts § 5 (2003).

<sup>25</sup> U.S. CONST. art. III § 1.

### C. STATUS AS ADJUNCTS

[II.C.1] Adjuncts are permanent or ad hoc officials who assist judges, but are not themselves Article III judges.<sup>26</sup> As judicial workloads have continued to increase, there has been a correlative increase in the number of adjuncts and an expansion in the judicial duties and responsibilities that adjuncts perform.<sup>27</sup>

[II.C.2] Adjuncts have assisted judges throughout the history of the federal system.<sup>28</sup> For example, Article III courts have possessed the authority to use adjuncts since the first judiciary act of 1789.<sup>29</sup> In addition, the Tax Court has possessed the authority to use adjuncts since 1943.<sup>30</sup> Today, Magistrate Judges act as adjuncts to the District Courts<sup>31</sup> and Special Trial Judges act as adjuncts to the Tax Court.<sup>32</sup> The present-day Court of Federal Claims does not use adjuncts to hear tax controversies.<sup>33</sup>

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<sup>26</sup> *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1047 (7th Cir. 1984) (Posner J. dissenting).

<sup>27</sup> *Id.* at 1046.

<sup>28</sup> *Id.*

<sup>29</sup> See Hon. Leslie G. Foschio, *A History and Development of the Office of the United States Commissioner and Magistrate Judge System*, 1999 FED. CTS. L. REV 4 at I.3-I.4.

<sup>30</sup> Lawrence M. Stratton, Jr., *Special Trial Judges, the Tax Court and the Appointments Clause: Freytag v. Commissioner*, 45 Tax Law 497, 498 (1992); See Foschio, *supra* note 30 at I.3-I.4.

<sup>31</sup> 32 Am Jur. 2d, Federal Courts § 161 (2003).

<sup>32</sup> 26 U.S.C. § 7456(c) and (d) (1982), amended by Tax Reform Act of 1986, 26 U.S.C. § 7443A (1986).

<sup>33</sup> However, the Court of Federal Claims uses special masters as adjuncts for hearing certain injuries from government administered vaccinations. See, *Office of Special Masters*, available at <<http://www.usfc.uscourts.gov/USCFChistory.htm>> (May 13, 2003).

### III. AUTHORITY OF THE JUDGES: APPOINTMENT AND ASSIGNMENTS

#### A. SPECIAL TRIAL JUDGES

[III.A.1] The Tax Court’s Chief Judge possesses the authority to appoint Special Trial Judges.<sup>34</sup> The appointment lasts for an indeterminate period and Special Trial Judges may be removed from service without restriction.<sup>35</sup> Pending legislation provides that Special Trial Judges are to be appointed for eight-year terms and prescribes more stringent requirements for their removal.<sup>36</sup> This pending legislation makes the appointment of Special Trial Judges resemble that of Magistrate Judges and would change the designation of Special Trial Judges to Magistrate Judge of the Tax Court.<sup>37</sup>

[III.A.2] Special Trial Judges have nearly the same authority as Tax Court judges in presiding over proceedings.<sup>38</sup> As such, there is neither an observable nor a practical difference in how proceedings are conducted by Special Trial Judges as compared to Tax Court judges.<sup>39</sup> Pursuant to statute, basically two categories of proceedings can be assigned to Special Trial Judges – the “specific” category and the “residual” category.<sup>40</sup> The specific category describes particular proceedings that may be assigned to Special Trial Judges, including declaratory judgment proceedings, small tax proceedings and proceedings where the amount in controversy does not exceed \$50,000.<sup>41</sup> Pending legislation adds proceedings for the determination of employment status to the specific category.<sup>42</sup> In contrast, the residual category provides that any other proceeding can be assigned to Special Trial

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<sup>34</sup> *First Western Gov’t Sec. Inc. v. Comm’r*, 94 T.C. 549, 558 (1990), *aff’d*, *Samuels, Kramer & Co v. Comm’r*, 930 F.2d 975 (2<sup>nd</sup> Cir.), *cert. denied*, 502 U.S. 957 (1991).

<sup>35</sup> *Id.* (providing examples of what can cause the termination of the Special Trial Judge’s employment – lack of work or funding, etc.).

<sup>36</sup> Joint Committee on Taxation, *Description of the “Tax Court Modernization Act”* (JCX-26-03) 12, April 1, 2003.

<sup>37</sup> *Id.*

<sup>38</sup> MARSHALL W. TAYLOR ET AL., *TAX COURT PRACTICE* § 1.04(b) at 7 (8th Ed. 1993).

<sup>39</sup> *Id.*

<sup>40</sup> *See* 26 U.S.C. § 7443A(b) (2003).

<sup>41</sup> *Id.*

<sup>42</sup> Joint Committee on Taxation, *supra* note 37 at 3.

Judges.<sup>43</sup> Accordingly, Special Trial Judges may be assigned to hear residual proceedings without regard to complexity or amount in controversy.<sup>44</sup>

## **B. MAGISTRATE JUDGES**

[III.B.1] District Court judges possess the authority to appoint Magistrate Judges.<sup>45</sup> Full time Magistrate Judges are appointed for eight-year terms, while part time Magistrate Judges are appointed for four-year terms.<sup>46</sup> Magistrate Judges may hear both civil and criminal proceedings. Similar to Special Trial Judges, Magistrate Judges can be assigned to hear basically two categories of proceeding – the “permissive” and the “consent” category. The permissive category describes particular criminal and civil proceedings that may be assigned to Magistrate Judges without the consent of the litigants. As such, Magistrate Judges may be assigned to: (1) hear pretrial matters; (2) conduct hearings and evidentiary hearings; (3) serve as a special master; or (4) conduct additional duties, which are consistent with the United States Constitution or laws.<sup>47</sup>

[III.B.2] In contrast, the consent category describes an array of civil proceedings that may be assigned to Magistrate Judges. With consent of the litigants, Magistrate Judges may conduct “any and all proceedings” in a civil matter.<sup>48</sup> Strict procedures exist to ensure litigants are not coerced into giving consent.<sup>49</sup> Upon the consent of the litigants, District Court judges can refer entire civil cases to Magistrate Judges for trial.<sup>50</sup> Accordingly, Magistrate Judges may conduct consent proceedings without regard to complexity or the amount in controversy.<sup>51</sup> Nevertheless, the District Court retains the power to vacate the referral upon a motion from the litigants or upon its own motion.<sup>52</sup>

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<sup>43</sup> 26 U.S.C. § 7443A(b) (2003).

<sup>44</sup> *Freytag v. Comm’r*, 501 U.S. 868, 877 (1991).

<sup>45</sup> *U.S. v. Johnson*, 258 F.3d 361, 371 (5th Cir. 2001).

<sup>46</sup> 28 U.S.C. § 631(e) (2003).

<sup>47</sup> 28 U.S.C. § 636(b) (2003).

<sup>48</sup> 28 U.S.C. § 636(c)(1) (2003).

<sup>49</sup> ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, A CONSTITUTIONAL ANALYSIS OF MAGISTRATE AUTHORITY 42 (1993).

<sup>50</sup> 28 U.S.C. § 636(c)(1) (2003).

<sup>51</sup> S. REP. NO. 96-74 at 1472 (1979).

<sup>52</sup> 28 U.S.C. 636(c)(4) (2003).

### C. COURT OF FEDERAL CLAIMS JUDGES

[III.C.1] The Court of Federal Claims, which replaced the Court of Claims in 1982,<sup>53</sup> resembles the Tax Court in certain respects. With the Senate’s advice and consent, the President appoints the judges of the Court of Federal Claims for fifteen-year terms.<sup>54</sup> Moreover, Court of Federal Claims judges have the authority to enter final judgments.<sup>55</sup> Unlike the Tax Court, however, the Court of Federal Claims judges have the authority to grant equitable relief in some cases.<sup>56</sup>

[III.C.2] When begun in 1855, the Court of Claims judges possessed the authority to appoint and use adjuncts to gather evidence in informal proceedings.<sup>57</sup> In 1925, the Court of Claims divided into a Trial Division and an Appellate Division,<sup>58</sup> and it had the authority to appoint “Trial Judges.”<sup>59</sup> Once appointed, these Trial Judges had the expanded authority to conduct formal judicial proceedings, including tax controversies.<sup>60</sup> Similar to present-day Special Trial Judges and Magistrate Judges, these Trial Judges could conduct proceedings without regard to complexity or amount in controversy.<sup>61</sup>

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<sup>53</sup> 46 BERNARD D. REAMS, JR., CONGRESS AND THE COURTS: A LEGISLATIVE HISTORY 1985-1992, Doc. No. 134 at 47 (1994).

<sup>54</sup> 28 U.S.C. §§ 171, 172 (2003).

<sup>55</sup> REAMS, *supra* note 54 at 46.

<sup>56</sup> *Id.*

<sup>57</sup> COWEN, *supra* note 18 at 92.

<sup>58</sup> REAMS, *supra* note 54 at 46.

<sup>59</sup> COWEN, *supra* note 18 at 92-93.

<sup>60</sup> *Id.* at 93.

<sup>61</sup> *Id.* at 95.



## D. SEPARATION OF POWERS

[III.D.1] In principle, the separation of powers doctrine seeks to preserve one of this country's founding principles, that the executive, legislative, and judicial powers should be vested in separate entities.<sup>62</sup> In practice, some degree of overlap exists among all of the branches of the government, which upsets the ideal application of the separation of powers doctrine.<sup>63</sup> As a result, the doctrine performs the more limited function to ensure that one branch of the government does not intentionally encroach on or exercise the powers of another branch for the purpose of reducing the power of that other branch.<sup>64</sup> Therefore, a separation of powers issue can arise concerning the permissibility of the transfer of judicial power from the Article III judges to the Article I judges. Specifically, issues arise concerning whether Special Trial Judges and Magistrate Judges may even hear proceedings. Nevertheless, Congress' power to establish judicial or quasi-judicial bodies outside of the constraints of Article III apparently is not in doubt.<sup>65</sup>

### 1. Separation of Powers and Special Trial Judges

[III.D.1.1] The applicable case law has found that assigning of proceedings to Special Trial Judges accords with the separation of powers doctrine. For instance, *Freytag v. Commissioner* addressed whether assigning proceedings to Special Trial Judges violates the United States Constitution's Appointments Clause.<sup>66</sup> The Supreme Court noted that the Appointments Clause functions as the root of the separation of powers doctrine by permitting Congress to vest the appointment of inferior officers in the President, Courts of law, or in Heads or Departments.<sup>67</sup> In finding the Tax Court to be a court of law and Special Trial Judges to be inferior officers, the Supreme Court upheld the constitutionality of assigning proceedings to Special Trial Judges.<sup>68</sup>

[III.D.1.2] In the recent case of *Crawford v. Commissioner*, the Ninth Circuit briefly addressed the more general issue as to whether the assignment of proceedings to Special Trial Judges violates the separation of powers doctrine.<sup>69</sup> The petitioner argued that the doctrine was violated because Special

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<sup>62</sup> Sward, *supra* note 21 at 1050.

<sup>63</sup> *See id.*

<sup>64</sup> *See id.*

<sup>65</sup> *See id.*

<sup>66</sup> 501 U.S. 868, 878 (1991).

<sup>67</sup> *Id.*

<sup>68</sup> *See id.* at 890-92.

<sup>69</sup> 266 F.3d 1120, 1121 (9th Cir. 2001).

Trial Judges are inferior officers of an Article I court who perform Article III judicial functions.<sup>70</sup> Relying on *Freytag*, the Ninth Circuit rejected petitioner’s argument without any substantive analysis. It reasoned that because assigning proceedings to Special Trial Judges does not violate the Appointments Clause in *Freytag*, it follows that such assignments do not violate the separation of powers doctrine.<sup>71</sup>

## 2. Separation of Powers and Magistrate Judges

[III.D.2.1] A broad range of case law finds that assigning proceedings to Magistrate Judges accords with the separation of powers doctrine. In *United States v. Raddatz*, the Supreme Court addressed whether the assignment of a permissive category proceeding to a Magistrate Judge amounts to an unconstitutional delegation of authority under the separation of powers doctrine.<sup>72</sup> In conducting this analysis, the Supreme Court determined that the assignment of a permissive category proceeding to a Magistrate Judge is discretionary and that the ultimate decision-making authority rests with the District Court.<sup>73</sup> Since Magistrate Judges remain under the District Court’s total control and jurisdiction, the Supreme Court reasoned that the assignment of proceedings to Magistrate Judges does not violate the separation of powers doctrine.<sup>74</sup>

[III.D.2.2] The Supreme Court has not addressed the constitutionality of the assignment of consent category proceedings to Magistrate Judges.<sup>75</sup> However, nearly all of the Courts of Appeals have tackled this issue and unanimously uphold the validity of such assignments.<sup>76</sup> This conclusion relies on both *Raddatz* and the parties’ consent to the assignment.<sup>77</sup>

[III.D.2.3] An en banc panel of the Ninth Circuit conducted an extensive review of the control and consent factors in *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix Inc.*<sup>78</sup> Analyzing the

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<sup>70</sup> *Id.* at 1122.

<sup>71</sup> *Id.* at 1123.

<sup>72</sup> 447 U.S. 667, 681 (1980).

<sup>73</sup> *Id.* at 683.

<sup>74</sup> *Id.*

<sup>75</sup> *U.S. v. Johnston*, 258 F.3d 361, 367 (5th Cir. 1995).

<sup>76</sup> RICHARD H. FALLON, JR., ET AL, HART AND WECHSLER’S THE FEDERAL COURTS AND THE COURTS AND THE FEDERAL SYSTEM 405 (5th Ed. 2003).

<sup>77</sup> *See Gairola v. Com. of Va. Dept. of Gen. Services*, 753 F.2d 1281, 1284-85 (4th Cir. 1985).

<sup>78</sup> 725 F.2d 537 (9th Cir.), *cert. denied*, 469 U.S. 824 (1984).

control factor, it reversed an earlier decision and noted that the District Court retains significant control over Magistrate Judges in several respects.<sup>79</sup> For instance, the District Court controls: (1) who becomes a Magistrate Judge through the appointment process; (2) which Magistrate Judge is assigned a consent category proceedings through the assignment process; and (3) the ability to vacate the assignment of the proceeding to a magistrate upon its motion or that of a litigant.<sup>80</sup> As such, this significant control protects the judiciary from encroachment of other branches under the separation of powers doctrine.<sup>81</sup> In analyzing the consent factor, the Ninth Circuit noted that the Supreme Court has permitted the waiver of certain fundamental constitutional rights.<sup>82</sup> As a result, it determined that waiver of the constitutional right to have an Article III judge hear a civil case is consistent with other Supreme Court jurisprudence.<sup>83</sup>

#### **IV. AUTHORITY OF THE JUDGES: THE DISPOSITION OF PROCEEDINGS**

##### **A. SPECIAL TRIAL JUDGES**

[IV.A.1] In specific category proceedings, the Tax Court's Chief Judge may authorize Special Trial Judges to make the court's decision.<sup>84</sup> If not so authorized, they must compile and submit a report of the proceeding to the Chief Judge.<sup>85</sup> The report includes findings of fact and a proposal for the disposition of the proceeding.<sup>86</sup> By statute, Special Trial Judges are never authorized to make the court's decision in residual category proceedings.<sup>87</sup> Again, instead of making a decision, the Special Trial Judge compiles and submits a report to the Chief Judge.<sup>88</sup> Upon receipt of the report, the Chief Judge assigns the proceeding and forwards the report to a Tax Court judge for review.<sup>89</sup> The

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<sup>79</sup> *Id.* at 543, 547.

<sup>80</sup> *Id.* at 546.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 543.

<sup>83</sup> *Id.*

<sup>84</sup> 26 U.S.C. § 7443A(c) (2003).

<sup>85</sup> Tax Court Rule 183(b) (2003).

<sup>86</sup> *Id.*

<sup>87</sup> 26 U.S.C. § 7443A(b)(4) (2003).

<sup>88</sup> Tax Court Rule 183(b) (2003).

<sup>89</sup> *Id.*

reviewing Tax Court judge is free to adopt, reject or modify any part of the report.<sup>90</sup> The reviewing Tax Court judge may also require the filing of additional briefs, receive further evidence, direct oral argument, and recommit the report to the Special Trial Judge with instructions.<sup>91</sup> However, due regard must be given to the Special Trial Judge's credibility determinations of the witnesses, and the findings of fact in the report are presumptively correct.<sup>92</sup> In fact, the reviewing Tax Court judge cannot overturn the Special Trial Judge's report on the basis that she finds the testimony credited by the Special Trial Judge to be unbelievable.<sup>93</sup>

## **B. MAGISTRATE JUDGES**

[IV.B.1] In permissive category proceedings, a District Court judge may authorize a Magistrate Judge to make the decision for the court if the proceeding deals with certain non-dispositive pre-trial matters.<sup>94</sup> The Magistrate Judge has broad discretion in the resolution of these matters and her decision is entitled to great deference by the District Court.<sup>95</sup> The District Court will not overrule the Magistrate Judge's determination unless she clearly abused her discretion.<sup>96</sup>

[IV.B.2] Conversely, in dispositive matters Magistrate Judges do not possess the authority to enter the court's final decision absent consent of the parties.<sup>97</sup> Instead, the Magistrate Judge remains continually subject to the supervisory authority of the District Court judge, who retains the ultimate authority to make a final decision.<sup>98</sup> Similar to Special Trial Judges, Magistrate Judges must prepare a document akin to a report, which includes proposed findings of fact and recommendations for the proceeding's disposition.<sup>99</sup> The report is submitted to a District Court judge and copies are delivered

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<sup>90</sup> [Tax Court Rule 183\(c\) \(2003\)](#).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Stone v. Comm'r*, 865 F.2d 342, 347 (Fed Cir 1989).

<sup>94</sup> [28 U.S.C. 636\(b\) \(2003\)](#).

<sup>95</sup> *Pflum v. U.S.*, 212 F.R.D. 580, 582 (D. Kan. 2003).

<sup>96</sup> *Id.*

<sup>97</sup> [28 U.S.C. § 636\(b\)\(1\) \(2003\)](#).

<sup>98</sup> *U.S. v. Jones*, 581 F2d 816, 817-18 (10<sup>th</sup> Cir 1978).

<sup>99</sup> [28 U.S.C. § 636\(b\)\(1\)\(C\) \(2003\)](#).

to the litigants.<sup>100</sup> The litigants may object to the report.<sup>101</sup> Upon objection, the District Court must make a de novo determination regarding the Magistrate Judge's proposed findings and recommendations to which the objection relates.<sup>102</sup> The contested findings and recommendations have no presumptive weight.<sup>103</sup> Even when the litigants do not levy objections, the District Court judge remains under a duty to review the report and may accept, reject or modify any part of the report.<sup>104</sup> The District Court judge also may request and receive further evidence or recommit the matter to the Magistrate Judge with instructions.<sup>105</sup>

[IV.B.3] On the other hand, Magistrate Judges have the authority to enter the District Court's decision in consent category proceedings.<sup>106</sup> These decisions are final and appeals are heard by the Court of Appeals.<sup>107</sup>

### C. COURT OF FEDERAL CLAIMS JUDGES

[IV.C.1] Currently, the Court of Federal Claims judges have the authority to enter the court's final decision in trials, as well on dispositive motions.<sup>108</sup> In all proceedings tried upon the facts, Court of Federal Claims judges must state findings of fact and conclusions of law.<sup>109</sup> These decisions are final and appeals are heard by the Court of Appeals for the Federal Circuit.<sup>110</sup>

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<sup>100</sup> *Id.*

<sup>101</sup> 28 U.S.C. § 636(b)(1) (2003).

<sup>102</sup> *Branch v. Martin*, 886 F.2d. 1043, 1046 (8<sup>th</sup> Cir. 1989).

<sup>103</sup> *See Davenport v. U.S.*, 2002 WL 1310282, \*1 n.1 (D.S.C. 2002) (citing *Matthews v. Weber*, 423 U.S. 261, 270 (1976)).

<sup>104</sup> 28 U.S.C. § 636(b) (2003).

<sup>105</sup> *Id.*

<sup>106</sup> 28 U.S.C. § 636(c)(1) (2003).

<sup>107</sup> 28 U.S.C. § 636(c)(3) (2003).

<sup>108</sup> 3 LAWRENCE F. CASEY, FED. TAX PROC § 11.78 (2003).

<sup>109</sup> *Id.* at § 11.82.

<sup>110</sup> 17 Fed. Prac. & Proc. Juris. 2d § 4101 (2003).

[IV.C.2] Prior to the 1982 abolishment of the Court of Claims, lawsuits filed in that court were assigned to the Trial Judges of the Trial Division.<sup>111</sup> These Trial Judges did not possess the authority to make decisions on dispositive motions.<sup>112</sup> Similar to both Special Trial Judges and Magistrate Judges, at the conclusion of trial the Trial Judges prepared a report of findings of fact and conclusions of law.<sup>113</sup> Upon completion of the report, the court furnished the report to the litigants, who could object to the report.<sup>114</sup> If a litigant objected to the report, which was known as an “appeal,” an Appellate Division judge would review the relative findings and conclusions before entry of the final decision.<sup>115</sup> If the litigants did not object to the report, the Court of Claims could adopt that the Trial Judge’s opinion as its own.<sup>116</sup> Additionally, the Court of Claims could reject or modify the report or could refer the matter back to the Trial Judge with instructions.<sup>117</sup> However, the findings and conclusions in the report made by the Trial Judge were presumed as correct and were entitled to “much consideration and weight.”<sup>118</sup>

## **D. DUE PROCESS**

### **1. Due Process and Special Trial Judges**

[IV.D.1] Two lines of due process arguments have emerged contesting the validity of final decisions of residual category proceedings – the “rubber stamp” and the “whodunit” argument. According to the rubber stamp argument, the Special Trial Judge’s report actually becomes the Tax Court’s final decision due to the reviewing judge’s insufficient review.<sup>119</sup> This argument analogizes that the Tax

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.* However, dispositive motions could be referred to the Trial Judges for an opinion before the Appellate Division ultimately decided the matter. 3 LAWRENCE F. CASEY, FED. TAX PROC § 11.54 at 394 (1977).

<sup>113</sup> 17 Fed. Prac. & Proc. Juris. 2d § 4101 (2003).

<sup>114</sup> CASEY, *supra* note 113, § 11.58 at 408. The Clerk of the Court of Claims would forward a copy of the report to the attorney of record of each party. 17 Fed Prac & Proc Juris 2d § 4101 (2003).

<sup>115</sup> 17 Fed. Prac. & Proc. Juris. 2d § 4101 (2003).

<sup>116</sup> *Id.*

<sup>117</sup> CASEY, *supra* note 113, § 11.58 at 408.

<sup>118</sup> *Id.*

<sup>119</sup> Rubber stamp in this context has been defined as an automatic authorization of a proposal without challenge <<http://www.wordreference.com/English/definition.asp?en=rubber+stamp>> (May 13, 2003).

Court judge’s review of the report is a mere formality – an effective rubber-stamping of the report as the court’s final decision. The whodunit argument contends that the litigants’ due process rights are violated due to their inability to evaluate or to access the report before the entry of the final decision. This argument analogizes that the true contents of the report are a mystery, which makes it impossible for the litigants to determine what effect the report may have on the reviewing judge.

**a. Rubber Stamp Argument**

[IV.D.1.a.1] The courts have rejected the rubber stamp argument. Although not relevant to its granting of certiorari, the Supreme Court briefly addressed a rubber stamp inference in *Freytag*.<sup>120</sup> In *Freytag*, a Special Trial Judge was given the responsibility for hearing and reporting on one of the longest trials in Tax Court history.<sup>121</sup> Despite the lengthy trial, the entry of the Tax Court’s final decision occurred within hours after the Special Trial Judge forwarded the report to the Chief Judge.<sup>122</sup> Devoting a footnote to the rubber stamp inference, the Supreme Court found the timing of events, without more, to be insignificant.<sup>123</sup> It stated that it will not infer rubber stamp activity on the part of the Chief Judge and that petitioners have the burden of proof in establishing any negative inference from the timing of events.<sup>124</sup>

[IV.D.1.a.2] In *Erhard v. Commissioner*, the Ninth Circuit was presented with a two-part rubber stamp argument.<sup>125</sup> First, the petitioner argued that, as a general rule, Special Trial Judges are more likely to decide residual category proceedings because the litigants are neither provided access nor the opportunity to object to the Special Trial Judge’s report.<sup>126</sup> Second, the petitioner contended that the factual record suggested that the Special Trial Judge actually decided their case.<sup>127</sup> The Ninth Circuit rejected both arguments. It relied on the *Freytag* footnote for the proposition that rubber

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<sup>120</sup> 501 US 868, 875 n.3 (1991).

<sup>121</sup> Stratton, *supra* note 31 at 499.

<sup>122</sup> 501 U.S. 868, 872 n.2 (1991).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> 46 F.3d 1470, 1475-76 (9th Cir.), *cert. denied*, 156 U.S. 930 (1995).

<sup>126</sup> *Id.* at 1476.

<sup>127</sup> *Id.*

stamp activity is not to be assumed.<sup>128</sup> However, it ultimately concluded that permitting the litigants to file objections to the Special Trial Judge's report may decrease the rubber stamp potential.<sup>129</sup>

[IV.D.1.a.3] In *Erhard*, the record established that the reviewing judge entered a final decision based on an incomplete understanding of the case. The reviewing judge admitted that she relied on the Special Trial Judge's report and failed to examine every exhibit or read the entire transcript.<sup>130</sup> In addition, she made comments in a reconsideration hearing that indicated a misunderstanding of important facts concerning the case.<sup>131</sup> Nonetheless, the Ninth Circuit found the reviewing judge's actions to be reasonable given the voluminous nature of the transcript.<sup>132</sup>

**b. Whodunit Argument**

[IV.D.1.b.1] The Eleventh Circuit recently rejected the whodunit argument in *Ballard v. Commissioner*.<sup>133</sup> In *Ballard*, the report allegedly was altered prior to its incorporation in the Tax Court's final decision.<sup>134</sup> As a result, petitioner's attorney moved for reconsideration of that final decision, supported by his affidavit contending that two Tax Court judges informed him that the final decision differed from the report.<sup>135</sup> The affidavit further contended that the final decision and the report differed as to certain findings of fact concerning the credibility of witnesses and relating to fraud.<sup>136</sup> In resolving the motion for reconsideration the Tax Court issued an order, signed by the Special Trial Judge, reviewing judge and Chief Judge of the Tax Court, stating that the report as adopted in the Tax Court opinion constituted the report of the Special Trial Judge.<sup>137</sup>

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> [321 F.3d at 1043](#).

<sup>134</sup> [Id. at 1041](#).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* The facts in *Ballard* do not indicate whether the order stated that the original report of the Special Trial Judge was adopted.



[IV.D.1.b.2] The Eleventh Circuit found that petitioner’s due process rights were not violated.<sup>138</sup> It noted that the reconsideration order indicated that the reviewing judge adopted the report of the Special Trial Judge.<sup>139</sup> In addition, it determined that no due process issues apply, even when assuming that the affidavit is true and drawing all reasonable inferences in favor of the petitioner.<sup>140</sup> The court cited no supporting authority, but instead relied on its understanding of the judicial process.<sup>141</sup> For example, it noted that when a case is assigned to multiple judges, those judges may have conferences with one another and change their original positions or thoughts.<sup>142</sup> “These conferences are an essential part of the judicial process . . . when more than one judge is charged with responsibility of *deciding* the case.”<sup>143</sup>

## 2. Due Process and Magistrate Judges

[IV.D.2.1] A single due process argument emerges contesting the validity of the use of Magistrate Judges based on their role as fact-finders. The fact-finder argument contends that an official entrusted with finding facts must actually hear the evidence and testimony.<sup>144</sup> As a result, the litigants’ due process is violated by the District Court relying merely on the Magistrate Judge’s findings to resolve credibility issues.<sup>145</sup>

[IV.D.2.2] In *Raddatz*, the Supreme Court determined that permissive category proceedings may be assigned to Magistrate Judges without violating the litigants’ due process rights because a District Court judge acts as the ultimate decision-maker.<sup>146</sup> *Raddatz* never addressed whether the assignment of consent category proceedings to Magistrate Judges violates the litigants’ due process rights.<sup>147</sup> However, the Courts of Appeals have found that the litigants’ consent removes any due process

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<sup>138</sup> *Id.* at 1043.

<sup>139</sup> *Id.* at 1042.

<sup>140</sup> *Id.* at 1042-43.

<sup>141</sup> *Id.* at 1043.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Raddatz*, 447 U.S. at 695.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 680; ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, A CONSTITUTIONAL ANALYSIS OF MAGISTRATE AUTHORITY 8 (1993).

<sup>147</sup> *Collins v. Foreman*, 729 F.2d. 108, 119 (2nd Cir.), *cert. denied*, 469 U.S. 870 (1984).

concerns.<sup>148</sup> Although litigants enjoy a due process right to appear before an Article III judge, they may freely waive that right.<sup>149</sup> The Magistrate Judge has authority to enter a final judgment based on evidence and testimony that she receives and hears.<sup>150</sup> Nonetheless, the First Circuit has found that referring consent category proceedings to Magistrate Judges without the litigants' consent would be troubling from a due process standpoint.<sup>151</sup>

## V. ANALYSIS

### A. FIXING WHAT WAS NEVER BROKEN

[V.A.1] As a general proposition, the authority and responsibilities of Special Trial Judges and Magistrate Judges are similar to one another. Notably, in certain instances both Special Trial Judges and Magistrate Judges prepare reports for review before entry of the court's final decision. A similar review procedure occurs with respect to the work of Trial Judges in the former Court of Claims. Ironically, the most striking difference between Special Trial Judges and Magistrate Judges (and the former Court of Claims Trial Judges) concerns the report, as well. In proceedings before Special Trial Judges, the litigants neither receive the report nor the opportunity to object to it. The opposite is true for Magistrate Judges (and was true for Court of Claims Trial Judges). However, the rule that prevents the litigants from receiving or objecting to a Special Trial Judge's report has not always been in effect.

#### 1. The Former Rule 182

[V.A.1.1] Prior to 1984, Rule 182 of the Tax Court Rules of Practice and Procedure provided for delivery of the Special Trial Judge's report to the parties and allowed the parties to object to the report.<sup>152</sup> Upon filing an objection, the reviewing judge then would afford due regard to the Special Trial Judge's findings and evaluation of the witnesses' credibility.<sup>153</sup> The Committee Notes stated that this rule was intended to make the use of Special Trial Judges more effective and similar to Trial

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<sup>148</sup> *Goldstein v. Kelleher*, 728 F.2d 32, 35 (1<sup>st</sup> Cir.), *cert. denied*, 469 U.S. 852 (1984); *Lehman Bros. Kuhn Loeb Inc. v. Clark Oil & Ref. Corp.*, 739 F.2d 1313, 1315 (8<sup>th</sup> Cir 1984), *cert. denied*, 469 U.S. 1158 (1985).

<sup>149</sup> *Collins*, 729 F.2d. at 119.

<sup>150</sup> *Goldstein*, 728 F.2d at 35; *Lehman Bros. Kuhn Loeb Inc.*, 739 F.2d at 1315.

<sup>151</sup> *Id.*

<sup>152</sup> GERALD A. KAFKA & RITA A. CAVANAUGH, LITIGATION OF FEDERAL CIVIL TAX CONTROVERSIES 2ND C-75 (1997); *Estate of Smith v. Comm'r*, 638 F.2d 665, 669 (3rd Cir. 1981).

<sup>153</sup> *Stone*, 865 F.2d at 345.

Judges of the Court of Claims.<sup>154</sup> Even after 1984, the Tax Court has concluded that the duties and authority of Special Trial Judges are similar to those of Trial Judges of the Court of Claims.<sup>155</sup>

[V.A.1.2] The former Rule 182 created a greater similarity between Special Trial Judges and Magistrate Judges. In addressing this rule, the Third Circuit reasoned that Special Trial Judges act in a capacity not dissimilar to Magistrate Judges.<sup>156</sup> As such, the Third Circuit found that Congress had prescribed conditions when final decisions by Special Trial Judges and Magistrate Judge are to be appealed directly to the Court of Appeals.<sup>157</sup> Moreover, the Third Circuit found that in all other circumstances, a reviewing judge first reviews the work of a Special Trial Judge or Magistrate Judge before entry of the final decision.<sup>158</sup> The Tax Court, itself, also has concluded that the duties and authority of Special Trial Judges are similar to those of Magistrate Judges.<sup>159</sup>

## 2. The Current Rule 183

[V.A.2.1] Rule 183 of the updated Tax Court Rules of Practice and Procedure replaces former Rule 182 and eliminates the delivery and objection provisions.<sup>160</sup> Other than changes to the delivery and objection provisions, Rule 183 is nearly identical to the former Rule 182.<sup>161</sup> For example, the reviewing judge is still required to give weight to the Special Trial Judge's determinations and credibility assessments.<sup>162</sup> The effect of Rule 183 ensures that the reviewing judge's relationship with

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<sup>154</sup> RULES OF PRACTICE AND PROCEDURE OF THE UNITED STATES TAX COURT WITH COMMITTEE NOTES 130 (1979).

<sup>155</sup> *First Western Gov't Sec., Inc.*, 94 T.C. at 558.

<sup>156</sup> *Estate of Smith*, 638 F.2d at 669.

<sup>157</sup> *Id.* at 669-70 (emphasis added).

<sup>158</sup> *Id.* at 670.

<sup>159</sup> *First Western Gov't Sec., Inc.*, 94 T.C. at 558.

<sup>160</sup> [Tax Court Rule 183 \(2003\)](#).

<sup>161</sup> *See generally, Stone*, 865 F.2d at 345 (stating that Rule 183(c) has only minor changes to it as compared to prior Rule 182(d)).

<sup>162</sup> [Tax Court Rule 183\(c\) \(2003\)](#).

a Special Trial Judge cannot be analogized to typical appellate review.<sup>163</sup> The Committee Notes offer no explanation or rationale for the removal of the delivery and objection provisions.<sup>164</sup>

### 3. Cause and Effect

[V.A.3.1] The Second Circuit in *Samuels, Kramer & Company v. Commissioner*, explained that the changes in the Tax Court of Practice and Procedure were prompted by the modification of the Internal Revenue Code in the Tax Reform Act of 1984.<sup>165</sup> However, these changes inadequately explain the absence of the delivery and objection provisions from Rule 183.<sup>166</sup>

[V.A.3.2] Prior to those 1984 modifications, Special Trial Judges statutorily were authorized to hear and decide only specific category proceedings.<sup>167</sup> Nonetheless, as the Supreme Court has recognized, in practice Special Trial Judges often reported on large and complex cases prior to 1984.<sup>168</sup> In 1984, Special Trial Judges gained the statutory authority to hear, but not decide residual category proceedings.<sup>169</sup> In light of the historic duties and responsibilities of Special Trial Judges, the 1984 grant of authority constituted a mere technical amendment.<sup>170</sup> In 1986, Congress affirmed the technical nature of the amendment by stating: “[t]he committee wishes to *clarify* that additional proceedings may be assigned to [Special Trial Judges] so long as a Tax Court judge must enter the final decision.”<sup>171</sup> As such, the technical amendment merely incorporated a long-standing practice of the Tax Court into the statute.

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<sup>163</sup> *Freytag v. Comm’r*, 904 F.2d 1011, 1015 (5th Cir. 1990), *aff’d*, 501 U.S. 868 (1991).

<sup>164</sup> PRENTISS HALL’S GUIDE TO TAX COURT PRACTICE AND PROCEDURE ¶ 405.10 at 371 (1986).

<sup>165</sup> *Samuels, Kramer & Co.*, 930 F.2d at 981.

<sup>166</sup> *Id.* at 977.

<sup>167</sup> *First Western Gov’t Sec., Inc.*, 94 T.C. at 554.

<sup>168</sup> *Freytag*, 501 U.S. at 875.

<sup>169</sup> *See Samuels*, 930 F.2d at 981.

<sup>170</sup> *Freytag*, 501 U.S. at 875.

<sup>171</sup> *Samuels*, 930 F.2d at 982 (emphasis added).

[V.A.3.3] The issue in *Samuels* did not involve either the rubber stamp or who dunit arguments.<sup>172</sup> If those arguments had been presented, the Second Circuit likely would have analyzed other causes that more fully explain the change to Rule 182.

[V.A.3.4] In considering the timing of the rule's change, a distinct possibility exists that the rule's change resulted from the Tax Court's decision in *Rosenbaum v. Commissioner*.<sup>173</sup> *Rosenbaum* involved the misapplication of the former Rule 182 and occurred in 1983 – shortly before the 1984 removal of the delivery and objection provisions.<sup>174</sup> In *Rosenbaum*, the Commissioner of the Internal Revenue Service levied several objections to the Special Trial Judge's report.<sup>175</sup> The reviewing judge held for the Commissioner with respect to nearly all of the objections.<sup>176</sup> Although the reviewing judge relied on the findings of the Special Trial Judge's report, he stated that he drew different inferences from the report in reaching his decision.<sup>177</sup>

[V.A.3.5] *Rosenbaum* was appealed and reversed in *Stone v. Commissioner*.<sup>178</sup> In *Stone*, the Federal Circuit held that the reviewing judge did not give appropriate weight to the Special Trial Judge's report.<sup>179</sup> More specifically, *Stone* found that a clearly erroneous standard applies whenever the reviewing judge seeks to overturn the Special Trial Judge's findings of fact and credibility determinations.<sup>180</sup>

[V.A.3.6] The timing of *Rosenbaum* and the demise of former Rule 182 offer a more convincing explanation for the removal of the delivery and objection provisions than a technical amendment to the Internal Revenue Code. In theory, by reversing *Rosenbaum*, *Stone* challenged the authority of Tax Court judges. By removing the delivery and objection provisions from the Tax Court Rules of Practice and Procedure, such challenges are now foreclosed.

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<sup>172</sup> *Id.* at 979 (*Samuels* involved an Appointments Clause challenge to the authority of a Special Trial Judge).

<sup>173</sup> 45 T.C.M. (CCH) 825 (1983).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Stone*, 865 F.2d at 348.

<sup>179</sup> *See id.* at 352.

<sup>180</sup> *Id.* at 347.

## B. THE DECLINE AND FALL OF DUE PROCESS

[V.B.1] Today, the whodunit argument has been rendered ineffective, while the potential for the litigants to be affected by a whodunit-type scenario is greater than ever due to the Eleventh Circuit's recent decision in *Ballard*.<sup>181</sup> Again, *Ballard* determined that alterations to the Special Trial Judge's report behind closed doors is permissible because both the Special Trial Judge and the reviewing Tax Court judge are responsible for *deciding* the case.<sup>182</sup> This determination misses the mark, because Special Trial Judges are specifically barred from deciding residual category proceedings.<sup>183</sup>

[V.B.2] As Congress bars Special Trial Judges from deciding residual category proceedings, the report does not serve as the basis for the actual decision of the proceeding. Instead, the purpose of the report is to provide guidance to the reviewing Tax Court judge in the entry of the court's final decision.<sup>184</sup> If the reviewing Tax Court judge and Special Trial Judge are permitted to collaborate in the preparation of the report, then the report loses its ability to provide guidance to the reviewing judge. As a result of such collaboration, the report can only serve its unintended purpose of serving as the basis for the actual decision in the proceeding.

[V.B.3] This subversion concerning the report is further amplified when the collaboration results in a report that differs from the Special Trial Judge's original inferences as to the facts and credibility of the witnesses. Such a change violates the Tax Court Rules of Practice and Procedure, which require that the reviewing judge give due regard to the findings and credibility determinations of the Special Trial Judge.<sup>185</sup> The petitioner in *Ballard* contends that such changes concerning the findings and credibility determinations appeared in the alleged altered report. Yet, the Eleventh Circuit, even when accepting petitioner's argument as true and drawing all reasonable inferences therefrom, has found that such changes are permissible.

## VI. CONCLUSION

[VI.1] Since 1984, the Tax Court's use of Special Trial Judges has dramatically differed in one respect from the District Court's use of Magistrate Judges and the former Court of Claims' use of Trial Judges. This difference centers on the Tax Court's reluctance to forward the Special Trial Judge's report to the litigants and offer the litigants an opportunity to object to the report. This

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<sup>181</sup> *Ballard*, 321 F.3d at 1043.

<sup>182</sup> *Id* (emphasis added).

<sup>183</sup> 26 U.S.C. § 7443A(c) (2003).

<sup>184</sup> As a point of comparison, the Supreme Court has determined that Magistrate Judges' recommendations are only of an advisory nature. *Raddatz*, 447 U.S. at 713 n.11.

<sup>185</sup> Tax Court Rule 183(c) (2003).

difference, which arguably has been added to the Tax Court Rules of Practice and Procedure in bad faith, is both unjustifiable and unfair from both a rubber stamp and whodunit standpoint. In fact, the attorney in *Ballard* examined over 700 Tax Court Memorandum Opinions dating back to 1994 involving proceedings assigned to Special Trial Judges.<sup>186</sup> Not one of those opinions noted any change from the Special Trial Judge's report.<sup>187</sup> The attorney in *Ballard* stated that “either we have tremendously brilliant Special [Trial] Judges, or the [reports] are [being] changed with no one knowing about it.”<sup>188</sup>

[VI.2] Pending legislation intends to rename Special Trial Judges as Magistrate Judges of the Tax Court, and also provide an appointment regime similar to Magistrate Judges.<sup>189</sup> Over the last 35 years, the authority of Magistrate Judges has successfully expanded to such an extent that Magistrate Judges are characterized today as an indispensable resource to the judicial system.<sup>190</sup> The issuing of secret reports by Special Trial Judges discredits the successes attributed to the use of Magistrate Judges who also can hear tax controversies. Notably, the successes attributed to the use of Magistrate Judges have occurred within a framework of rules that are fair and open to the litigants. The increasing similarity between Special Trial Judges and Magistrate Judges, as seen in the pending legislation, should continue further by amending the Tax Court Rules of Practice and Procedure through the re-application of former Rule 182.

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<sup>186</sup> Cahill, *supra* note 2.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> Joint Committee on Taxation, *supra*, note 37 at 12.

<sup>190</sup> See Foschio, *supra* note 30 at III.9.