No. 03-1034

IN THE

Supreme Court of the United States

ESTATE OF BURTON W. KANTER, *et al.*,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICI CURIAE PUBLIC CITIZEN, INC., and THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Public Citizen is a national nonprofit consumer advocacy organization with approximately 157,000 members. Its lawyers have extensive experience before regulatory agencies and the federal courts, and its work includes efforts to assure that the procedural rights of all persons are protected in the courts and agencies, including the right to see all relevant documents in a proceeding and the right to respond to all evidence and rulings. Public Citizen is filing this brief because the practices being challenged in this case threaten to undermine these procedural rights, and because it believes that its broad expertise can assist the Court in resolving the issues before it. Amicus takes no position on the merits of the underlying tax controversy.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 400,000 members dedicated to the principles of liberty, equality, and fundamental fairness embodied in the Constitution and this nation's civil rights laws. Like Public Citizen, the ACLU believes those core principles are imperiled by the administrative practice challenged in this case. And, like Public Citizen, the ACLU takes no position on the underlying tax dispute between the parties.

INTRODUCTION AND SUMMARY OF ARGUMENT

The basic question presented by this case is whether Congress intended to authorize the Tax Court to create an adjudicative system in which the reports of Special Trial Judges, who conduct complex trials where credibility is a central issue, are kept secret and the parties have no opportunity to respond to those reports, either to the Tax Court Judge who decides the case or the Court of Appeals that reviews the

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[1] No person other than amici or their counsel authored this brief or made a monetary contribution toward its preparation. Letters of consent from the parties to the filing of this brief are on file with the Clerk.

decision. In cases where more than $50,000 is at stake, the Tax Court currently refuses to disclose fact-finding reports prepared by Special Trial Judges and submitted to Tax Court Judges, who alone are authorized to enter final decisions. As the summary of this system below makes clear, the relationship between Special Trial Judges and Tax Court Judges is nothing like that between two equal judges reaching a common result, or between a law clerk and a judge, or agency staff advising a decisionmaker, as the Government argued in its opposition to certiorari in this case.

The Tax Court's secretive treatment of Special Trial Judges' reports is an anomaly in the modern federal system. If these Special Trial Judge proceedings in the Tax Court were treated like similar two-level proceedings in either an Article III court or an administrative agency, the Tax Court would be required to disclose these reports and afford the parties an opportunity to comment. Nothing in the applicable statutes authorizes these secret procedures, and it cannot reasonably be concluded that Congress intended to permit the Tax Court to refuse to disclose the reports of Special Trial Judges when similar documents must be disclosed and used in further adversary proceedings in every other similar context in the federal system. [2]

[2] In this case, the decision of the Tax Court was stated to be jointly that of the Tax Court Judge and the Special Trial Judge. That assertion has no bearing on the statutory question of whether the report prepared by the Special Trial Judge should have been disclosed to the parties and whether the parties should have been allowed to respond to the report and the factual findings contained therein, both in the Tax Court and in the Court of Appeals.

ARGUMENT

CONGRESS DID NOT INTEND TO AUTHORIZE THE TAX COURT TO REFUSE TO DISCLOSE THE REPORTS OF SPECIAL TRIAL JUDGES AND DENY PARTIES AN OPPORTUNITY TO RESPOND TO THEM.

I. The Role of Special Trial Judges in the Tax Court System.

In 1986, Congress authorized the Tax Court to appoint Special Trial Judges (STJs) to assist the Tax Court in its duties. *See* 26 U.S.C. § 7443A(a). *See generally Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868 (1991). Special Trial Judges are appointed by the Chief Judge of the Tax Court and are paid 90% of the salary of a Tax Court Judge. *Id.* at (a) & (d). Congress specified four defined categories of cases on which STJs could sit, plus any others to which they were assigned by the Chief Judge. *Id.* at (b). Congress also authorized STJs to render final decisions, subject to further review as specified by the Tax Court, only in those four categories of cases. *Id.* at (c). Notably, Category (3) in subsection (b) consists of cases in which the amount of the tax dispute does not exceed $50,000. In such larger cases, therefore, the final decision may be made only by a Tax Court Judge. Although Congress did not spell out the relationship between the STJ and the Tax Court Judge, that issue is addressed in Tax Court Rule 183.

Where an STJ is designated to serve as an initial fact-finder, he submits a report, including findings of fact and an opinion, to the Chief Judge of the Tax Court. Tax Ct. R. 183(b). The Chief Judge then assigns the case to a Tax Court Judge (or a division, which is composed of one or more Tax Court judges, 26 U.S.C. § 7444(c)), who "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 ar-

gument, or may recommit the report with instructions." Tax Ct. R. 183(c). That Rule also instructs Tax Court Judges that, in performing their functions, they must give "[d]ue regard … to the circumstance that the Special Trial Judge had the opportunity to evaluate the credibility of witnesses, and the findings of fact recommended by the Special Trial Judge shall be presumed to be correct." None of these provisions of Rule 183 is objectionable. What is challenged is the practice, not contained in any Rule or statute, under which the Court refuses to disclose STJ reports, let alone allow the parties to respond to the findings contained in them, regardless of whether the Tax Court Judge adopts or rejects the STJ's findings.

One additional part of this system bears on that challenge, the statute that authorizes judicial review of Tax Court decisions, 26 U.S.C. § 7482. Subsection (a)(1) requires that Tax Court decisions be judicially reviewed "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." That review is governed by Rule 52(a) of the Federal Rules of Civil Procedure, which requires the trial judge to make factual findings (as does Tax Court Rule 183) and only allows them to be set aside, "whether based on oral or documentary evidence," if they are "clearly erroneous [with] due regard … given to the opportunity of the trial court to judge the credibility of the witnesses." However, under the current Tax Court practice, the report containing STJ's findings of fact—a document that Judge Cudahy called the single most significant item in evaluating a Tax Court decision on fraud in cases like this—*Kanter v. Comm'r of Internal Revenue*, 337 F.3d 833, 886 (7th Cir. 2003) (Cudahy, J., dissenting)—is never shown to the parties or the appeals court. Thus, the reviewing court in STJ cases has no realistic means to carry out the requirement, imported from Rule 52(a), that "due regard" shall be given to the trial judge's assessment of the witnesses because it has no idea whether the Tax Court Judge agreed or disagreed with

the credibility findings of the STJ, who was the one who conducted the trial.

The principal question in this case is whether this secretive practice is contrary to the intent of Congress in establishing the system by which Special Trial Judges are used by the Tax Court in cases involving disputes of more than $50,000. Whatever may be said in defense of this practice, there is no basis, as the Government has urged, to analogize it to the relation between a law clerk and a judge, or between two coequal judges working on a draft of an opinion. Moreover, as we now show, this system is so contrary to every other similar federal system that it cannot have been what Congress intended. Indeed, as the petitioners' briefs argue, this system raises serious due process concerns, which present another reason not to assume that Congress intended to permit the STJ reports to be withheld by the Tax Court.

II. The Tax Court's Refusal to Disclose the Fact-Finding Reports of STJs and Afford Parties an Opportunity to Comment on Them Is an Anomaly in Modern Federal Law.

The Tax Court's secretive treatment of STJ fact-finding reports is aberrant. In every other federal judicial proceeding where an initial fact-finder conducts the trial and submits a report for consideration by a judge empowered to enter a final decision, the initial fact-finder's report is included in the record and served on the parties, who are then given an opportunity to respond. Nothing in the applicable statutes signals that Congress intended to authorize the Tax Court to deviate from this universal practice of disclosing initial fact-finders' reports to parties and reviewing courts.

The role of STJs in the Tax Court is very similar to that of magistrate judges in the district courts. Congress has granted magistrates the authority to decide certain classes of civil cases and to make recommendations to decisionmakers in others. 28 U.S.C. § 636(b)(1). In those cases where only

limited authority is granted, magistrates serve an initial fact-finding function in the district courts, similar to that performed by STJs in the Tax Court in cases involving more than $50,000. Yet Congress has mandated that fact-finding reports written by magistrate judges in the district courts—reports very similar to those written by STJs in the Tax Court—be included in the record and served on the parties. 28 U.S.C. § 636(b)(1)(C). Parties then have the right to file written objections to the proposed findings before the district court judge makes his final decision. *Id.* [3]

There is no obvious policy rationale for the Tax Court to diverge from the procedural transparency of the district courts in their disclosure of magistrates' reports. In fact, the Tax Court has less authority in reviewing fact-finding reports than do the district courts. The Tax Court is required to presume that factual findings are correct under Rule 183, whereas in some situations the district court must perform de novo review of rulings by magistrates. 28 U.S.C. § 636(b)(1)(C). Without disclosure of STJ reports, there is no way of knowing whether the Tax Court Judge afforded the STJ's findings the proper level of deference.

Disclosure of magistrates' reports also enables reviewing courts to determine whether a district court properly accepted or rejected a magistrate's proposed findings on credibility. In *United States v. Raddatz*, 447 U.S. 667 (1980), where a magistrate conducted a suppression hearing and made credibility judgments, this Court suggested that due process may be violated if a district judge rejects a magistrate's proposed findings without having heard or seen the witnesses. In criminal

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[3] Even before the enactment of the current section 636 in 1976, the failure of a district court to give parties an opportunity to be heard before adopting a magistrate's recommendation to grant a preliminary injunction was considered to be "an abnegation of judicial authority by the court entirely contrary to the provisions of Article III." *Reed v. Board of Election Comm'rs*, 459 F.2d 121, 123 (1st Cir. 1972).

cases, several courts have since held that, where a magistrate finds in favor of a defendant on a disputed issue of fact, the district court cannot reject that finding and rule in favor of the Government without providing a new hearing at which the judge can determine firsthand the credibility of the witnesses. To do otherwise may violate due process and Article III. *See*, *e.g.*, *Cullen v. United States*, 194 F.3d 401, 406 (2d Cir. 1999) (district judge may not reject magistrate's credibility judgments without having heard live witnesses, as this practice raises "troubling questions of constitutional due process") (citation omitted); *United States v. Mejia*, 69 F.3d 309 (9th Cir. 1995); *Hill v. Beyer*, 62 F.3d 474 (3d Cir. 1995); *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir. 1982); *Louis v. Blackburn*, 630 F.2d 1105, 1106 (5th Cir. 1980) (due process requires that district judge either accept magistrate's credibility determinations or make independent decision after hearing live testimony). Similar reasoning applies to STJ reports in the Tax Court because it is the STJ, not the Tax Court judge, who has seen and heard the witnesses.

Similarly, Special Masters, appointed by Article III courts to recommend findings of fact to a judge authorized to make a final decision, Fed. R. Civ. P. 53(a)(1)(B), play a role comparable to that of STJs. Fact-finding reports of Special Masters must be served on each party and filed with the court. Fed. R. Civ. P. 53(f). Before acting on Special Masters' reports, courts must also accord the parties an opportunity to be heard. Fed. R. Civ. P. 53(g). *See Kieffer v. Sears, Roebuck & Co.*, 873 F.2d 954 (6th Cir. 1989) (remanding for further proceedings when a Special Master's report and recommendation was adopted by the district court without giving the appellant an opportunity to be heard).

In the field of bankruptcy, in non-core proceedings, bankruptcy judges submit proposed findings of fact and conclu-

sions of law to the district court, to which parties are entitled to file objections. 28 U.S.C. § 157(c)(1). [4] The role of bankruptcy judges in conducting trials of non-core cases and submitting recommendations to final decisionmakers is analogous to that of STJs in cases over $50,000. Like STJs, who are inferior officers of the United States (*Freytag*, 501 U.S. at 881-83), bankruptcy judges cannot constitutionally decide certain claims on their own. *See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). However, in the bankruptcy court, unlike the Tax Court, the fact-finding reports of bankruptcy judges must be disclosed, and parties must be given an opportunity to respond to them before the district court enters a final decision. Fed. R. Bankr. P. 9033.

This Court in *Freytag* narrowly concluded that the Tax Court was a court of law, not a "department" under the Appointments Clause. 501 U.S. at 890. Nonetheless, as an Article I court, the Tax Court has many attributes of an administrative agency, and hence analogizing its operation to the administrative context is instructive. The reports of administrative law judges ("ALJs") in federal administrative law cases tried under the formal adjudication provisions of the Administrative Procedure Act, 5 U.S.C. § 554, 556 & 557, must be disclosed. The APA provides that all "initial, recommended and tentative decisions" in such cases are made part of the record, including the findings of an ALJ, which are analogous to those of an STJ in the Tax Court. 5 U.S.C. § 557(c). The APA also gives parties the right to respond to an ALJ's report by submitting proposed findings, exceptions to recommended decisions, or supporting reasons for, and

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[4] Section 157(c)(1) is drawn from 28 U.S.C. § 636(b)(1) (part of the United States Magistrate Act). These statutes contain analogous provisions for proposed findings and recommendations to be made by initial fact-finders and submitted to district judges. 1-3 COLLIER ON BANKRUPTCY ¶ 3.303 [2] (15th ed.).

exceptions to, proposed findings. 5 U.S.C. § 557(c). The purposes of Section 557(c) "are to preserve objections in the record and to inform the parties and any reviewing body of the disposition of the case and the grounds upon which the agency's 'decision' is based." *Borek Motor Sales, Inc. v. NLRB*, 425 F.2d 677, 681 (7th Cir. 1970).

In *Universal Camera v. NLRB*, 340 U.S. 474 (1951), this Court held that effective Article III review of an agency decision necessitated consideration of the ALJ's fact-finding report and whether any departures from the report by the agency were justified. "Evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's." *Id.* at 496. *See also Edwards v. Sullivan*, 985 F.2d 334, 338 (7th Cir. 1993) (holding that a reviewing court will not reassess credibility determinations made by an ALJ as long as they find some support in the record). As this Court noted, "[s]urely an examiner's report is as much a part of the record as the complaint or the testimony." *Universal Camera,* 340 U.S. at 493.

Other courts have held that "intelligent appellate review" requires that the reviewing court be informed of both the basis for an ALJ's decision and the agency's treatment of that decision. *See*, *e.g.*, *Armstrong v. Commodities Futures Trading Comm'n*, 12 F.3d 401, 403-04 (3d Cir. 1993) (when court could not tell from Commission's opinion which parts of the ALJ's decision it adopted and which parts it rejected, "the Commission's conclusion that the ALJ reached a 'substantially correct' result leaves questions about which specific findings or conclusions by the ALJ were incorrect").

The courts of appeals agree that, when an agency rejects the findings of an ALJ, it must explain its reasoning carefully and plausibly. "The Board's departure from the ALJ's findings is vulnerable if it fails to reflect attentive consideration to the ALJ's decision." *Citizens State Bank of Marshfield v.*

FDIC, 718 F.2d 1440, 1444 (8th Cir. 1983). *See also*, *e.g., In re United Corp*., 249 F.2d 168, 178-79 (3d Cir. 1957); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 853 (D.C. Cir. 1970); *American Federation of Television and Radio Artists v. NLRB*, 395 F.2d 622, 628 (D.C. Cir. 1968) ("Because the Board reversed the Examiner without hearing oral argument, we have given particular attention to the question whether the Board's findings are vulnerable for failure to reflect attentive consideration of the Examiner's decision."); *Retail Store Employees Union v. NLRB*, 360 F.2d 494, 495 (D.C. Cir. 1965) (holding NLRB's departure from an ALJ's decision invalid where the Board simply expressed the belief that facts relied upon by the examiner did not support the examiner's finding). Obviously, if a reviewing court is not given access to ALJ reports, or in this case STJ reports, it cannot determine whether the agency (Tax Court) gave sufficient consideration to the findings of the person who actually saw and heard the witnesses.

State courts have also adopted the practice of disclosing initial fact-finding reports. In *Mazza v. Cavicchia*, 105 A.2d 545, 557 (N.J. 1954), the New Jersey Supreme Court, in an opinion by Chief Justice Arthur Vanderbilt, held that failure to disclose an ALJ's report violated due process:

> [W]e have not been able to find a single case in any state of the Union, nor have any been cited to us, justifying or attempting to justify the use of secret reports by a hearer to the head of an administrative agency. To approve such a practice in deciding an administrative controversy would be to confer on New Jersey the dubious distinction of being the only jurisdiction in the United States to ignore a fundamental element of due process and fair play.

State courts have continued to follow the *Mazza* approach. *See* BERNARD SCHWARTZ, ADMINISTRATIVE LAW 437 n.13 & n.14 (3d ed. 1991).

Indeed, prior to 1983, the Tax Court also followed this model of disclosing reports of initial fact-finders. In 1943, Congress authorized the Tax Court to appoint commissioners, the precursors to STJs, to hold hearings and make initial determinations in tax disputes. HAROLD DUBROFF, THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS 346 (1979). The Tax Court promulgated Tax Court Rule 48, requiring commissioners to conduct hearings and giving the parties 30 days to propose findings of fact before the commissioner submitted a report of his/her findings to the court. The report was then served on the parties, who had a right to file exceptions. *Id*. At that time, Tax Court Rule 182(b) specifically mandated that commissioners' reports be disclosed. *See* 60 T.C. 1149 (1973).

The title "commissioner" was changed to "special trial judge" by the Tax Reform Act of 1984, § 464(a), 98 Stat. 824. Then, in section 1556(a) of the Tax Reform Act of 1986, 100 Stat. 2754, Congress gave STJs the authority to hear and decide certain classes of cases as described in 26 U.S.C. §§ 7443A(a) and (b). Meanwhile, in 1983, the Tax Court had repealed the disclosure requirement so that STJ reports were no longer required to be disclosed to the public and hence were no longer routinely available to the parties and the courts of appeals. *See* 81 T.C. 1069 (1983) (amending Rule 182 and renumbering it to Rule 183). The Tax Court provided no contemporaneous explanation of any problems encountered under its prior system of disclosing initial fact-finders' reports, nor any reason why it needed to be changed.

In contrast with this lack of authority to keep STJ reports secret, Congress has actually provided for a procedure very close to what the Tax Court did in this case, but in a different context. Under 26 U.S.C. § 7458, both the taxpayer and the Secretary have an absolute right to be heard before a division of the Tax Court, but if the case is subsequently considered by the full Tax Court, pursuant to section 7460(b), "neither the taxpayer nor the Secretary shall be entitled to notice and

an opportunity to be heard before the full Tax Court upon review." Although the statutes do not specify that the report of the division in that situation is not made public when it is issued, that is our understanding of the practice. That is also consistent with, if not commanded by, the final sentence of section 7460(b), which provides that the report of the division "shall not be part of the record" in cases reviewed by the full Tax Court because in that situation the full Tax Court is making a de novo determination on the question presented. As the briefs of petitioners demonstrate, en banc consideration by the Tax Court is utilized for questions of law, in contrast to the fact questions at issue in this case and in others tried before STJs. Accordingly, this explicit congressional creation of the very type of system followed here, but in a different context, further underscores the impropriety of its use of secret STJ reports in cases required to be decided by a Tax Court Judge. The lack of explicit congressional authority for the Tax Court to use its current STJ system is particularly significant in light of the fact that the system governing review by the full Tax Court was in place for many years before the office of STJ was created in 1986.

In every other American judicial proceeding where an initial fact-finder submits a report for consideration by a judge empowered to make a final decision, the initial fact-finder's report must be included in the record. If the Tax Court were considered either an Article III court or an administrative agency subject to the APA, it would be compelled to disclose the STJ's reports and accord parties an opportunity to comment on the report before any final decision was made. Yet the Tax Court, which decides cases with substantial amounts at stake, refuses to disclose the fact-finding reports of STJs. This Tax Court practice is so unique that, without specific statutory authorization, it is unreasonable to conclude that Congress intended to deviate from the universal practices in comparable court and agency contexts when

it authorized STJs to conduct complex trials involving substantial tax liabilities.

III. The Tax Court's Refusal to Include Rule 183 Reports in the Record Undermines the Fundamental and Universal Adjudicative Practices for Assuring Fair and Effective Judicial Review.

The Tax Court's current treatment of Rule 183 reports as secret documents impedes meaningful adversarial comment and judicial review—practices that Congress has legislated to protect in analogous areas of law. In refusing to include STJ reports in the record, the Tax Court departs from the fundamental American legal doctrine that all evidence on which a decision rests must be included in the trial record, and that record must constitute the exclusive basis for decision. *E.g.*, *West Ohio Gas Co. v. Public Utilities Comm'n of Ohio*, 294 U.S. 63, 69 (1935). Furthermore, in refusing to disclose STJ findings to the parties, the Tax Court departs from the established adjudicative principle that notice and an opportunity to be heard is a basic requirement of a fair hearing. *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313 (1950). As a result, parties in the Tax Court are denied the opportunity to comment on preliminary findings contained in the STJ report. More importantly, if the Tax Court Judge disagrees with the factual findings of the STJ, the parties and the appeals court will never learn of this disagreement, despite the requirement that the reviewing court give deference to the findings of the judge who heard and saw the witnesses. 26 U.S.C. § 7482(a)(1).

The need for disclosure of all evidence to ensure a complete record for review and opportunities for adversarial comment has led Congress and the judiciary to restrict ex parte communications and improper judicial notice. Congress has banned ex parte communications "relevant to the merits of the proceeding" between any "interested person" and agency decisionmakers in hearings required to be on the record. 5 U.S.C. § 557(d). *See*, *e.g.*, *PATCO v. Federal Labor*

Relations Authority, 685 F.2d 547, 562 (D.C. Cir. 1982) (broadly construing term interested person to further goals of ex parte prohibition); *Portland Audubon Soc. v. Endangered Species Comm.*, 984 F.2d 1543 (9th Cir. 1993) (holding that off the record communications between White House officials and decisionmakers in a formal hearing violated Section 557 of the APA). Congress has also mandated that, when prohibited ex parte communications do occur, the decisionmaker must include the communications in the public record. 5 U.S.C. § 557(d)(1)(C). Judicial notice has also been restricted. All facts that can be reasonably disputed must be proven at trial. *See* Fed. R. Evid. 201 (limiting judicially noticed facts to those "not subject to reasonable dispute"). In *Ohio Bell Telephone Co. v. Public Utilities Comm'n,* 301 U.S. 292, 303 (1937), a company's right to a fair and open hearing under the Fourteenth Amendment was violated when the agency failed to disclose the facts of which it took official notice and on which it based its decision. As this Court noted, judicial review could become meaningless if broad judicial notice were authorized as a regular practice. *See also*, *e.g.*, *West Ohio Gas Co.*, 294 U.S. at 77.

Even in cases not required to be heard and decided on the record, the judiciary has recognized the importance of full disclosure to assure meaningful judicial review. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 415, 416 (1971) (reviewing court must have access to the basis of the agency's decision in order to conduct a "searching and careful" inquiry to determine whether the ruling was based on consideration of relevant factors). In cases where there is no requirement for an on the record hearing, such as informal adjudications and rulemakings governed by the notice and comment procedures of 5 U.S.C. § 553, ex parte communications that are not included in the public record have been held inconsistent with APA requirements for judicial review. *E.g.*, *United States Lines, Inc. v. Federal Maritime Comm'n*, 584 F.2d 519, 540-41 (D.C. Cir. 1978) (Commission's reliance

on ex parte communications not recorded in the public record deprived the public of a meaningful opportunity to participate and effectively foreclosed judicial review, even where proceeding was not required to be on the record). In *Home Box Office, Inc. v. Federal Communications Comm'n*, 567 F.2d 9, 54 (D.C. Cir. 1977), the court noted that the agency's secrecy and failure to include all of the bases for its decision in the record impeded the reviewing courts in their evaluation of the agency's actions for arbitrariness or inconsistency with delegated authority. "Even the possibility that there is here one administrative record for the public and this court and another for the Commission and those 'in the know' is intolerable." *Id*. at 54. *See also Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959) (remanding a licensing case to the FCC for an evidentiary hearing to bring to light all information presented to FCC members off the record and give parties a chance to comment); *United States Lines*, 584 F.2d at 535 (holding that an agency must disclose and specify all evidence relied on by the decisionmaker in sufficient detail to allow for meaningful adversarial comment); *Home Box Office, Inc., supra* (remanding so that the extent and content of ex parte communications could be added to the record and parties could be accorded a chance to comment).

Congress and the judiciary also require that parties be given an opportunity to explain, rebut, or support evidence obtained through official or judicial notice: "[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary." 5 U.S.C. § 556(e); Fed R. Evid. 201(e) (affording right to be heard on propriety of judicial notice). Adversarial comment is so basic to fair and open adjudication in our legal system that the full hearing required by due process cannot be provided without it. *See, e.g., Morgan v. United States*, 304 U.S. 1, 18 (1938); *Ohio Bell Telephone Co.*, 301 U.S. at 292; *West*

Ohio Gas Co., 294 U.S. 63 (holding that due process was denied when a party was not given an opportunity to supplement or explain evidence taken on judicial notice).

Adversarial comment is also needed to illuminate assertions of fact and expert opinion that may be biased, inaccurate, or incomplete. *See Home Box Office*, 567 F.2d at 55; *United States Lines*, 584 F.2d at 534.

> An unjust decision may very likely be the result where no opportunity is given to those affected to call attention to such mistakes. That is why it is a fundamental principle of all adjudication, judicial and administrative alike, that the mind of the decider should not be swayed by materials which are not communicated to both parties and which they are not given an opportunity to controvert.

Mazza, 105 A.2d at 555. Furthermore, providing opportunities for adversarial comment can ensure that all questions will be raised and all evidence will be submitted by the parties prior to judicial review. Conversely, if opportunities for adversarial comment are lacking, factual questions underlying a ruling may be raised for the first time on judicial review. *See United States Lines*, 584 F.2d at 534 ("[O]ur insistence that this information be revealed during the agency proceedings not only serves the interests of the parties and the court, but also preserves the prerogatives of the agency to address in the first instance the questions of law and fact raised by its action.").

Although somewhat different from situations involving ex parte communications or expansive official notice, the failure to make public the STJ report also frustrates the ability of a reviewing court to perform its assigned duties and impedes the adversarial process. In this and other STJ cases, the evidentiary record is complete and was fully available to all parties, and in that sense, the ex parte and official notice problems do not exist. Non-public evidence, as such, is not the problem. Rather, the problem is that the record lacks the

evaluation by the STJ of important issues of fact—especially issues of credibility which can be critical in cases of fraud such as this—that are part of the undisclosed report of the STJ who tried the case. As the discussion above demonstrates, the views of the initial fact-finder who heard and saw the witnesses are vital in a court's assessment of whether the factual findings made by the agency or the lower court can be sustained.

The Tax Court's refusal to include Rule 183 reports in the record is inconsistent with Congress's policy of ensuring effective judicial review and adversarial comment. The Tax Court has never given any reason why it should be permitted to continue a practice which so clearly undermines judicial review and the adversarial process, and which is not permitted in comparable cases elsewhere in the federal system. Accordingly, this Court should construe the applicable statutes not to confer on the Tax Court the right to require that STJ reports be kept secret from the parties and the courts of appeals and the right to deny all parties the opportunity to respond to the STJ's proposed findings.

* * *

Amici do not understand why the Government is defending the Tax Court's system, beyond the fact that the IRS won this particular case in the Tax Court. The process by which decisions are reached in cases tried before STJs, however, could also result in losses for the IRS in the Tax Court, which would be much more difficult for it to overturn on appeal. Perhaps the explanation for the Government's defense of these procedures is that the IRS is a repeat player and that, by and large, the current system benefits it more than the traditional one that petitioners and this amicus brief support. Whatever the reason, it is unfortunate that the Government did not look at the issue differently, more in line with the etching on the Justice Department's headquarters: "The Government wins when justice is done." *Cf. Berger v. United States,* 295 U.S. 78, 88 (1935) (the interest of the United

States in a criminal case "is not that it shall win a case, but that justice shall be done").

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed, and the case remanded to the Tax Court with instructions that the report of the Special Trial Judge should be served on the parties and a reasonable opportunity be provided to them to submit objections or supporting statements concerning that report to the Tax Court Judge to whom the case is assigned.

Respectfully submitted,

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Date: August 2004

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[5] Counsel acknowledge the substantial research and writing assistance provided by Christina Platto, a summer associate at the Public Citizen Litigation Group and a member of the Class of 2006 at Harvard Law School.