

JUDICIAL REVIEW OF CUSTOMS SERVICE ACTIONS

PETER M. GERHART*

This article is based on a report prepared for the Administrative Conference of the United States in connection with its study of judicial review of actions taken by the U.S. Customs Service. The recommendations herein were adopted in substantially identical form by the Administrative Conference at its September 19, 1977, plenary session. The article examines the present availability and scope of review of administrative decisions of the U.S. Customs Service. The author analyzes the overall operation of the Customs Service, procedures for internal review of Customs decisions and for assessment of penalties and other sanctions, and the distribution of jurisdiction to review Customs decisions between the U.S. Customs Court and the U.S. district courts. His conclusion offers extensive recommendations for the reform of the existing system, addressing such matters as jurisdiction, standing, burden of proof, and assessment of penalties.

INTRODUCTION

This article analyzes the adequacy of judicial review of U.S. Customs Service actions. Its principal focus is on the role of the U.S. Customs Court and the federal district courts in overseeing and controlling Customs Service actions; its underlying theme is the manner in which laws relating to imports are administered and applied.

* Assistant Professor, Ohio State University College of Law; J.D. Columbia Law School (1971).

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The U.S. Customs Service (Customs) is organized within the Treasury Department to administer and enforce a variety of statutes regulating U.S. imports and exports. Its tasks include: processing incoming travellers, vehicles, merchandise, and mail; collecting import duties and taxes; ensuring that prohibited merchandise is not brought into the country; preventing fraud; investigating alleged unfair import competition; and regulating trade and shipping in many other ways. In all these tasks, Customs makes decisions and exercises discretionary powers affecting many persons, under circumstances in which disputed issues of fact, law, and policy are likely to arise.

Two courts share responsibility for reviewing Customs action. The Customs Court, a nine-judge constitutional¹ tribunal located in New York City, is the exclusive forum for review of many administrative actions of Customs, but deals only with disputes arising under trade laws.² Other Customs actions are subject to review exclusively in federal district courts.³

Because analysis of the role of judicial review requires an understanding of the administrative process subject to review, this article begins with an overview of Customs Service operations. Recommendations concerning changes in the administrative procedures of the Customs Service are, however, beyond the scope of this article.

While this article focuses on recommendations concerning judicial review of Customs Service actions, there is no assumption implicit that improved judicial review would be a panacea for all Customs' ills. Indeed, reforms in the administrative process at Customs may be far more important to effective and fair administration of the law. The recommendations herein would open the administrative process to important judicially-mandated reforms, but in the final analysis judicial review must remain the ultimate, and not the principal, source of control of administrative action. Reforms in the process for judicial review are therefore only one part of an effective reform of the administration of customs laws.

Rather than surveying all Customs procedures, this article will

¹ The Customs Court is referred to as a "constitutional" tribunal because Congress has designated the Customs Court as a court established under Article III of the Constitution. 28 U.S.C. § 251 (1970).

² Decisions of the Customs Court are reviewed by the Court of Customs and Patent Appeals, 28 U.S.C. § 1541 (1970), whose decisions are subject to review upon *certiorari* by the Supreme Court, 28 U.S.C. § 1256 (1970).

³ See text accompanying notes 180-198 *infra*.

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focus on the procedures used in three representative areas: (1) those used to assess and collect import duties and taxes⁴ on commercial importations; (2) those used to insure that imported merchandise meets safety and other regulatory standards; and (3) those used to assess and collect civil penalties, especially penalties under section 592 of the Tariff Act of 1930.⁵ These subjects are the most important of the tasks assigned to Customs: they affect the largest number of people, consume the greatest amount of resources, and embody the most significant fact-finding and regulatory functions.⁶

OVERVIEW: THE NATURE OF THE CUSTOMS PROCESS

Although the Customs Service was the first agency established by Congress,⁷ customs administration is one of the least visible and least understood government functions. Few Americans have had any exposure to the customs process beyond, perhaps, a brief contact at the passport gate. Moreover, there is little published description of customs administration, congressional oversight has been sporadic, and, until recently,⁸ the field has been left virtually untouched by scholars. On the whole, there are few who understand customs administration beyond those who are regularly involved in the process—Customs personnel, importers, and a relatively small number of customs brokers and lawyers specializing in customs matters. The system has been, and, to a large extent, still is, an insulated area, ingrown and relatively unaffected by developments in other fields.

Customs implements—and at times formulates—an important part of the national public policy concerning international trade,

⁴ Taxes collected by Customs on behalf of the Internal Revenue Service include excise taxes, 26 U.S.C. §§ 4061–4227 (1970 & Supp. V 1975) and tobacco taxes, 26 U.S.C. §§ 5701–5763, 251 (1970 & Supp. V 1975). *See generally* OFFICE OF THE CHIEF COUNSEL, U.S. CUSTOMS SERVICE, U.S. DEP'T OF THE TREASURY, LAWS AND REGULATIONS ENFORCED OR ADMINISTERED BY THE UNITED STATES CUSTOMS SERVICE 26–1 (Apr. 1975).

⁵ 19 U.S.C. § 1592 (1970).

⁶ This Article does not consider judicial review of actions taken under the Antidumping Act of 1921, 19 U.S.C. §§ 160–172 (Supp. V 1975) or the Countervailing Duty Act, 19 U.S.C. § 1303 (Supp. V 1975), both of which are topics of great current concern.

⁷ Act of July 31, 1789, ch. 5, 1 Stat. 29 (repealed 1890).

⁸ *See* E. ROSSIDES, U.S. CUSTOMS, TARIFFS AND TRADE 71–193, 405–420 (1977); R. STURM, A MANUAL OF CUSTOMS LAW (1974). A study prepared for the Attorney General's Committee on Administrative Procedure describes procedures used by the Customs Service but is somewhat dated. *See* 2 THE ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, U.S. DEP'T OF JUSTICE, MONOGRAPH NO. 27, ADMINISTRATION OF THE CUSTOMS LAWS (1940).

our economic system, and public health and safety. By collecting import duties and taxes, by insuring that imported goods comply with regulatory standards, and by administering laws against "unfair" import competition, Customs has a direct impact on the price and availability of imported merchandise, on the safety and quality of imported products, and on the nature of import competition faced by U.S. firms and workers.

Moreover, the importance of the policies Customs implements has paralleled the rapid expansion of international trade over the last two decades. Customs' workload has increased rapidly⁹ in both volume and significance as international trade has become a major source of competitive stimulus—and thus potential injury—to U.S. businesses. As a result, the question of how Customs operates has assumed an increasingly greater importance.

The Customs Service traditionally has not been viewed as a regulatory or administrative agency, and, until recently, has been virtually untouched by the developments in administrative procedure of the past 50 years. Indeed, many Customs procedures descend from, or reflect, practices developed in the last century. Its operations invariably lack the procedural formalities often observed by other regulatory agencies. Customs does not resolve disputes through hearings on the record before an impartial decisionmaker, has no administrative law judges to take testimony under oath, and does not allow formal rebuttal of evidence relied upon in making decisions.¹⁰ Instead, decisions may be reached without any articulated rationale, often on the basis of informal discussions between affected persons and Customs personnel, and sometimes on the basis of information which is not revealed to those adversely affected by the decision.

Some of the procedures Customs uses may be required by the volume of work the Service performs. For example, Customs must process every importation of merchandise, which in fiscal year 1976 amounted to more than 3 million individual import transac-

⁹ *Customs Modernization Act and Section 592 of the Tariff Act of 1930: Hearings on H.R. 9220 Before the Subcomm. on Trade of the House Comm. on Ways and Means, 94th Cong., 2d Sess. 37-99 (1976) (testimony of David R. Macdonald)[hereinafter cited as *Modernization Act Hearings*]. Customs estimates that since 1950 entries of merchandise have grown 336 percent, entries of vehicles have grown 236 percent, and entries of persons have grown by 199 percent. *Id.* at 40.*

¹⁰ The single exception arises in connection with the revocation or suspension of the licenses of customs brokers, for which formal administrative hearings are provided. *See* note 17 *infra*.

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tions.¹¹ In order to make the administration of this and other functions workable, informality and simplicity may be necessary, and discretionary authority of Customs personnel may be unavoidable.

On the other hand, many of the procedures Customs uses today derive from those established when customs duties were the principal source of government revenue.¹² Procedures at that time were structured to protect the government's ability to collect revenue, with maximum emphasis on efficiency, simplicity, and collection, and minimum emphasis on procedural fairness or availability of review.

Now Customs' revenue-raising function is only incidental; its primary function is to implement statutes regulating international trade. Congress sets import duties and authorizes the President to negotiate changes in duties, not with a view toward the revenue they will produce, but on the basis of the impact that such duties are likely to have on domestic markets and industries. Likewise, when Customs keeps merchandise out of the country, ensures that imports meet product standards, or interprets and applies statutes governing competitive practices, it exercises a regulatory rather than a revenue-raising function. Thus, the basic function of Customs has shifted, and many of the administrative procedures that once may have been justified to protect the collection of revenue are no longer appropriate for advancing the public interest that Customs now represents.

Because the significance of Customs' role as a regulatory agency has grown, there is increasing interest in how it performs its functions. The Subcommittee on Trade of the House Committee on Ways and Means has formed a special task force to provide oversight of Customs administration¹³ and has held two sessions of hearings concerning customs modernization and the reform of

¹¹ U.S. CUSTOMS SERVICE, U.S. DEP'T OF THE TREASURY, PROLOGUE '76 30 (1976).

¹² In fact, for many decades after the establishment of the federal government customs revenue constituted almost the entire source of federal income. Average annual customs receipts amounted to approximately 92.3 percent of the average annual federal revenue between 1800 and 1820, and constituted over half of total U.S. revenue until the 1920's. *See generally* W. FUTRELL, THE HISTORY OF AMERICAN CUSTOMS JURISPRUDENCE 29-56 (1941). Today, customs revenue constitutes less than 2 percent of all revenue collected. *See* U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970 1121 (bicentennial ed., pt. 2, 1975).

¹³ Subcomm. on Trade of the House Comm. on Ways and Means, Trade Press Release No. 6 (Mar. 23, 1977).

monetary penalty provisions.¹⁴ A bill approved by Ways and Means would modernize some of the laws relating to imports.¹⁵ In addition, the Customs Section of the Civil Division of the U.S. Department of Justice is studying the jurisdiction and powers of the Customs Court over actions of the Customs Service and other agencies.

THE ADMINISTRATIVE PROCESS AT THE CUSTOMS SERVICE

Customs Organization

Most of the work performed by the Customs Service is carried out by personnel at 3,000 stations within the 300 ports of entry designated by Congress and the Secretary of the Treasury as locations through which imported merchandise may enter the country.¹⁶ Customs employees at larger ports like New York City often have specialized responsibilities. Customs inspectors are responsible for examining imported merchandise and the vehicles, vessels, and planes used to transport that merchandise. Import specialists ascertain the duties due on particular types of merchandise; for example, an import specialist in consumer electronic products determines the duties due on all commercial importations of televisions, radios, phonographs, and similar merchandise. In this way, import specialists develop familiarity with regular importers, their merchandise, and how the merchandise should be treated under the various laws and regulations enforced by the Service. Ports in a particular geographic area are encompassed within a customs district under the supervision of a district director, who is generally the first to review disputed decisions made by personnel at the ports. There are forty-eight customs districts, each encompassed within one of nine customs regions under the direction of a regional commissioner of Customs.

At the apex of the organizational pyramid is the Customs Service

¹⁴ See *Modernization Act Hearings*, *supra* note 9; *Customs Procedural Reform: Hearings on H.R. 8149 Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 95th Cong., 1st Sess. (1977) [hereinafter cited as *Procedural Reform Hearings*].

¹⁵ H.R. 8149, 95th Cong., 1st Sess. (1977).

¹⁶ Within each port there are usually numerous stations where Customs personnel process people or goods. There are approximately 160 stations on the U.S.-Canadian border, some manned by only one person. Temporary Customs stations also may be established to process nonrecurring imports such as those arising from lumbering operations near the border. See generally 19 C.F.R. § 101.1, 101.3, 101.5 (1977).

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headquarters in Washington, D.C., which is headed by the Commissioner of Customs and divided into seven operating offices, each headed by an assistant commissioner. Substantive legal questions arising from Customs work are reviewed and generally decided by the Office of Regulations and Rulings, which also promulgates Customs Regulations and administrative rulings and makes other substantive determinations. The Office of Operations oversees day-to-day operations at the ports by establishing inspection and processing procedures and training personnel. The Office of Investigations conducts investigations and gathers information needed to assess duties and carry out Customs enforcement functions. Two other offices, Administration and Internal Affairs, handle hiring, budgeting, and accounting matters and internal investigations and control. The Office of Enforcement Support was established in 1974 to aid in the prevention of fraud and smuggling. It is responsible for developing new technology and systems to support Customs investigation and interdiction efforts. A seventh office, the Office of the Chief Counsel, provides legal advice to Customs organizations. It serves as liaison with the Customs Section of the Civil Division of the Department of Justice, which litigates cases before the Customs Court, and with U.S. attorneys, who litigate Customs cases before district courts.

Merchandise Processing

1. *Overview*

Processing of imported merchandise by Customs involves two initial steps: examination and release of the merchandise, and entry. If the importer has obtained a special permit for immediate delivery, merchandise is examined and released by Customs under bond as soon as it is imported.¹⁷ Within 10 days after the mer-

¹⁷ Many importers hire a customhouse broker as their agent to clear merchandise through the customs process. Because of the important role they play, brokers are themselves the subject of regulatory controls administered by Customs: Customs determines the qualifications and responsibilities of brokers, administers examinations, issues licenses (and has authority to revoke or suspend licenses), and determines what functions may be undertaken by nonlicensed brokers or agents. See 19 U.S.C. § 1641 (1970); 19 C.F.R. § 111 (1977). Revocation or suspension of a broker's license follows a formal hearing before the district director of Customs under procedures consistent with § 554 (adjudications), § 557 (decisions), and § 558 (revocation of licenses) of the Administrative Procedure Act. 5 U.S.C. §§ 554, 557, 558. See 19 C.F.R. § 111.62-.74 (1976). The decision of the district director is subject to review by the Secretary of the Treasury whose decision is reviewable by a court of

chandise is released, the importer or his agent must complete the requirements for entry—submission (and acceptance by Customs) of required documents and payment of duties and import taxes estimated to be due on the merchandise. If the importer has not obtained a special permit for immediate delivery, the steps are taken in reverse order: the entry procedures are completed and then the merchandise is examined and released.

After these two steps have been completed, the import specialist “liquidates” the entry by determining the amount of duties and taxes actually due on the merchandise,¹⁸ and either sends the importer a bill for additional charges owed or remits any overpayment. Thereafter, the importer has 90 days to protest the liquidation by filing a written statement. If after informal administrative reconsideration, a protest is denied by Customs, the importer may file a summons in the Customs Court challenging the decision.

2. Immediate Delivery Privileges

Over 80 percent of all import transactions are processed under special permits for immediate delivery.¹⁹ Such a permit allows the importer to take delivery of the merchandise as soon as it is examined and released by Customs, before he tenders the entry documents and estimated duties to Customs. The importer must then complete the entry procedures within 10 days.²⁰ Such procedures benefit the Customs Service, importers, and brokers, because they allow the physical inspection of merchandise to proceed independent of the documentary inspection (entry). For Customs, this reduces congestion on the docks and alleviates pressures to expedite review of entry documents; for importers and brokers, it allows merchandise to be received quickly.

Special permits for immediate delivery, issued to importers and brokers by district directors, may cover a particular shipment or an entire class of merchandise to be imported for up to one year.²¹ The standards for issuing them are imprecise. Permits may be issued:

appeals. 19 U.S.C. § 1641(b) (1970). *See, e.g.*, *Twigger v. Schultz*, 484 F.2d 856 (3d Cir. 1973).

¹⁸ Liquidation is defined in the Customs regulations as the “final computation or ascertainment of the duties or drawback accruing on an entry.” 19 C.F.R. § 159.1 (1977).

¹⁹ Immediate delivery privileges are authorized by 19 U.S.C. § 1448(b) (1970) and administered under regulations in 19 C.F.R. § 142 (1977).

²⁰ 19 C.F.R. § 142.11 (1977). If the merchandise is subject to a quota the time period within which entry must be completed may be shorter. *Id.*

²¹ *Id.* § 142.3.

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for perishable merchandise and any other merchandise for which delivery can be permitted with safety to the revenue, when immediate release of such merchandise is necessary to avoid unusual loss or inconvenience to the importer or to the carrier bringing the merchandise to the port, or more effectively to utilize Customs manpower or to eliminate or reduce congestion.²²

Although this regulation seems to put the burden on the applicant to show that the conditions for granting the permit exist, in practice permits are issued routinely unless the district director believes that issuance would impair the safety of the revenue.²³ There are no procedures for challenging a refusal to issue a permit or for review of such a decision.

Special permits may be discontinued or suspended by a district director. Discontinuance may result if an importer "has repeatedly failed to make timely entry without sufficient justification" or has "not taken prompt action to settle a claim for liquidated damages" imposed for failing to make timely entry.²⁴ No procedures govern the discontinuance of special permits. Suspension may result if the importer "is substantially or habitually delinquent [in paying] Customs bills."²⁵ Suspension is governed by the following procedures: the importer is given notice by a customs region that he is "substantially and habitually delinquent," and that his permit has been suspended in that region. Thereafter, if the importer pays all bills on which he is delinquent, the suspension is lifted; if he does not, his immediate delivery privileges are suspended in every other customs region. There are no procedures by which a suspension or

²² *Id.* § 142.1.

²³ The regulations are imprecise because Congress has never sanctioned the use of immediate delivery privileges on a wide scale. When the statute authorizing immediate delivery was passed it was the practice first to review and accept the entry documents and estimated duties, and then to inspect the merchandise. Permits for immediate delivery were to be "special" for "perishable articles and other articles, the immediate delivery of which is necessary." 19 U.S.C. § 1448(b) (1970). Since importation has increased so greatly, these permits are now the rule rather than the exception.

²⁴ 19 C.F.R. § 142.7(a) (1977). If the importer or broker does not make timely entry he has breached one of the provisions of the bond covering the importation, and Customs may assert a claim for the liquidated damages specified in the bond. The "action to settle a claim" referred to in the regulation is either payment of the claim or a petition seeking relief from the claim. *See* text accompanying note 109 *infra*. Such action is considered "prompt" if it is taken within the time specified in the claim.

²⁵ 19 C.F.R. § 142.7(b) (1977). There is no regulation defining the term "substantially or habitually delinquent."

discontinuance may be appealed or otherwise reviewed within the Customs Service.

The standards under which permits can be discontinued or suspended are imprecise. Because they are applied at the district or region level, there is a danger of inconsistency. For example, there is controversy concerning when entry is "timely."²⁶ To be timely, the entry procedures must be completed within 10 days after merchandise is released; completion requires acceptance of the entry documentation by Customs.²⁷ If an importer submits entry documents on the first day after release of the merchandise but the documents are returned to him by Customs for correction on the ninth day, it may be impossible to resubmit them for acceptance by the tenth day. Some district directors apparently treat this as untimely entry, while others consider entry to be timely as long as the corrected documents are resubmitted within a reasonable period. Issues such as these are currently being litigated in a district court in Illinois.²⁸

3. *Examination and Release*

Control over imported merchandise from the moment the merchandise arrives at a port is an important enforcement power giving Customs the opportunity to examine the merchandise and withhold its release if it does not comply with regulatory standards. Examination of merchandise yields information used in assessing duties, reveals whether the entry documents accurately describe the quantity and quality of merchandise, insures that each product is properly marked to show the country of origin, and permits assessment of compliance with other regulatory standards. Because of the volume of imports and inadequate staffing, however, thorough inspection is often not possible. Only rarely do Customs inspectors even count the items of merchandise to insure that the correct quantity has been declared.²⁹

In some cases, specialized examination may be required if infor-

²⁶ The issue is important because untimely entry may lead to discontinuance of immediate delivery privileges and to claims for liquidated damages under a bond. See note 22 *supra*.

²⁷ See text accompanying notes 34-35 *infra*.

²⁸ *Gallagher and Ascher Co. v. Simon*, No. 76-C-3499 (N.D. Ill., filed Oct. 12, 1976) (suit to enjoin district director from suspending permit).

²⁹ The process of examination and release normally takes very little time; it is generally completed within a day or two after the merchandise arrives and is sometimes completed within a matter of hours.

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mation is needed to determine duties or if the merchandise is subject to regulatory controls. For example, imported sugar is subject to a "polariscopic test," flat glass must be weighed, and imported petroleum must be tested to determine its API gravity at 60 degrees Fahrenheit. Customs has established procedures for determining such facts, often relying upon analysis by its own laboratories or by independent testing agencies licensed for this purpose.³⁰ More thorough and particularized inspection may be necessary to determine whether merchandise complies with other regulatory statutes. Imported books and movies may be read or screened to determine if they are "obscene;"³¹ knives may be examined to assure they are not prohibited "switchblade knives."³²

If the regulatory standards applicable to a particular product are interpreted and applied by another agency, Customs will normally coordinate its activities with the agency involved. Such inter-agency action takes many forms and involves agencies as diverse as the Department of Agriculture, the Department of Health, Education and Welfare and the Consumer Product Safety Commission.

After Customs obtains the information it needs and determines that merchandise should be allowed into the country, the shipment is released to the importer. However, Customs retains control over the merchandise because the importer's bond covering it guarantees that the goods will be redelivered to Customs upon demand. A liquidated damage amount, up to the value of the bond, is recoverable by Customs if the merchandise is not so returned. Customs' power to reacquire physical control over the merchandise—under threat of liquidated penalties—is an important enforcement tool.³³

4. *Entry*

Through the entry procedure Customs ensures that required documents are adequately and accurately completed, determines whether the merchandise is admissible to the country, and collects

³⁰ For example, Customs has licensed "public gaugers" whose reports concerning the properties of imported petroleum products are accepted by Customs as accurate. *See* 19 C.F.R. § 151.43 (1977). Procedures governing the examination of sugar are contained in 19 C.F.R. § 151.21-.31 (1977). Those pertaining to flat glass are contained in 19 C.F.R. § 151.101 (1977).

³¹ *See* note 83 *infra* and accompanying text.

³² *See* 15 U.S.C. § 1241 (1970).

³³ Procedures invoked when Customs demands the redelivery of merchandise or attempts to collect liquidated penalties for failure to redeliver the merchandise upon demand are discussed in text accompanying notes 108-10 *infra*.

estimated duties and taxes on the merchandise.³⁴ To complete entry, the importer (or his agent) submits entry papers to the local customhouse for approval.³⁵ If the documents are found to be in order, they are reviewed by the import specialist, who determines whether the declaration of estimated duties and taxes is accurate. He will refuse to accept the entry papers if the importer incorrectly calculated estimated duties or taxes or if other information is erroneous or missing. For example, if the import specialist believes that the classification the importer used to determine the rate of duty is incorrect, he may require estimated duties to be recalculated before he accepts the entry papers. The import specialist does not make a final decision concerning the amount of duties and taxes due; his function is to screen the entry to ensure that, given the information then available to him, the estimated duties and taxes appear to be calculated correctly.

Importers usually do not contest the import specialist's calculation of estimated duties or taxes at this stage of the process, since there are no established procedures for doing so. Therefore, if the import specialist refuses to accept the entry papers, the importer corrects and resubmits them. At a later date, the importer may challenge such a determination and, if successful, receive a refund of overpaid duties and taxes.

³⁴ The text here describes "consumption entries," which allow the importer to receive the merchandise as soon as it is inspected and released by Customs. Over 80 percent of all entries are of this type. If the importer does not want the merchandise immediately, or, in some instances, if the merchandise is to be remanufactured or exported, the importer may make a "warehouse entry." In that case, the merchandise is inspected and stored in a bonded warehouse, but estimated duties on the merchandise are not paid until the merchandise is withdrawn from the warehouse by the importer. *See* 19 C.F.R. § 144 (1977). For such purposes, Customs has established regulations for licensing and bonding warehouses. *Id.* § 19.1-49.

Simplified entry procedures have been established for noncommercial importations. "Appraisal entry" is used for damaged merchandise, personal gifts, household effects, and certain other classes of merchandise, and may be authorized by the Commissioner of Customs in other instances. *See id.* § 143.11-16. "Informal entries," which are made by most returning tourists, are used for shipments valued at less than \$250, for household or personal effects or tools of trade entitled to free entry, for certain books imported by libraries, and for certain other types of merchandise. *See id.* § 143.21-28.

³⁵ Entry papers include proof that the importer has the right to receive the goods (*e.g.*, a bill of lading); documents containing information needed to determine duties (a commercial invoice, a copy of the Special Customs Invoice, packing lists); in some instances, proof that the merchandise is admissible to the country (*e.g.*, a certificate required by another federal agency); and a document showing a declaration of duties and taxes (usually a Consumption Entry). Under some circumstances, the import specialist or the district director may waive the requirement that particular documents be submitted. *Id.* § 141.92.

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5. Customs Bonds

Customs bonds provide a means by which Customs, without holding imported merchandise or resorting to a lengthy collection process, can ensure that the interests it is mandated to protect are protected. District directors approve bonds and determine the amount in which they must be filed.³⁶

The three general bonds used most frequently with respect to imported merchandise are: (1) the general term bond; (2) the immediate delivery and consumption entry bond (term); and (3) the immediate delivery and consumption entry bond (single entry). Most importers maintain either a general term or an immediate delivery (term) bond. Customs brokers are not permitted to file a general term bond, and generally maintain a term immediate delivery bond. Under an immediate delivery and consumption entry bond, (either term or single entry),³⁷ an importer or broker promises, among other things: to complete entry within 10 days after release of the merchandise; to deposit estimated duties with the entry; to redeliver the merchandise to Customs upon demand; to pay duties which become due after the merchandise is liquidated; and to file additional documents requested by Customs.³⁸ A person filing a general term bond agrees to the same conditions, and may agree to several others concerning matters such as merchandise

³⁶ The district directors are to approve bonds "if satisfied that the amount is sufficient, the bond is in proper form and [a related form] has been properly completed." U.S. CUSTOMS SERVICE, U.S. DEP'T OF THE TREASURY, CUSTOMS MANUAL CM-139 to -140, CM-140 (15th rev. Oct. 1976) [hereinafter cited as CUSTOMS MANUAL]. See also 19 C.F.R. § 113.15 (1977).

The general term bond is generally equal to 10 percent of duties and taxes which the importer paid in the immediately preceding year in that district or (if no such duties and taxes were paid) 10 percent of the amount of duties and taxes which the importer estimates he will incur in the coming year (rounded to the nearest one hundred thousand dollars). CUSTOMS MANUAL, *supra* at CM-140. If current charges against the bond threaten to be larger than the amount of the bond, the district director may require the importer, as a condition of continued importation, to deposit supplementary duties, or file a larger bond, a superseding bond, or a single entry bond covering each new importation. The amount of the immediate delivery and consumption entry bond is determined on the basis of the amount and frequency of the charges the district director believes will be incurred against the bond and the speed with which those charges are likely to be discharged by liquidation and the payment of duties. The single entry bond is equal to the value of the imported merchandise (as determined at the time of entry) plus the estimated duties and taxes on the merchandise.

³⁷ A term bond covers all importations within a single year. A single entry bond covers only a particular entry.

³⁸ Riders may be added to the bonds to cover special contingencies—for example, the deferred payment of Internal Revenue Service taxes. See CUSTOMS MANUAL, *supra* note 36, at CM-140.

entered temporarily (as for repairs), transportation of merchandise in bond to another port for inspection, and warehouse entries.³⁹

There are no written procedures for challenges to, or review of, decisions the district director makes with respect to bonds. If an importer or broker believes that the amount of the bond or other bond requirements are incorrect, his only remedy is to seek a reversal of the decision from the regional director or Customs headquarters; however, reversals rarely occur.⁴⁰

Ascertaining Duties and Taxes

Following entry and release of merchandise, Customs must liquidate the entry by determining whether the importer paid the correct duties and taxes at the time of entry. This article discusses some of the substantive issues involved in ascertaining import duties and taxes, and then describes the procedures leading to liquidation and subsequent judicial review.

1. *Substantive Issues*

The assessment of duties and taxes involves both factual and legal issues. First, the imported merchandise is classified into one of the more than 6,700 descriptive product categories in the Tariff Schedules established by Congress.⁴¹ The Tariff Schedules show the rate of duty to be collected on products in each category, either a specific rate (*e.g.*, 10 cents a dozen), an *ad valorem* rate (*e.g.*, 10 percent of "value"), or a combination of both. Classification decisions are of crucial significance for the importer, because they establish the rate of duty to be paid.⁴²

Customs must also appraise the merchandise by determining the value of the product under one of several standards established by Congress.⁴³ Because those standards are extremely complicated,

³⁹ *Id.*

⁴⁰ Procedures for enforcing the provisions of a bond are discussed at text accompanying notes 108–110, *infra*.

⁴¹ Description of the principles used to classify merchandise are set out in E. ROSSIDES, U.S. CUSTOMS SERVICE, U.S. DEP'T OF THE TREASURY, *TARIFFS AND TRADE* 95–120 (1977); Feller, *An Introduction to Tariff Classification*, 8 *LAW & POL'Y INT'L BUS.* 991 (1976), and R. STURM, *A MANUAL OF CUSTOMS LAW* 145–399 (1974).

⁴² *See, e.g.*, Schmidt, Pritchard & Co. v. United States, 10 *CUST. BULL.* 35, 36 (1976). There the issue was whether certain wire rod coiling equipment should be classified as "metal working machine tools" taxable at 15 percent *ad valorem*, or as "machines for working metal, not otherwise provided for," taxable at 10 percent *ad valorem*.

⁴³ The standards of valuation are contained in 19 U.S.C. §§ 1401(a), 1402 (1970).

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appraisal determinations often involve complex statutory interpretation and intricate factual issues.⁴⁴

In addition to classification and appraisal, many aspects of duty assessment raise complex questions. For example, imported merchandise assembled in a foreign country from components fabricated in the United States is entitled to an allowance for the cost or value of the components, but only if the components were exported in a state ready for assembly without further fabrication, have not lost their physical identity, and have not been advanced in value or improved in condition abroad except through assembly.⁴⁵ Customs personnel regularly make similarly difficult determinations.⁴⁶

2. Procedures for Ascertaining Duties and Taxes

a. Liquidation

The import specialist uses informal procedures to determine whether the estimated duties and taxes paid by the importer were correctly computed. The scope of his investigation depends on the product involved, the standards to be applied in determining value, the prior experience he or other specialists have had with similar products, and the extent to which he relies upon the information supplied by the importer on the entry documents. The import specialist's task, although complex, is facilitated in several ways.

The import specialist has no obligation to compile a record or verify information upon which he relies. Unless challenged, he need not demonstrate the accuracy of his decisions to any impartial decision-maker. Indeed, the import specialist need only "estimate" the value of the merchandise "by all reasonable ways and means,"⁴⁷ and even if ultimately challenged in the Customs Court, the decision is supported by a presumption that it is correct.⁴⁸

⁴⁴ See generally, SENATE COMM. ON FINANCE, 93D CONG., 1ST SESS., REPORT ON CUSTOMS VALUATION 61-81 (Comm. Print 1973).

⁴⁵ See Item 807.00 of the Tariff Schedules of the United States, 19 U.S.C. § 1202, sch. 8, pt. 1 subpt. B (1970). Similarly, Item 806.30 provides for reduced valuation for articles of metal manufactured in the United States, exported for further processing and then imported for still further processing. 19 U.S.C. § 1202, sch. 8, pt. 1, subpt. A (1970).

⁴⁶ See, e.g., 19 U.S.C. § 1313 (1970) (drawbacks of duty paid on re-exported materials), 19 U.S.C. §§ 1506 and 1563 (1970) (allowances for abandoned or damaged property), 19 U.S.C. § 1558 (1970) (refunds for exported or destroyed merchandise); 26 U.S.C. §§ 4061-4227, 5701-5763 (1970) (import taxes imposed under the Internal Revenue Code).

⁴⁷ 19 U.S.C. § 1500(a) (1970).

⁴⁸ 28 U.S.C. § 2635(a) (1970).

The import specialist has a number of sources to guide his treatment of relevant issues. Substantive decisions of Customs in the form of notices, letters, and rulings are circulated to all ports through a format known as the Customs Information Exchange. Much of the information supplied to import specialists through the Exchange is not published or otherwise disseminated to the public unless it is voluntarily disclosed by an import specialist or released under a Freedom of Information Act request. The import specialist, either on his own or at the importer's request, may ask the Office of Regulations and Rulings to give advice on specific substantive issues that arise.⁴⁹ National import specialists in New York City act as Customs' repository and clearinghouse for data pertaining to individual products or individual markets, including records of how products have been dealt with at various ports, and can give guidance on the basis of such data.

For some appraisements, especially those involving the determination of foreign value or cost of production, the import specialist may gather additional information or verify that provided by the importer. All information supplied by the importer is subject to verification by Customs agents, who can obtain access to the records of the importer or his foreign supplier for such purposes.⁵⁰ In some instances, Customs will undertake a so-called "foreign investigation," having Customs agents overseas obtain information necessary for the ascertainment of duties.⁵¹ Copies of reports resulting from such investigations are available to importers only through discovery procedures incident to a Customs Court proceeding.⁵²

⁴⁹ 19 C.F.R. § 177.11 (1977).

⁵⁰ 19 U.S.C. § 1509 (1970). If an importer denies Customs information which is pertinent to value or classification determinations, Customs can prohibit the relevant importation, withhold delivery of merchandise, and, if the denial continues for a year, sell the withheld merchandise at public auction. *Id.* § 1511 (1970). Customs also has authority to require importers to appear and testify under oath. *Id.* § 1509 (1970). Interestingly, Customs has no authority to compel those involved in importation to keep books and records relating to importations, a defect which would be remedied by H.R. 8194 and H.R. 8367, 95th Cong., 1st Sess. (1977).

⁵¹ There are no published regulations governing the conduct of such investigations; they are informal and the report of the agent making the investigation is the only form of record. In most cases, importers who desire to do so are permitted to participate in investigations of their foreign suppliers. However, if the importer is not informed by the supplier, he may remain unaware of the investigation until the information gathered in the investigation is used to appraise his merchandise.

⁵² Such reports are exempt from disclosure under the Freedom of Information Act. *See* 19 C.F.R. § 103.10(g) (1977).

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If through such means the import specialist determines that the importer's estimated duties and taxes were correct, the merchandise is liquidated "as entered," and Customs procedures with respect to that importation generally are complete. Approximately 85 percent of all entries are liquidated in this manner.⁵³ If the import specialist determines that the estimated duties and taxes were too high, the merchandise is liquidated at the correct amount, and the excess payment refunded to the importer. If the estimated duties and taxes were too low, the merchandise is liquidated at the higher amount, and the importer is billed for the difference.⁵⁴

As mentioned earlier, the standards to classify and value goods are complex and extremely difficult to apply, so disputes do arise between Customs and importers. Such disputes may be disposed of informally, either before or after liquidation.

If the importer believes that the estimated duties he paid were determined incorrectly, he might attempt to have disputed issues resolved through informal administrative procedures prior to liquidation. Typically, the importer would first speak to the import specialist who made the disputed decision. If the import specialist refused to change the decision, the issue might be raised with the import specialist's immediate supervisor, the district director, or the national import specialist in New York City. Alternatively, the importer might request that the import specialist seek a ruling from the Office of Regulations and Rulings in Washington under the internal advice procedure,⁵⁵ in which case that office may issue a letter ruling, settling the issue.

Should the importer decide to abandon the informal approach, the goods would be liquidated and the importer given the opportunity to seek further administrative review by protesting the liquidation, and ultimately to seek review in the Customs Court.

Even if the importer raises no issues prior to the liquidation, the import specialist may do so. He may ask the importer to correct clerical errors or make noncontroversial changes in the entry document or may issue a "notice of tentative liquidation" informing

⁵³ Letter from Leonard Lehman, Assistant Commissioner of Customs for Regulations and Rulings, to author (Aug. 26, 1976) (on file with the Administrative Conference of the United States, Washington, D.C., and at office of Law and Policy in International Business).

⁵⁴ The liquidation actually is approved by the district director of the port involved, but rarely with more than *pro forma* review unless a disputed issue has already been brought to his attention. Decisions of the district director are often made by his staff under his supervision.

⁵⁵ See 19 C.F.R. § 177.11(b) (2) (1977)

the importer of a tentative decision to require additional duties and giving the importer an opportunity to challenge the tentative determination. The importer then may discuss the matter with the import specialist and seek an informal resolution through the import specialist's superiors. Again, final liquidation is generally postponed until these informal procedures have run their course.⁵⁶

The length of the liquidation process varies greatly. Many decisions are routine, based upon established precedent or information supplied by the importer. Because of the volume of work there are pressures to process entries quickly without raising controversy.⁵⁷ However, there is no time period within which liquidation must be completed. When disputes do arise, or when the determinations made by Customs are complex, liquidation often does not occur until long after the goods have been entered.

b. *Protests*

After liquidation is completed, the importer must pay any additional duties, but he then may seek review of contested issues by filing a protest—a written statement setting forth arguments and evidence to refute the determinations made in the liquidation.⁵⁸ The protest, which must be filed within 90 days of liquidation,⁵⁹ is an important procedural step, since protests control access to the Customs Court; no suit may be brought in the Customs Court until after a protest has been filed and denied by Customs.⁶⁰

After receiving a protest, the import specialist reviews the issues raised and submits a memorandum to the district director outlining the facts and the basis of the liquidation. The district director, after considering the import specialist's report and the protest, may request further information and, although he is not required to do

⁵⁶ Notice of final liquidation is given by posting the notice on a customhouse bulletin board at the port of entry, not by mailing it to the importer. 19 C.F.R. § 159.9 (1977). If the importer does not receive a refund of duties or a bill for additional duties, he may never receive personal notice that liquidation has been completed.

⁵⁷ The 1200 import specialists collectively liquidated over three million formal entries in fiscal year 1975. U.S. CUSTOMS SERVICE, U.S. DEP'T OF TREASURY, PROLOGUE '76 33 (1976).

⁵⁸ Liquidations that have not been protested within the prescribed period are final, although they may be corrected for clerical errors, mistakes of fact, or other inadvertance not amounting to an error in the construction of a law or, in certain circumstances, reliquidated on account of fraud. 19 U.S.C. §§ 1520(c), 1521 (1970).

⁵⁹ *Id.* § 1514(b)(2) (1970).

⁶⁰ Unless a request for accelerated disposition is filed, Customs has up to 2 years to review a protest. 19 U.S.C. § 1515 (1970). When a request for accelerated disposition is filed, the protest is deemed to be denied unless acted on within 30 days. 19 C.F.R. § 174.22 (1977).

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so, may give the importer an opportunity to discuss the issues informally. If uncertain of how to resolve the issues, he may seek advice either from the regional commissioner, the national import specialist in New York City, or the Office of Regulations and Rulings in Washington.

In some instances a protesting party may seek review of the protest by higher authority than the district director. This is possible: if the challenged decision is allegedly inconsistent with a ruling of the Commissioner of Customs or with a decision in any district concerning the same or substantially similar merchandise; if the protest raises a question of law or fact not yet ruled on by the Commissioner of Customs or his designee or by the courts; if the protest, although subject to a prior ruling, raises facts or legal arguments not previously considered; or if the protesting party had previously applied for, but had been denied, internal advice under Customs internal advice procedures.⁶¹

A protesting party seeking such review files an application for further review with the district director. If the district director determines that the claim is valid, he allows the protest (*i.e.*, reverses the liquidation). If he believes the protest should be denied, he forwards the protest and application to the regional commissioner for his district, who determines at what level further review should take place.⁶² If the protest involves a "strictly factual issue" or if it "clearly" should be allowed under a specific ruling from headquarters, the regional commissioner will decide the issue,⁶³ but any other issue will be forwarded to the Office of Regulations and Rulings for a decision.⁶⁴ If the protest is denied, the importer may seek Customs Court review of the issues raised by the protest.⁶⁵

Regardless of who the ultimate decision-maker is, the procedures used by Customs in ruling on protests are informal. Neither evi-

⁶¹ 19 C.F.R. § 174.23 (1977).

⁶² U.S. CUSTOMS SERVICE, U.S. DEP'T OF TREASURY, FUNDAMENTALS OF DUTY ASSESSMENT 8-11 (2d rev. June 1973).

⁶³ *Id.*

⁶⁴ *Id.* The regulations in 19 C.F.R. § 174.26 (1977) articulate the division of reviewing authority between the regional commissioner and Customs Headquarters by listing the issues to be determined by Headquarters (the Office of Regulations and Rulings) and leaving other decisions to the regional commissioner.

⁶⁵ In fiscal year 1975, 57,012 protests were filed; 76 percent of these were denied by Customs, of which less than 1 percent were challenged in the Customs Court. Letter from Leonard Lehman, Assistant Commissioner of Customs for Regulations and Rulings, to author (Aug. 26, 1976) (on file with the Administrative Conference of the United States, Washington, D.C.).

dence nor argument is preserved on a record, nor is there an impartial decision-maker. Decisions may be based on information which is not disclosed to the importer. Decisions need not be, and generally are not, supported by a written explanation, although in some cases the importer may receive a written or oral explanation. More often, the importer receives only a notice that the protest is granted or denied.

Customs has up to two years in which to act on the protest. An importer may, however, apply for accelerated disposition of a protest at any time more than 90 days after the protest is filed, in which event the protest is deemed denied unless it is acted on within 30 days.⁶⁶ If the protest is denied, the importer may seek Customs Court review of the issues raised by the protest.

c. Internal Audits

The decision of the import specialist concerning classification and value generally is not reviewed unless the importer involved questions it. Procedures do exist, however, to identify and correct erroneous decisions that favor, and are thus not questioned by, the importer. There are at least two ways—one formal and one informal—in which erroneous decisions may be corrected.

Informally, incorrect determinations that favor an importer may be detected if Customs recognizes that inconsistent determinations concerning similar merchandise are being made at different ports. This may occur, for example, if the national import specialist in New York City recognizes such inconsistent treatment in the course of reviewing information concerning individual importations. There is no guarantee that inconsistencies will be detected in this way, and Customs apparently has no workable formal procedures for systematically reviewing the treatment given to imports at the various ports. The danger may exist that some importers will “shop” between ports until they find one which gives their merchandise favorable treatment. The Customs Information Exchange⁶⁷ is an attempt to obviate this possibility.

d. Review at Request of U.S. Companies

A more formal mechanism for detecting and correcting incorrect decisions is provided by infrequently used provisions permitting

⁶⁶ 19 C.F.R. § 174.22 (1977).

⁶⁷ See generally text accompanying note 49 *supra*.

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U.S. companies, under certain circumstances, to challenge Customs decisions concerning duties on merchandise imported by others.⁶⁸ Under these procedures a U.S. manufacturer, producer, or wholesaler may request information from Customs concerning the duty imposed on particular imports and may file a petition with Customs alleging that the correct duty has not been assessed. However, the request for information and the petition may be filed only with respect to merchandise of the same class or kind as that dealt in by the U.S. company. If the petitioner is dissatisfied with Customs' response to his petition, he may contest the decision by filing an action in the Customs Court, which has exclusive jurisdiction over such actions.⁶⁹ As with protests, Customs procedures for handling such petitions are informal—the petitioner may be given an opportunity to meet with the relevant decision-maker and may present evidence, but he is not given a hearing on the record, an articulated basis for the decision, or an opportunity to examine confidential information relied upon in making the decision.

There is no similar mechanism by which importers can challenge Customs decisions made with respect to the merchandise imported by others, and importers have been denied the right to challenge such action in a district court.⁷⁰

e. *Administrative Rulings*

One other aspect of Customs procedure is relevant to the duty assessment process. Because of the many complex issues arising under trade laws, and because importers, exporters, and others often need to know how such issues will be resolved before they engage in trade transactions, Customs provides interested persons with a procedure for seeking an administrative ruling on an issue arising under the laws administered by Customs.⁷¹ Such a ruling may be given if the issue is prospective (*i.e.*, not already raised in the course of Customs processing), is not hypothetical, and all facts needed to make the ruling are supplied.

Once given, a ruling is binding on Customs with respect to the

⁶⁸ 19 U.S.C. § 1516 (1970). Regulations governing the procedures are contained in 19 C.F.R. § 175 (1977).

⁶⁹ 28 U.S.C. § 1582(b) (1970).

⁷⁰ *Kocher v. Fowler*, 397 F.2d 641 (2d Cir. 1967), *cert. denied*, 391 U.S. 920 (1968) (district court has no jurisdiction to compel Customs to collect duties from competitor, even though plaintiff has no recourse through the Customs Court).

⁷¹ 19 C.F.R. § 177 (1977).

transaction involved (provided that the actual facts do not differ from those on which the ruling was based) and is considered to be authority governing similar transactions. Rulings thought to affect a substantial volume of imports or transactions or to be otherwise of general interest are published in the *Customs Bulletin* and, upon publication, become established Customs practice.⁷² However, if a ruling changes prior practices and would result in increased duties or import restrictions, or is thought to be of general interest to the domestic industry, a *Federal Register* notice is published to give interested persons an opportunity to comment on the ruling.⁷³ There is no procedure for pre-enforcement judicial review of administrative rulings, but any ruling may be challenged as applied to particular import transactions.

Prohibited Imports

The Customs Service is the agency primarily responsible for keeping prohibited merchandise out of the country and ensuring that imported merchandise meets regulatory standards.⁷⁴ In fulfilling this role, Customs enforces a large variety of statutes. Some require Customs to decide whether imported merchandise meets regulatory standards; under others, Customs merely enforces a determination made by personnel of another agency.

There is an important distinction between exclusion of merchandise pursuant to a customs law and exclusion of merchandise pursuant to a law that is not a customs law. Exclusion action taken pursuant to a customs law is generally reviewable only in the Customs Court; exclusion action pursuant to a law that is not a customs law is not reviewable in the Customs Court, but may be reviewed in a district court. Unfortunately, no definition clearly distinguishes between a customs law and other laws pursuant to

⁷² *Id.* § 177.10(a)-(b) (1977). An increase in a rate of duty or charge under an established and uniform practice may not become effective without 30 days public notice. 19 U.S.C. §1315(d) (1970).

⁷³ 19 C.F.R. § 177.10(c) (1977). Customs does not provide a formal hearing when considering administrative rulings, but interested persons who know of the ruling may be given an opportunity to present their views orally or in writing. *Id.* § 177.1, 177.4. An importer may also request a district director to furnish advice concerning valuation of merchandise to be entered later. However, unlike administrative rulings, such advice is not binding on Customs during actual appraisement of the merchandise. *Id.* § 152.26.

⁷⁴ Although it is an important part of Customs' work, Customs action which results in the exclusion of merchandise from the United States is rarely subjected to challenge in the Customs Court. Less than 1 percent of all protests filed are to challenge such action.

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which merchandise is excluded.⁷⁵ An importer who seeks review of an exclusion decision in the wrong court may find his case dismissed.⁷⁶

1. Substantive Issues

a. Imports Prohibited Under Customs Law

An import quota is a control on the quantity of merchandise that may be brought into the country during a specified period (usually one year). Absolute quotas prohibit any importation of merchandise above the quota amount and generally apply to specific products from designated countries. Tariff rate quotas provide for an increased rate of duty on imports after a specified amount of covered merchandise has been imported.

Although quotas are usually established by other governmental entities,⁷⁷ Customs may be required to determine the amount of the quota⁷⁸ and must determine whether an import comes within a particular quota category.⁷⁹ Customs attempts to ensure that quotas are administered fairly: ideally, no importer should be given undue preference, importers should be able to predict into which quota category their product will fall, and information concerning the amount of merchandise imported under each quota category should be disseminated quickly enough to permit importers to

⁷⁵ Generally, customs laws are those codified in Title 19 of the United States Code or those applicable to imported but not to domestically produced merchandise. Other laws under which merchandise is excluded are not customs laws. This general distinction is drawn from the cases cited in notes 142–43 (cases in the Customs Court) and 183–86 (cases in the district courts) *infra*. Although there is no authority on this point, seizures under the obscenity statute, 19 U.S.C. § 1303 (1970), are probably best construed to be under a law that is not a customs law; they are actions taken on the advice of U.S. attorneys under standards applicable to both domestic and imported merchandise.

⁷⁶ See, e.g., *Consumers Union of the United States, Inc. v. Comm. for the Implementation of Textile Agreements*, No. 76–1064 (D.C. Cir. Apr. 20, 1977), *petition for rehearing denied*, (D.C. Cir. Sept. 2, 1977).

⁷⁷ Quotas may be established by Congress, by an executive department (e.g., the Department of Agriculture, 7 U.S.C. § 1100 (1970)), or the President upon advice of an agency. See 19 U.S.C. § 2251(b) (Supp. V 1975). See generally E. ROSSIDES, U.S. CUSTOMS SERVICE, U.S. DEP'T OF THE TREASURY, *TARIFFS AND TRADE* 295–321 (1977).

⁷⁸ For example, Customs must determine “the average aggregate apparent annual consumption” of certain fish to determine the applicable tariff rate quota. 42 Fed. Reg. 9739 (1977).

⁷⁹ For example, quotas on certain textile articles specify various quantity limits for narrowly defined product categories, and Customs must determine in which category a particular import falls.

estimate when the quotas will be filled. Most quotas are administered on a first come-first served basis; merchandise arriving at a port is released by Customs until the quota is filled. Merchandise arriving after the quota has been filled is generally held in a bonded warehouse until the quota is reopened (usually during the next year), or it may be exported.

Section 304 of the Tariff Act of 1930⁸⁰ requires all imported merchandise to be marked in English to show its country of origin. Products not marked in conformity with both the statute and regulations adopted by Customs are not permitted to enter the country and are subject to an additional 10 percent duty if not properly marked at the time of liquidation. Issues arising under this statute usually concern the size, location, and wording of the required marking.⁸¹ Customs laws also prohibit the importation of merchandise produced by "convict or/and forced labor,"⁸² and "obscene" matter or matter "advocating or urging treason or insurrection."⁸³

b. *Imports Prohibited Under Laws That Are Not Customs Laws*

Many statutes administered or enforced by Customs establish safety or other regulatory standards for products distributed in the United States, including the Lanham Trademark Act, the Consumer Product Safety Act, the Copyright Act, the Food, Drug and Cosmetic Act, and the National Traffic and Motor Vehicle Safety

⁸⁰ 9 U.S.C. § 1304 (1970).

⁸¹ Customs regulations concerning both the wording of the required marking and exceptions to the marking requirements are contained in 19 C.F.R. §134.0-.55 (1977). *See generally* R. STURM, A MANUAL OF CUSTOMS LAW 421 (1974); Note, *Tariff Law—No Option to Import Without Marking*, 12 COLUM. J. TRANSNAT'L L. 596 (1973).

⁸² 19 U.S.C. § 1307 (1970). Only one order prohibiting imports under this section is in effect. 19 C.F.R. § 12.42(h) (1977). Preliminary determinations are made by the Commissioner of Customs after such investigation "as appears to be warranted," taking into account representations offered by any interested parties, *id.* §12.42(d), but without formal administrative hearings. The final decision to exclude merchandise is made by the Commissioner of Customs with the approval of the Secretary of the Treasury, and can be protested. *See text* accompanying notes 58-65 *supra*. If the protest is denied, appeal to the Customs Court is possible. *See text* accompanying note 135 *infra*. *See generally* Armstrong, *American Import Controls and Morality in International Trade: An Analysis of Section 307 of the Tariff Act of 1930*, 8 N.Y.U. J. OF INT'L L. & POL. 19 (1975).

⁸³ 19 U.S.C. § 1305 (1970). Imported matter violating this prohibition is subject to seizure under procedures prescribed by the Supreme Court. *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971) (forfeiture action must be initiated within 14 days of seizure and completed within 60 days). *See generally* Comment, *Government Seizures of Imported Obscene Matter: Section 305 of the Tariff Act of 1930 and Recent Supreme Court Obscenity Decisions*, 13 COLUM. J. TRANSNAT'L L. 114 (1974).

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Act of 1966.⁸⁴ Some such statutes absolutely forbid the importation of specified merchandise.⁸⁵ Customs' primary task under these statutes is to identify and interdict attempted entry of forbidden products, which may give rise to questions concerning whether a particular import falls within the prohibited class.⁸⁶

Statutes that set standards for, but do not absolutely prohibit, imported merchandise often require that other agencies determine whether imports comply with the statute or applicable regulations.⁸⁷ Customs merely enforces such decisions by denying entry to noncomplying products. In such instances Customs action involves little or no discretionary decision-making. Customs acts in accordance with the instructions it receives; if an importer is aggrieved by the exclusion of merchandise under one of these statutes, his complaint is usually with the agency interpreting and applying the standard, not with Customs itself. Nonetheless, Customs does have an important administrative role in identifying products that are subject to various regulatory standards and coordinating examination and testing procedures with the relevant federal agency. In other instances, Customs seeks advice from other agencies when making decisions. For example, in determining whether imported material is either obscene or advocates or urges treason or insurrection within the meaning of the relevant statutes, Customs personnel generally rely upon the advice of U.S. attorneys.

Under still other regulatory statutes Customs action is predicated to a greater degree on its own factual determinations or its interpretation and application of statutory standards. If a trademark registered under the Lanham Trademark Act is also registered with Customs, Customs may deny entry to imported merchandise

⁸⁴ A complete list of all the statutes enforced by Customs, with relevant citations, is contained in OFFICE OF THE CHIEF COUNSEL, U.S. CUSTOMS SERVICE, U.S. DEPT OF THE TREASURY, LAWS AND REGULATIONS ENFORCED OR ADMINISTERED BY THE UNITED STATES CUSTOMS SERVICE (Apr. 1975).

⁸⁵ *E.g.*, 22 U.S.C. § 1934 (1970) (munitions); 42 U.S.C. §§ 2077, 2122, 2131 (1970)(nuclear material); 15 U.S.C. §§ 1241-1244 (1970) (switchblade knives).

⁸⁶ *See e.g.*, *Precise Imports Corp. v. Kelly*, 218 F. Supp. 494 (S.D.N.Y. 1963), *aff'd*, 378 F.2d 1014 (2d Cir.), *cert. denied*, 389 U.S. 973 (1967)(whether imported knives fell within prohibition on switchblade knives).

⁸⁷ *E.g.*, 7 U.S.C. § 1360(c) (Supp. V 1975) (decisions concerning pesticides imported under Federal Insecticide, Fungicide, and Rodenticide Act to be made by Environmental Protection Agency), 21 U.S.C. § 381 (1970) (the Food and Drug Administration certifies foreign establishments as approved sources for pharmaceuticals under the Food and Drug Act and approves importations).

which “bears”⁸⁸ or “copies or simulates”⁸⁹ that trademark. Similarly, under the Copyright Act Customs may seize imports which in its determination bear a false copyright notice or infringe a work copyrighted in the United States.⁹⁰

2. *Procedures for Prohibiting Imports*

The determination that merchandise should be excluded from the country is generally made while the goods are held by Customs for inspection. If so, the exclusion process may take one of two courses. Customs may simply refuse to release the merchandise until it is brought into compliance with the applicable regulation, or, if it cannot be brought into compliance, order it to be exported. Alternatively, if authorized by statute, Customs may seize the merchandise (even if the merchandise is still in Customs custody) and proceed by means of administrative forfeiture proceedings, which in turn may lead Customs to initiate an *in rem* forfeiture action in a district court.

a. *Refusal to Release Goods*

Customs enforces most regulatory statutes applicable to imports by refusing to release merchandise determined to be ineligible for entry. For example, if Customs determines that textiles are subject to a quota that is already filled, that televisions are not properly marked to show the country of origin, or that a drug is imported from a noncertified foreign establishment, Customs merely refuses to release the goods. Such determinations are made by the personnel at each port as part of the entry and examination process, and no hearing, evidentiary record, or reasoned opinion is provided.⁹¹

An importer who seeks to have such a determination reversed might first initiate informal discussions with the import specialist or inspector, his superior at the port, or personnel in the Office of

⁸⁸ 19 U.S.C. § 1526 (1970).

⁸⁹ 15 U.S.C. § 1124 (1970). The Lanham Trademark Act, as amended, is codified at 15 U.S.C. §§ 1051–1072, 1091–1096, 1111–1121, 1123, 1127 (1970 & Supp. V 1975).

⁹⁰ Congress revised the Copyright Act in 1976, Pub. L. No. 94–553, 90 Stat. 2541 (to be codified at 17 U.S.C. §§ 101–810). As part of the revision, Congress gave Customs authority (to be codified at 17 U.S.C. § 603) to adopt regulations requiring a court order before it can take action against imports.

⁹¹ An importer may decide not to challenge the determination. The importer of textiles may export the merchandise or store it in a bonded warehouse until the next quota period. The importer of televisions may export them or mark them in accordance with Custom’s demands. The importer of drugs may attempt to have the foreign establishment certified or may export or destroy the drugs under Customs supervision.

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Regulations and Rulings. In addition, if the decision not to release the merchandise is made under a customs law, the importer has 90 days in which to file a protest.⁹² Because such a protest involves the exclusion of merchandise, Customs must respond to it within 30 days; if no response is given, or if the protest is denied, the importer can file a summons in the Customs Court seeking review of the issues raised in the protest.⁹³ Customs procedures for handling such a protest are similar in their informality to procedures used for protests against liquidation decisions.⁹⁴

If the exclusion of merchandise is pursuant to a law other than a customs law, the protest procedures are not available. An importer may utilize internal advice procedures to have the exclusion considered by the Office of Regulations and Rulings,⁹⁵ but there are no assurances that such procedures will provide prompt review.⁹⁶ Importers faced with continued refusal by Customs to release merchandise may be granted review of that decision in a district court.⁹⁷

b. *Seizure and Forfeiture*

Some of the statutes and regulations enforced by Customs require or authorize the seizure and forfeiture of prohibited merchandise.⁹⁸ Under such statutes, seizure is used even if the merchandise has not been released by Customs. Seizure procedures can

⁹² 19 U.S.C. § 1514 (1970).

⁹³ 19 C.F.R. § 174.21 (1977).

⁹⁴ See text accompanying notes 58–65 *supra*.

⁹⁵ The procedures for obtaining internal advice are set forth in 19 C.F.R. § 177.11 (1977). Customs recently published a ruling given under the internal advice procedure at the request of a person whose merchandise had been refused entry as unlawful switchblade knives. See 11 CUST. BULL. 7 (1977).

⁹⁶ Exclusion often results from a factual or legal determination made by an agency other than Customs, in which event challenge through the administrative process may depend on procedures established by the other agency. Interestingly, the Consumer Product Safety Commission provides an importer with a hearing on the record before an impartial hearing examiner before instructing Customs to prohibit goods from entering the country. See 15 U.S.C. § 2066 (Supp. V 1975). This formal procedure for resolving disputed issues contrasts sharply with the more informal procedures used by Customs.

⁹⁷ See cases cited in notes 183–86 *infra*.

⁹⁸ Such statutes are of two types: those that authorize seizure because the merchandise is not allowed in the country, and those that authorize seizure because the person importing the merchandise has violated the law. The procedures described here are applicable to seizures under both types of statutes. Merchandise smuggled into the country is also subject to seizure and forfeiture.

be illustrated by Customs enforcement of the Lanham Trademark Act.⁹⁹

Before seizure, while the goods are held by Customs, the importer is given notice of the alleged violation and an opportunity either to remedy the violation or to persuade Customs that no violation has occurred. With respect to alleged trademark infringement, the importer receives notice that the goods will be detained (*i.e.*, denied entry) for 30 days, during which time the importer may demonstrate that the imports are not infringing any trademark, obtain the trademark owner's consent to the importation, or remove the allegedly offending mark.¹⁰⁰ If the importer does not obtain release of the merchandise by one of these methods within 30 days, the importer is notified of his forfeiture liability, the merchandise is seized, and forfeiture proceedings are instituted.¹⁰¹ However, the importer is given an opportunity to petition Customs for relief from forfeiture under mitigation provisions.¹⁰²

The mitigation procedure (formally known as a "petition for relief from forfeiture") is initiated when the importer petitions Customs to reverse or otherwise modify its decision.¹⁰³ In the case of alleged trademark infringement, the application is reviewed by personnel in the Office of Regulations and Rulings, who hold informal discussions with interested parties—including the U.S. trademark owner—before making a determination. In unusual or significant cases, the Commissioner of Customs or the Secretary of the Treasury may become involved in the administrative ruling.

If the importer does not file a mitigation petition, or if the issue is not resolved through the mitigation procedures, the Service moves to forfeit the goods.¹⁰⁴ Customs may proceed by summary

⁹⁹ 15 U.S.C. §§ 1051-1072, 1091-1096, 1111-1121, 1123, 1127 (1970 & Supp. V 1975). It is unlawful to import merchandise which "bears" or "simulates or copies" a trademark registered under the Act on the Principal Register and with Customs.

¹⁰⁰ 19 C.F.R. § 133.22 (1977). The initial decision to detain merchandise is made by the import specialist, who may seek advice from his immediate superiors or from the Office of Regulations and Rulings in Washington, D.C. In many instances Customs is notified of the suspected infringement by the U.S. owner of the trademark, and inspectors are made aware of the possibility of importations of allegedly infringing merchandise.

¹⁰¹ 19 C.F.R. § 133.22(c) (1977).

¹⁰² The mitigation procedures are contained in 19 C.F.R. § 171.11-13 (1977).

¹⁰³ In cases of alleged trademark infringement there is slight opportunity for compromise, since the merchandise is not allowed in the country if Customs finds it to be infringing. The mitigation procedures are most often used when Customs is seeking monetary penalties.

¹⁰⁴ Some statutes authorize Customs to proceed against seized property in libel actions, in

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forfeiture when the merchandise is either of a type whose entry is prohibited (as it would be if it allegedly infringed a U.S. trademark), or valued at less than \$2,500.¹⁰⁵ It does so by giving the importer notice of summary forfeiture. Only if the importer files a claim for the goods is the case referred to a U.S. attorney for condemnation proceedings in a district court, after which the goods are either released to the importer (if the importer prevails) or destroyed (if Customs prevails).

If merchandise is valued at over \$2,500 and is not of a type whose entry is prohibited, the only way Customs can secure forfeiture of the merchandise following the mitigation procedures is to refer the matter to a U.S. attorney for the institution of condemnation proceedings in a district court.¹⁰⁶ In such condemnation proceedings, rules concerning the burden of proof facilitate the government's proof of a violation of law: once the government shows probable cause for instituting the forfeiture proceeding, the person claiming the property has the burden of proving that the alleged violation of law giving rise to the seizure did not occur.¹⁰⁷

c. Recovery of Merchandise After Release

If Customs determines that merchandise should not be allowed in the country, but the merchandise has already been released to the importer, Customs has two options. If authorized by statute, it may seize the merchandise, in which event the mitigation and forfeiture procedures outlined above are followed. Such procedures are employed, for example, when Customs seizes merchandise alleged to be obscene.

If the merchandise is not subject to seizure, Customs may demand that the goods be delivered to it. The bond filed by the importer guarantees redelivery of merchandise not already sold or disposed of. If the goods are not redelivered upon demand, the importer has breached the bond and Customs may recover from the importer the liquidated damages specified in the bond.¹⁰⁸ Cus-

which event Customs refers the case to a U.S. attorney for court proceedings without following the summary administrative procedures described in the text. 19 C.F.R. § 162.42 (1977).

¹⁰⁵ *Id.* § 162.46--47.

¹⁰⁶ *Id.* § 162.49. Merchandise may be seized even if it is not of a type which is prohibited from entering the country, under statutes providing for seizure and forfeiture as a sanction for failure to report or for false or fraudulent practices.

¹⁰⁷ 19 U.S.C. § 1615 (1970).

¹⁰⁸ The procedures described here are also used by Customs to recover liquidated penal-

toms proceeds by giving the importer notice of its claim for liquidated damages and a demand for payment, following which the importer has the opportunity to file a petition for relief, setting forth facts that justify a cancellation of the claim.¹⁰⁹ Such a petition is subject to informal administrative review. The importer may discuss the issues with Customs personnel, but there is no provision for presentation of evidence or cross-examination at a hearing, or for a decision on the record. Most often, the parties reach a compromise and the importer pays a mitigated damage amount. If no compromise is reached (or if the importer does not file a petition for relief), the case can be referred to a U.S. attorney for the institution of an action in a federal district court to recover the liquidated damages stipulated in the bond.¹¹⁰

Penalty Provisions

Because the Customs Service relies primarily on information reported by importers, it must be assured that such information is accurate and complete. To further that end, Congress has granted Customs broad authority to impose penalties on those who either fail to report or report in a false or fraudulent manner.

The most notable such authority is contained in 19 U.S.C. § 592 (hereinafter referred to as section 592), which prohibits fraudulent or false statements or practices with respect to imports, and, as a penalty, authorizes Customs to seek forfeiture of either the imported goods or the value of the imported goods. Although there are 40 other statutes which authorize Customs to assess fines or penalties,¹¹¹ section 592 is the most often invoked and the most controversial of the penalty provisions.¹¹²

ties for noncompliance with the other conditions of a bond—for example, failure to complete entry procedures within stipulated time periods or deliver required documentation.

¹⁰⁹ 19 C.F.R. § 172.1 (1977).

¹¹⁰ *Id.* § 172.2.

¹¹¹ A list of all such statutes is contained in *Procedural Reform Hearings*, *supra* note 13, at 315 (statement of author) and 541 (statement of Customs Service). *See, e.g.*, 19 U.S.C. § 1460 (1970) (failure to report arrival of a vessel in the United States from a contiguous country); 19 U.S.C. § 1584 (1970) (failure to provide accurate manifests); 19 U.S.C. § 1497 (1970) (failure to properly declare articles upon entry).

¹¹² Enforcement of Section 592 is an area of Customs activity that has received wide publicity and attention. *See* Dickey, *Customs: Fines, Forfeitures, Penalties and the Mitigation Procedures—Sections 592 and 618 of the Tariff Act of 1930*, 30 BUS. LAW. 299 (1975) [hereinafter cited as Dickey I]; Dickey, *Survivals from More Primitive Times: Customs Forfeitures in the Modern Commercial Setting Under Sections 592 and 618 of the Tariff Act of 1930*, 7 LAW & POL'Y INT'L BUS. 691 (1975) [hereinafter cited as Dickey II]; Herzstein, *The Need to Reform Section*

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Substantively, section 592 prohibits a broad range of conduct, making it unlawful to attempt to bring merchandise into the United States by means of any "fraudulent or false" statement or practice "without reasonable cause to believe the truth" of the statement, whether or not the United States is deprived of duties. The statute also makes it unlawful to aid or procure such false statement or practice, and prohibits any willful act or omission by which the United States may be deprived of duties.¹¹³ Many section 592 cases result from false statements on entry documents, such as understatements of the quantity of goods imported, misstatements of the invoice price of goods, or the omission of information required by Customs to determine the proper appraised value of merchandise—for example, data concerning buying commissions or "assists."¹¹⁴ If an importer misstates the country of origin of merchandise to avoid restrictions on trading with certain countries or ships merchandise through a third country to avoid a quota, he is subject to penalties under section 592.¹¹⁵ Section 592 violations are not limited, however, to statements or practices known to be false by the person involved—even a negligent falsehood is prohibited by section 592 if it occurs without a "reasonable cause to believe the truth" of the statement.¹¹⁶

The penalty for violation of section 592 is fixed by statute and is

592 of the *Tariff Act of 1930*, 10 INT'L LAW. 285 (1976). See also *Modernization Act Hearings*, *supra* note 9; *Procedural Reform Hearings*, *supra* note 14.

¹¹³ 19 U.S.C. § 1592 (1970). Two criminal statutes also prohibit false import practices. Using language similar to that in section 592, 18 U.S.C. § 542 (1970) provides for a fine of not more than \$5,000 and/or imprisonment for not more than 2 years for false or fraudulent statements or practices. Suspected violations of this provision are referred to U.S. attorneys by the Customs Special Agent investigating the alleged violations, after review and consultation with the Regional Counsel of Customs. See U.S. CUSTOMS SERVICE, U.S. DEP'T OF THE TREASURY, CIRCULAR NO. ENF-3-CC (June 10, 1975). Under a second criminal statute, 18 U.S.C. § 545 (1970), it is unlawful to knowingly and wilfully smuggle or clandestinely introduce merchandise into the United States or to make out any false or fraudulent document with intent to defraud the United States. Violations are punishable by a fine of not more than \$10,000 or imprisonment for not more than 5 years, or both. See also *id.* § 543.

¹¹⁴ Assists include blueprints, molds, and dies given by the importer to the foreign manufacturer in connection with the manufacture of merchandise for the importer. The value of such assists must be considered in determining dutiable value and is required to be stated on the entry documents. Often, there is a legitimate dispute concerning which types of services constitute dutiable assists.

¹¹⁵ U.S. Dep't of the Treasury News Release, *Customs Frauds: Hunting Moths in a Dust Storm* (Oct. 26, 1975). See also *Dickey I*, *supra* note 112, at 303-05.

¹¹⁶ See, e.g., *United States v. Wagner*, 434 F.2d 627 (9th Cir. 1970) which interpreted and modified an earlier case holding that intent to defraud was a required element of a section 592 violation. See also *Kohner v. Wechsler*, 477 F.2d 666, 673 n.12 (2d Cir. 1973).

extremely high. Regardless of the culpability of the violator or the revenue loss or other injury to the United States, the penalty is fixed as forfeiture of the imported goods or their value.¹¹⁷ As a result, Customs often must assess extreme penalties (which may later be mitigated) for relatively insignificant violations.¹¹⁸ Although Customs is authorized by section 592 to seize merchandise and seek its forfeiture as a sanction, it rarely does this.¹¹⁹ Customs never seizes merchandise if, as is often the case, it is in the hands of an innocent purchaser¹²⁰ when the violation is discovered. Customs regulations were recently amended to provide that merchandise otherwise lawfully in the country may be seized under section 592 only if a district director determines that the violator appears to be insolvent, that his assets are beyond the jurisdiction of the United States, or that seizure is otherwise necessary to protect the revenue.¹²¹ In other instances, monetary penalties are assessed.

Customs initiates the penalty process by sending the person involved—the respondent—a “pre-penalty notice” informing him of Customs’ intention to assess penalties under section 592 if he fails to demonstrate within 30 days that such penalties would be improper.¹²² After receiving the notice, the respondent, using informal procedures, may persuade the district director that a violation has not occurred or that the assessment of the penalty would be inappropriate for some other reason.¹²³ If the district director

¹¹⁷ The value of the goods imposed as a penalty is “domestic value” (roughly the price at which the same merchandise would be purchased in the United States) rather than the value used to assess import duties. 19 C.F.R. § 162.43(a) (1977).

¹¹⁸ The American Importers Association cites an example in which Customs allegedly lost about \$200 in revenue because of negligent conduct but assessed a penalty of \$135,000. American Importers Association, *Why Customs Penalty Statute (Sec. 592) Must Be Changed!* (unpublished position paper on file with the Administrative Conference of the United States, Washington, D.C.). The Wall Street Journal reports penalty assessments of \$110 million against Electronic Memories and Magnetic Corp., \$43 million against Control Data Corp., \$42.5 million against Standard-Kollsman Industries, Inc., and \$40 million against Mattel, Inc. Wall St. J., Mar. 11, 1975, at 42, col. 1.

¹¹⁹ If merchandise seized under section 592 is worth less than \$50,000, it may be released to the owner if the owner deposits with Customs the full value of the merchandise in cash or a letter of credit. *Id.* § 162.44(a).

¹²⁰ *Id.* § 162.41(a).

¹²¹ 42 Fed. Reg. 25,323 (1977) as amended by 42 Fed. Reg. 27,599 (1977).

¹²² If the penalty assessment is less than \$25,000, no pre-penalty notice is given; the importer is first notified of the alleged violation when he receives a penalty assessment notice. 19 C.F.R. §§ 102.31, 171.1(b) (1977).

¹²³ Decisions to assess penalties for section 592 violations are made by district directors, who determine whether a violation has occurred and whether the violation is of sufficient magnitude to warrant penalty proceedings. Often, violations perceived to be non-negligent

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remains unconvinced, he issues a claim of penalty, a form similar to the pre-penalty notice, assessing the full penalty and demanding payment.

After receiving a claim of penalty, the respondent may invoke the mitigation procedures provided under section 618 of the Tariff Act of 1930, which gives the Secretary of the Treasury (and Customs as his delegate) the authority to mitigate forfeitures and penalties upon such terms and conditions as he considers just and reasonable.¹²⁴ To invoke these procedures, the respondent files a petition demonstrating that a violation has not occurred or that the penalty should be reduced. If the penalty assessment exceeds \$25,000, the Office of Regulations and Rulings decides whether and how much to mitigate the penalty, basing its decision on information submitted by the respondent and on a written report from the district director.¹²⁵ Such decisions are discretionary and nonreviewable.¹²⁶

During this process, the respondent generally is given opportunities to discuss the facts of the case with the district director or other decision-maker and to present written information and argument. No formal record is kept, however, and the importer has no formal opportunity to challenge the information relied on against him. If the information is contained in an investigative report compiled by a Customs agent, the importer normally sees only a summary of the information. No statement of the facts or legal principles underlying the decision is made.¹²⁷

Because the assessed penalty is almost always disproportionate to the culpability of the respondent or the loss of revenue resulting from the violation, Customs virtually always offers to mitigate the

or "technical" are settled without a penalty assessment by permitting the importer to correct the entry documents and pay the revenue deficiency. The district director's decision to assess a penalty is based in part upon information assembled by a Customs investigating agent.

¹²⁴ 19 U.S.C. § 1618 (1970).

¹²⁵ If the penalty assessment is less than \$25,000, decisions concerning mitigation are made by the director of the district in which the goods were entered. 19 C.F.R. § 171.21 (1977).

¹²⁶ See, e.g., *United States v. One 1961 Cadillac Hardtop Automobile*, 337 F.2d 730 (6th Cir. 1964) (federal courts have no jurisdiction to grant remission or mitigation for forfeiture of car used in illegal transportation of narcotics). *Contra*, *United States v. One 1974 Mercury Cougar Automobile*, 397 F. Supp. 1325 (C. D. Cal. 1975).

¹²⁷ Mitigation decisions are formalized by notifying the respondent of the amount to which Customs is willing to mitigate the penalty. The form letter used for this purpose contains no explanation of the basis of the determination. If dissatisfied with this mitigation offer, respondent may file a supplemental petition for mitigation. 19 C.F.R. § 171.33 (1977).

penalty.¹²⁸ But such offers to mitigate present the respondent with a hard choice. While the respondent may acquiesce in Customs' decision on the violation and pay the mitigated penalty in settlement of the claim, if he does, he forfeits his right to judicial review. On the other hand, in order to obtain judicial review of the Service's determination the respondent must forego the benefit of mitigation and risk incurring the entire penalty.¹²⁹ This dilemma, more often than not, pressures the respondent into accepting the mitigation offer, and as a consequence few section 592 penalty assessments are effectively subject to judicial review.¹³⁰ This amounts to what one writer has termed "administrative blackmail."¹³¹

By assessing a penalty and then offering to compromise

¹²⁸ In 1974, in an effort to increase public understanding of section 592 procedures, the Department of the Treasury published internal guidelines governing such mitigation decisions by Customs. *Guidelines for the Remission or Mitigation of Forfeitures and Claims for Forfeiture Value*, 39 Fed. Reg. 39,061 (1974). In general, the guidelines contemplate that penalties will be mitigated to an amount which reflects the revenue loss resulting from the violation and the culpability of the defendant, taking into account such factors as any contributory error by Customs personnel, respondent's cooperation with Customs investigators, and remedial action taken by the respondent. Customs may reduce penalty assessments to an amount equivalent to the revenue loss resulting from the violation if voluntary disclosure of a violation is made before an investigation has been initiated. 19 C.F.R. § 171.1 (1977).

¹²⁹ See 19 U.S.C. § 1592 (1970). However, in an unreported decision, *Andean Credit, S.A. v. United States*, No. 73-1294-CIV-WM (S.D. Fla. Dec. 10, 1973), the court refused to order forfeiture of a yacht valued at over \$1 million, which it stated would be "so severe a penalty as to be shocking to the conscience of this Court." Instead, the court ordered payment of unpaid duties, which amounted to \$60,000.

¹³⁰ The pressure to compromise claims is demonstrated by the following information compiled by William Dickey, formerly Deputy Assistant Secretary of the Treasury for Enforcement, Operations, and Tariff Affairs, comparing the original penalty assessments in randomly selected section 592 cases with the amount to which the assessment was mitigated:

(in dollars)			
<i>Penalty</i>	<i>Mitigated Amount</i>	<i>Penalty</i>	<i>Mitigated Amount</i>
179,398	34,785	193,400	12,431
1,770,855	5,413	150,876	3,944
345,000	3,244	2,202,413	23,673
219,741	13,275	5,510,450	88,000
2,210,706	30,888	4,714,811	250

See Dickey II, *supra* note 112, at 703-05.

¹³¹ Nelson, *Administrative Blackmail: The Remission of Penalties*, 4 WEST. POL. Q. 610, 620 (1951). The author referred to use of authority to mitigate penalties by administrative agencies in general. See also Murphy, *Money Penalties—An Administrative Sword of Damocles*, 2 SANTA CLARA LAW. 113 (1962). Statutes imposing monetary penalties and authorizing administrative agencies to remit or mitigate the penalty are common. See Gellhorn, *Administrative Prescription and Imposition of Penalties*, 1970 WASH. U.L.Q. 265 (1970).

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or mitigate, [an agency] may induce the defendant to settle his alleged liability in order to avoid the risk of incurring the full penalty in a court proceeding. As a result the defendant is often penalized without even an administrative hearing. The safeguard of court review to protect the rights of defendants is bargained away. Court review, however, is intended to serve another purpose. It is the means of confining the actions of errant administrators, of holding them true to the policies laid down by the legislature. The only means of involving this supervision is litigation. If the litigants are bought off, the administrators are free to shape policy as they please.¹³²

If a party against whom penalties have been assessed refuses to pay the original or a mitigated penalty, the case is referred to a U.S. attorney for the institution of forfeiture proceedings in a district court. The respondent may be afforded another opportunity to settle the case for less than the penalty amount (even for less than the mitigation amount offered by Customs).¹³³ Respondents who seek judicial review of penalty assessments face an additional burden in forfeiture proceedings. In such proceedings, the government need only show probable cause for the institution of the suit; if it does, the burden is on the respondent to prove that the penalty statute was not violated.¹³⁴

JUDICIAL REVIEW OF CUSTOMS ACTION

Overview

The Customs Court and U.S. district courts share responsibility for reviewing action taken by the Customs Service.¹³⁵ District

¹³² Nelson, *supra* note 120, at 611-12 (footnote deleted).

¹³³ Some attorneys advise their clients not to accept mitigation offers made by Customs because they feel the U.S. attorneys generally offer better settlement terms. There are no procedures governing such settlements.

¹³⁴ See 19 U.S.C. § 1615 (1970); *United States v. Alcatex, Inc.*, 328 F. Supp. 129, 134 (S.D.N.Y. 1971). See also *United States v. Nephrite Jade*, 325 F. Supp. 986, 989 (W.D. Mo. 1970).

¹³⁵ In addition, a court of appeals reviews decisions of the Secretary of the Treasury to revoke or suspend a broker's license. 19 U.S.C. § 1641(b) (1970). This article does not consider the adequacy or propriety of judicial review in such instances. No provision governs judicial review of decisions to deny a license, which are made by the Commissioner of Customs and reviewed by the Secretary of the Treasury.

courts hear cases in which the Service seeks to collect liquidated damages for violation of the terms of a bond, or seeks forfeiture of merchandise under a provision authorizing seizure, or seeks to collect a penalty. The Customs Court has no jurisdiction over such cases.

In other cases, division of jurisdiction between the Customs Court and district courts is governed by the following considerations. The subject matter jurisdiction of the Customs Court¹³⁶ is delineated by statute—the court has exclusive jurisdiction to review those Customs actions that are subject to a protest, and to hear appeals by U.S. manufacturers, producers, or wholesalers that are authorized under section 516 of the Tariff Act of 1930. The Customs Court has no jurisdiction to review Customs actions not subject to a protest or petition and may not take jurisdiction over those actions that are subject thereto until a protest (by an importer) or a petition (by a U.S. manufacturer, producer, or wholesaler) has been filed and denied. “Final judgments or orders” of the Customs Court are reviewed by the Court of Customs and Patent Appeals.¹³⁷

Congress has not explicitly provided for review of Customs actions that are not subject to protest or petition. District courts often exercise their general and special jurisdictional powers to review such actions.

Thus, when Customs action does not involve a penalty, forfeiture, or liquidated damages—matters over which only the district courts have jurisdiction—the jurisdiction of the Customs Court controls the division of responsibility between that court and district courts. Because jurisdiction in the Customs Court is available only to those persons authorized to file a protest or petition, and is not available until a protest or petition is denied by Customs, the prerequisites to suit in the Customs Court also limit standing to challenge certain Customs actions as well as the timing of judicial review.

¹³⁶ On the Customs Court generally see R. STURM, *A MANUAL OF CUSTOMS LAW* 12 (1974); Johnson, *The United States Customs Court—Its History, Jurisdiction, and Procedure*, 7 OKLA. L. REV. 393 (1954); Rao, *A Primer on Customs Court Practice*, 40 BROOKLYN L. REV. 581 (1974).

¹³⁷ 28 U.S.C. § 1541(a) (1970).

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Customs Court Jurisdiction

1. *Suits by importers*

For importers, brokers, and others involved in the importing process, access to the Customs Court is controlled by the protest procedure at Customs. The Customs Court has jurisdiction over suits by importers only if the importer has filed a protest, the protest has been denied by Customs, and the importer has paid all liquidated duties, charges, or exactions.¹³⁸

The subjects over which the Customs Court has jurisdiction in a suit by an importer include all matters subject to a protest under the protest provisions of 28 U.S.C. § 1514, and none others. The Customs Court's jurisdictional statute provides:

§ 1582 Jurisdiction of the Customs Court

(a) The Customs Court shall have exclusive jurisdiction of civil actions instituted by any person whose protest pursuant to the Tariff Act of 1930, as amended, has been denied, in whole or in part, by the appropriate customs officers, where the administrative decision, including the legality of all orders and findings entering into the same, involves: (1) the appraised value of merchandise; (2) the classification and rate and amount of duties chargeable; (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury; (4) the exclusion of merchandise from entry or delivery under any provisions of the customs laws; (5) the liquidation or reliquidation of an entry, or a modification thereof; (6) the refusal to pay a claim for drawback; or (7) the refusal to reliquidate an entry under section 520(c) of the Tariff Act of 1930, as amended.¹³⁹

With respect to these areas, the jurisdiction of the Customs Court is exclusive.¹⁴⁰ Thus, a suit brought in a district court to review any of

¹³⁸ Protests are filed in accordance with 19 U.S.C. § 1514 (1970), which specifies the seven types of Customs action that are subject to a protest. Actions subject to a protest under this section are identical to those over which the Customs Court has jurisdiction under 28 U.S.C. § 1582 (1970).

¹³⁹ 28 U.S.C. § 1582(a) (1970).

¹⁴⁰ *Id.* The exclusivity of Customs Court jurisdiction is reconfirmed by 28 U.S.C. § 1340 (1970), which grants district courts original jurisdiction over "any civil action arising under

the types of administrative actions listed in the seven subparagraphs of section 1582(a) is subject to dismissal for lack of subject matter jurisdiction.¹⁴¹

Actions by the Customs Service not subject to protest under section 1514 (and thus not within the seven subparagraphs of the court's jurisdictional statute) are not subject to review in the Customs Court. For example, although the Customs Court has jurisdiction to review actions excluding merchandise under a customs law,¹⁴² actions excluding merchandise under a law that is not a customs law are not subject to a protest or to review under section 1582, and hence are not reviewable by the Customs Court.¹⁴³ Similarly, navigation fees and certain inspection fees collected by the Customs Service are not "charges or exactions . . . within the jurisdiction of the Secretary of the Treasury" and are subject to neither a protest nor an appeal in the Customs Court.¹⁴⁴

any Act of Congress providing for internal revenue, or revenue from imports on tonnage, *except matters within the jurisdiction of the Customs Court*" (emphasis supplied).

¹⁴¹ Consumers Union of the United States, Inc. v. Comm. for the Implementation of Textile Agreements, No. 76-1064 (D.C. Cir. Apr. 20, 1977), *petition for rehearing denied* (D.C. Cir. Sept. 2, 1977); SCM Corp. v. Int'l Trade Comm'n, 549 F.2d 812 (D.C. Cir. 1977) (directing district court to retain jurisdiction until Customs Court ruled on its own jurisdiction); Fritz v. United States, 535 F.2d 1192 (9th Cir. 1976); J.C. Penney Co. v. United States Treasury Dep't, 439 F.2d 63 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971); Kocher v. Fowler, 397 F.2d 641 (D.C. Cir. 1967), *cert. denied*, 391 U.S. 920 (1968); N. Am. Cement Corp. v. Anderson, 284 F.2d 591 (D.C. Cir. 1960); E. States Petroleum Corp. v. Rogers, 280 F.2d 611 (D.C. Cir. 1960); Morgantown Glassware Guild v. Humphrey, 236 F.2d 670 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 896 (1956); Boston Wool Trade Ass'n v. Snyder, 161 F.2d 648 (D.C. Cir. 1947); Cottman Co. v. Dailey, 94 F.2d 85 (4th Cir. 1938); Riccomini v. United States, 69 F.2d 480 (9th Cir. 1934); Kreutz v. Durning, 69 F.2d 802 (2d Cir. 1934); Akins v. Saxbe, 380 F. Supp. 1210 (N.D. Maine 1974); Altieri v. United States, 299 F. Supp. 458 (D.P.R. 1969); Horton v. Humphrey, 146 F. Supp. 819 (D.D.C. 1956); Nat'l Sanitary Rag Co. v. Hamilton, 4 F. Supp. 642 (N.D. Cal. 1933).

¹⁴² See, e.g., Consumers Union of the United States, Inc. v. Comm. for the Implementation of Textile Agreements, No. 76-1064 (D.C. Cir. Apr. 20, 1977), *petition for rehearing denied* (D.C. Cir. Sept. 2, 1977) (exclusion under voluntary quota is within exclusive jurisdiction of Customs Court); Benrus Watch Co. v. United States, 238 F. Supp. 191 (Cust. Ct. 1964) (exclusion for failure to mark watch movements).

¹⁴³ See, e.g., V.G. Nahrgang v. United States, T.D. 47,134, 65 TREAS. DEC. 1095 (1934) (refusal of Customs to release imports found adulterated by Food and Drug Administration not subject to Customs Court review). *But see* Karl Schroff & Assocs. v. United States, 47 Cust. Ct. 339 (1961) (government agrees to release merchandise excluded under copyright statute after protest and Customs Court suit; jurisdiction of court not questioned).

¹⁴⁴ See Puget Sound Freight Lines v. United States, 36 C.C.P.A. 70 (1949) (navigation fees and charges under 19 U.S.C. § 58 (1970) are not "exactions within the jurisdiction of the Treasury," and thus are not subject to Customs Court review); Louis Ruhe v. United States, T.D. 26,936, 10 TREAS. DEC. 737 (1905), *Aff'd*, T.D. 27,773, 12 TREAS. DEC. 612 (1906) (inspection fee imposed by Department of Agriculture not reviewable in Customs Court).

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When Customs assesses liquidated damages for breach of the conditions of an import bond, the Customs Court will normally review the assessment since the liquidated damages are construed to be a "charge or exaction . . . within the jurisdiction of the Secretary of the Treasury" and therefore subject to both protest under section 1514 and review in the Customs Court under section 1582.¹⁴⁵ The Customs Court has jurisdiction to review whether liquidated damages were lawfully assessed for failure to redeliver merchandise to Customs upon demand,¹⁴⁶ failure to submit entry documents within the time specified in a bond for immediate release privileges,¹⁴⁷ and failure to submit proper proof of exportation for merchandise entered temporarily.¹⁴⁸ However, the Customs Court considers only whether the conditions of the bond were violated. It may not review the amount of the liquidated damages set in the bond and assessed by Customs since that is a "legislative matter" that is "within the control of the administrative officers."¹⁴⁹

The protest requirement limits the jurisdiction of the Customs Court in other ways. The following Customs actions are not subject to protest or to review in the Customs Court: refusal to grant, and suspension of, immediate delivery privileges;¹⁵⁰ refusal to grant, or revocation of, a license to perform the duties of a public gauger or bonded warehouseman;¹⁵¹ denial of a customhouse broker's license;¹⁵² and decisions concerning the amount of a bond required to be filed.¹⁵³

Such actions are reviewable in a district court. *See, e.g., Carriso, Inc. v. United States*, 106 F.2d 707 (9th Cir. 1939).

¹⁴⁵ However, to be reviewable in the Customs Court the exaction "must relate in some manner to imported merchandise and affect the importer, consignee, or agent of such imported merchandise." *Universal Carloading and Distributing Co.*, Abstract 35,743, 71 TREAS. DEC. 1083 (1936) (Customs Court declines jurisdiction to review imposition of liquidated damages against bonded carrier for failure to deliver merchandise).

¹⁴⁶ *Huber v. United States*, 29 Cust. Ct. 92 (1952) *rev'd on other grounds*, 41 C.C.P.A. 69 (1953). *But see Klein v. United States*, T.D. 47,281, 66 TREAS. DEC. 297 (1934).

¹⁴⁷ *J.M. Altieri v. United States*, 46 Cust. Ct. 307 (1961).

¹⁴⁸ *Arthur Cook v. United States*, 6 Cust. Ct. 114 (1941); *Guy Barkam Co. v. United States*, 7 Cust. Ct. 155 (1941).

¹⁴⁹ *United States v. Frank F. Smith & Co.*, 25 C.C.P.A. 163, 167-68 (1937).

¹⁵⁰ *See* text accompanying notes 21-28 *supra*.

¹⁵¹ *See* notes 30 and 34 *supra*.

¹⁵² *See* note 135 *supra*.

¹⁵³ *American Askania Corp. v. United States*, 10 Cust. Ct. 76 (1943). *See* text accompanying note 40 *supra*. In addition, the ability of the Customs Court to correct erroneous Customs action has been limited because the Customs Court has held that the Customs actions involved are discretionary and therefore not subject to review. For example, Customs, as

2. *Suits by U.S. Competitors*

The Customs Court also has exclusive jurisdiction when a petition filed by a U.S. manufacturer, producer, or wholesaler under section 516 of the Tariff Act of 1930¹⁵⁴ is denied.¹⁵⁵ This permits judicial review of the same matters that are subject to a petition under section 516: decisions concerning appraisement, classification, or rates of duty, including antidumping and countervailing duties; a finding by the Secretary of the Treasury of no sales or likelihood of sales at less than fair value under the Antidumping Act of 1921;⁵⁶ and a finding by the Secretary of the Treasury under the Countervailing Duty Act¹⁵⁷ that no bounty or grant was bestowed on imports. District courts have no jurisdiction to review these matters.¹⁵⁸

However, the procedures leading to review in the Customs Court are not available unless the challenged decision relates to

delegate of the Secretary of the Treasury, is authorized to abate or refund duties on merchandise destroyed while in Customs' custody. *See* 19 U.S.C. § 1563 (1970). The Customs Court has held that it has no authority either to grant such refund if Customs has declined to do so, or to review the merits of Customs' decisions. *Deila Failde v. United States*, 388 F. Supp. 564 (Cust. Ct. 1963); *Michaelian & Kohlberg v. United States*, 65 TREAS. DEC. 1372 (1934). Other cases have acknowledged the court's power to determine whether Customs actions under this provision exceed its authority or fail to comply with the terms of the statute, but without indicating that the power would be used to control Customs action effectively. *D.M. Ferry & Co. v. United States*, 85 F. 550, 557 (6th Cir. 1898); *H.Z. Bernstein Co. v. United States*, 354 F. Supp. 1364, 1371 (Cust. Ct. 1958). *But see* *Art Craft Jewelry Co. v. United States*, 64 Cust. Ct. 414, 418 (1970) (without considering right to review, court apparently held plaintiff's claim invalid as a matter of law).

However, the scope of review of such discretionary functions was changed recently when the court adopted Administrative Procedure Act standards for judicial review of discretionary action. *Suwanee Steamship Co. v. United States*, C.D. 4708 (Cust. Ct. July 18, 1977). The appropriate scope of review of discretionary actions is not considered in this Article.

¹⁵⁴ *See* text accompanying notes 68-70 *supra*. Actions challenging denial of a petition are given precedence in the Customs Court and the Court of Customs and Patent Appeals. 28 U.S.C. §§ 2633, 2602 (1970).

¹⁵⁵ 28 U.S.C. § 1582(b) (1970).

¹⁵⁶ 19 U.S.C. § 160 (Supp. V 1975). The Act authorizes the imposition of a special dumping duty on imports found to have been sold at less than fair value if a U.S. industry is being or is likely to be injured by reason of the importation. The Act also authorizes the imposition of countervailing duties to offset the amount of bounties or grants bestowed upon imported merchandise.

¹⁵⁷ *Id.* § 1303. Section 516 also permits a U.S. manufacturer, producer, or wholesaler to seek review of Customs decisions not to impose special marking duties under 19 U.S.C. § 1304 (1970). *Diamond Match Co. v. United States*, 44 Cust. Ct. 67 (1960). *See* note 81 *supra* and accompanying text.

¹⁵⁸ *See* *Calf Leather Tanners' Ass'n v. Morganthau*, 80 F.2d 536 (D.C. Cir.), *cert. denied*, 297 U.S. 718 (1936). *But see* discussion of *Timken v. Simon*, note 196 *infra* and accompanying text.

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merchandise that is the same class or kind as that dealt in by the U.S. firm bringing the challenge. Actions of the Customs Service that are not subject to challenge under section 516 may not be challenged in the Customs Court.¹⁵⁹

Character and Powers of the Customs Court

The Customs Court has been designated by Congress as “a court established under Article III of the Constitution”¹⁶⁰ and is composed of nine judges appointed by the President with the advice and consent of the Senate. The judges hold office for life during good behavior.¹⁶¹ Legislation provides that no more than five judges may be appointed from the same political party and that the chief judge is to be designated “from time to time” by the President.¹⁶²

The court has national jurisdiction, encompassing controversies arising in any state or territory of the United States. Although the court is located in New York City, it is empowered to, and does, hold trials or hearings at any port or place within its jurisdiction.¹⁶³ Moreover, the chief judge may order a judge of the court to preside at an evidentiary hearing in a foreign country, unless such hearings are prohibited by the laws of such country.¹⁶⁴

The court has been given all the powers of a district court for preserving order, compelling the attendance of witnesses, and requiring the production of evidence,¹⁶⁵ and the rules of the Customs Court provide a full system of pre-trial discovery from parties and nonparties, including the production of documents, requests

¹⁵⁹ *E.C. Miller Cedar Lumber Co. v. United States*, 86 F.2d 429, 434 (C.C.P.A. 1936) (decisions concerning measure, weight, and quantities of imported merchandise, which determine duty assessments, not subject to challenge).

¹⁶⁰ 28 U.S.C. § 251 (1970). This provision was enacted to overrule *Ex Parte Bakelite Corp.*, 279 U.S. 438 (1929), which held that the Court of Customs Appeals (the predecessor of the Court of Customs and Patent Appeals) was a legislative court not established under Article III of the Constitution. See *Glidden Co. v. Zdanok*, 370 U.S. 530 (1965).

¹⁶¹ 28 U.S.C. § 252 (Supp. V 1975).

¹⁶² 28 U.S.C. § 251 (1970).

¹⁶³ *Id.* § 256; CUST. CT. R. 2.2(a).

¹⁶⁴ 28 U.S.C. § 256 (1970).

¹⁶⁵ *Id.* § 1581. See also *id.* § 2637 (witnesses; inspection of documents). The court's authority to impose sanctions for failure to respond to discovery requests is articulated in CUST. CT. R. 6.5(b)(2). See, e.g., *Gehrig, Hoban & Co. v. United States*, 76 Cust. Ct. 277 (1976). The court may also punish persons for criminal contempt of court under 18 U.S.C. § 401 (1970). *Holt v. United States*, 41 C.C.P.A. 8 (1953); *In re Spector*, 42 Cust. Ct. 726 (1959).

for admissions, interrogatories and depositions,¹⁶⁶ as well as complete motion practice.¹⁶⁷ Cases are usually heard and decided by a single judge, but the chief judge may appoint three judges to hear and decide cases involving a constitutional question or an issue with “broad or significant” implications.¹⁶⁸

The Court of Customs and Patent Appeals and the Customs Court itself have often said that the Customs Court lacks “equity” jurisdiction and “equity power.”¹⁶⁹ What is meant by such statements is far from clear; the decisions convey at least two different meanings. In one sense, the statement that the Customs Court has no equity power signifies that the Customs Court lacks jurisdiction to review administrative action before a protest has been filed and denied.¹⁷⁰ As so understood, the Customs Court’s lack of equity power invites consideration of whether—and under what circumstances—the Customs Court should be authorized to intervene in the administrative process prior to filing and denial of a protest. That question is covered by the recommendations set forth later in this article.

Other decisions referring to the lack of equity power in the Customs Court have done so in a different context, indicating that the Customs Court will adhere to procedural statutes or regulations even when a strict interpretation leads to unexpected or unjust results.¹⁷¹ These cases suggest that Customs should adopt a more flexible approach when substantial interests otherwise would suffer because of harmless, inadvertent procedural errors,¹⁷² but they do

¹⁶⁶ CUST. CT. R. 6.

¹⁶⁷ *Id.* R. 4. See generally RAO, *A Primer on Customs Court Practice*, 40 BROOKLYN L. REV. 581 (1974).

¹⁶⁸ 28 U.S.C. § 255 (1970).

¹⁶⁹ See, e.g., *Eurasia Import Co. v. United States*, 31 C.C.P.A. 202, 211 (1944) and cases cited in notes 170 and 172 *infra*.

¹⁷⁰ See, e.g., *Matsushita Elec. Indus. Co. v. United States Treasury Dep’t*, 67 Cust. Ct. 328 (1971), *aff’d*, 485 F.2d 1402 (C.C.P.A. 1973), *cert. denied*, 414 U.S. 21 (1973) (Customs Court denied its own equity power by refusing to invoke All Writs Act to review administrative action not subject to protest but allegedly ripe for review).

¹⁷¹ See, e.g., *Bullocks, Inc. v. United States*, 7 Cust. Ct. 12 (1941) (although error occurred because Customs officer failed to mark documents properly Customs not required to re-liquidate entries pursuant to a prior judgment); *Olaf V. Sundt v. United States*, 4 Cust. Ct. 114 (1940) (Customs Court has no “equity powers” to hear claim for remission of duties when petition for remission was filed just after the 60 day deadline).

¹⁷² The other cases in which the “equity power” of the Court has been denied also reflect strict adherence to provisions of law, despite plaintiff’s claim that the result is inequitable. *Cummins-Collins Distilleries v. United States*, 36 C.C.P.A. 88 (1949) (rejecting plaintiff’s claim that it is inequitable to require plaintiff to pay higher duty after goods have been sold at price calculated to include only low estimated duty); *Carl Matusek Shipping Co. v. United*

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not suggest that the Customs Court's jurisdiction should be changed and would not be affected by the recommendations in this article.

When the Customs Court does have jurisdiction following the denial of a protest or petition, it is unclear whether the court has the power to issue injunctions or writs of mandamus.¹⁷³ The court has never issued a writ in those circumstances; nor has it been asked to do so, but there is authority to the effect that it could do so. Under the All Writs Act¹⁷⁴ "all courts of the United States" (and thus the Customs Court)¹⁷⁵ have the right to issue writs in aid of their respective jurisdictions. The Court of Customs and Patent Appeals has issued writs under this Act in both patent and customs cases,¹⁷⁶ and it is likely that, were it faced with the issue, the Customs Court would hold that once it has jurisdiction it is authorized to issue writs in appropriate cases under the All Writs Act. In any event, the recommendations of this article would confer explicit authority on the Customs Court to issue injunctions.

It is also unclear whether the Customs Court may issue declaratory judgments: In an early case, *Eurasia Import Co. v. United*

States, 331 F. Supp. 1386 (Cust. Ct. 1963) (plaintiff's failure to file proper form is sufficient reason to deny drawbacks); *Gilbert W. Greene v. United States*, 13 Cust. Ct. 237 (1944) (no "equity power" to consider importer's claim that he would have been exempt from duties had he not followed Customs' erroneous advice with respect to filing of forms).

Other cases have required strict adherence to procedural rules without referring to the Court's lack of "equity power." *American Mail Lines, Ltd. v. United States*, 34 C.C.P.A. 1 (1946) (protest dismissed because grounds relied upon at trial were different from those contained in protest); *Nikko Boeki, Int'l, Inc. v. United States*, 71 Cust. Ct. 16 (1973) (protests dismissed because filed three days prior to liquidation; protest to be valid must be filed after liquidation); *Best Foods, Inc. v. United States*, 147 F. Supp. 749 (Cust. Ct. 1956) (same).

¹⁷³ The *Matsushita* case, *supra* note 170, did not address that precise issue. There, the Customs Court held that it could not exercise power under the All Writs Act until after the jurisdictional prerequisite of a denied protest had been satisfied. *See also Dexter v. United States*, 11 CUST. BULL. 50 (Cust. Ct. Feb. 9, 1977).

¹⁷⁴ 28 U.S.C. § 1651(a) (1970).

¹⁷⁵ *Id.* § 451. *Moise Products Co. v. United States*, 37 Cust. Ct. 135 (1956).

¹⁷⁶ *United States v. Boe*, 543 F.2d 151 (C.C.P.A. 1976) (the Court of Customs and Patent Appeals has jurisdiction under All Writs Act to order Chief Judge of Customs Court not to take jurisdiction); *Cook v. Dann*, 522 F.2d 1276 (C.C.P.A. 1975) (asserting court's power to issue writs, but refusing to exercise such power in absence of executive abuse of discretion); *Import Motors, Ltd. v. Int'l Trade Comm'n*, 530 F.2d 937 (C.C.P.A. 1975) (enjoining the International Trade Commission from precluding plaintiff from hearing in a section 337 proceeding, *vacated*, 530 F.2d 940 (C.C.P.A. 1975)); *Weil v. Dann*, 503 F.2d 562 (C.C.P.A. 1974) (asserting court's power to issue writs, but refusing to exercise power where it would not foster effective appellate review); *Loshbaugh v. Allen*, 404 F.2d 1400 (C.C.P.A. 1969) (acknowledging mandamus power, but refusing to suspend a proceeding before the Commissioner of Patents).

States,¹⁷⁷ the Court of Customs and Patent Appeals stated in *dictum* that the Customs Court could not issue declaratory judgments, but did not expressly consider the effect of the Declaratory Judgment Act. That statute provides that:

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, *any court of the United States*, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration (emphasis supplied).¹⁷⁸

In a subsequent decision, the Customs Court, without referring to *Eurasia*, indicated that it could issue declaratory judgments but declined to do so on the ground that it would be improper under the circumstances.¹⁷⁹ These are the only two cases dealing with the Customs Court's authority to issue declaratory judgments.

District Court Jurisdiction

As a result of the statutory limitations on Customs Court jurisdiction, certain Customs actions may be reviewable only in a federal district court. Suits seeking forfeiture, monetary penalties, or liquidated damages under a bond are brought in a district court. If Customs seizes goods, but has not initiated forfeiture or condemnation proceedings, the district court has jurisdiction to require Customs to do so.¹⁸⁰ The Customs Court does not have jurisdiction in cases involving forfeiture or penalties, even if a protest against the exclusion of merchandise has been filed and denied.¹⁸¹

¹⁷⁷ 31 C.C.P.A. 202 (1944).

¹⁷⁸ 28 U.S.C. § 2201 (1970).

¹⁷⁹ *Moise Products Co. v. United States*, 37 Cust. Ct. 135 (1956) (declaratory judgment is improper when plaintiff is seeking an interlocutory ruling on law to be applied at administrative level). It is established that controversies concerning import duties do not concern "Federal taxes" and are not outside the Declaratory Judgment Act for that reason. See *Algonquin SNG, Inc. v. Federal Energy Administration*, 426 U.S. 548 (1976). It is unclear what effect, if any, *United States v. King*, 395 U.S. 1 (1969), has on this question. There, the Supreme Court ruled that the Court of Claims, which is also "a court of the United States" could not issue declaratory judgments, but that holding was based on the unique position and history of the Court of Claims.

¹⁸⁰ *In re* No. 32 E. 60-7th St., 96 F.2d 153, 156 (2d Cir. 1938); *In re Behrens*, 39 F.2d 561, 563 (2d Cir. 1930).

¹⁸¹ *United States v. American Metal Co.*, 12 Ct. Cust. App. 440, 444 (1925); *Sheldon & Co. v. United States*, 8 Ct. Cust. App. 215, 218 (1917); *M.M. Scher & Sons, Inc. v. United*

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District Court jurisdiction over other Customs actions is dependent upon an interpretation of Customs Court jurisdiction: district courts may take jurisdiction under one of their general or specific jurisdictional provisions¹⁸² when the Customs Court does not have jurisdiction over the subject matter. This occurs most frequently when Customs excludes merchandise under a law that is not a customs law—action subject neither to a protest nor to review in the Customs Court. Under this scheme, district courts have subject matter jurisdiction to review exclusion of merchandise under the Food, Drug, and Cosmetic Act (a decision made by the Food and Drug Administration);¹⁸³ exclusion of goods such as switchblade knives (a decision made by Customs);¹⁸⁴ exclusion of oil pursuant to a quota imposed by the President under section 22 of the Agricultural Adjustment Act;¹⁸⁵ and under former procedures, exclusion of goods which allegedly copy a registered trademark (a decision made by Customs).¹⁸⁶

Interestingly, when district courts have jurisdiction over Customs action, they may provide immediate relief against unlawful Customs action before administrative procedures surrounding a protest or petition are completed.¹⁸⁷ In those situations, district courts

States, 24 Cust. Ct. 243 (1950)(mitigated penalty is not an exaction subject to protest or review).

¹⁸² 28 U.S.C. § 1331 (1970) (where matter in controversy "arises under the Constitution, laws or treaties of the United States"); *id.* § 1340 (matters "arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court"); *id.* § 1346(a)(2) ("any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress").

¹⁸³ *Sugarman v. Forbragd*, 405 F.2d 1189, 1190 (9th Cir. 1968) (review of FDA order excluding allegedly adulterated coffee beans); *The James J. Hill*, 65 F. Supp. 265, 269 (D. Md. 1946) (review of FDA order to export or destroy wheat); *Goodwin v. United States*, 371 F. Supp. 433, 436 (S.D. Cal. 1972) (exclusion by FDA).

¹⁸⁴ *Precise Imports Corp. v. Kelly*, 218 F. Supp. 494 (S.D.N.Y. 1963) (exclusion of switchblade knives under criminal statute), *aff'd*, 378 F.2d 1014 (2d Cir.), *cert. denied*, 389 U.S. 973 (1967).

¹⁸⁵ *C. Tennant Sons & Co. of New York v. Dill*, 158 F. Supp. 63 (S.D.N.Y. 1957).

¹⁸⁶ *Croton Watch Co. v. Laughlin*, 208 F.2d 93 (2d Cir. 1953) (exclusion under trademark laws). *See also* *Richard J. Spitz, Inc. v. Dill*, 140 F. Supp. 947 (S.D.N.Y. 1956) (district court has jurisdiction to consider exclusion made under Foreign Assets Control Regulations); *Carriso, Inc. v. United States*, 106 F.2d 707 (9th Cir. 1939) (district courts have jurisdiction to challenge certain navigation fees collected by Customs).

¹⁸⁷ *See* *Croton Watch Co. v. Laughlin*, 208 F.2d 93 (2d Cir. 1953); *Richard J. Spitz, Inc. v. Dill*, 140 F. Supp. 947 (S.D.N.Y. 1956). Indeed, one of the reasons importers attempt to invoke district court jurisdiction is to avoid the procedural prerequisites of Customs Court jurisdiction. *See, e.g., J.C. Penney Co. v. United States Treasury Dep't*, 439 F.2d 63 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971).

have greater ability to control administrative action than does the Customs Court, which must wait until a protest or petition is filed and denied before assuming jurisdiction.

When the subject matter under challenge is within the exclusive jurisdiction of the Customs Court, it is generally held that the district court has no jurisdiction,¹⁸⁸ even if the Customs Court is unable to hear the case because procedural prerequisites have not been completed.¹⁸⁹ Cases to that effect are premised on the notion that Congress intended the Customs Court to offer a "complete system of corrective justice"¹⁹⁰ in matters over which it has jurisdiction. Therefore, the prerequisites for Customs Court review are taken as limitations on judicial review of Customs actions by district courts. Persons not authorized to petition or protest subject matter within the Customs Court's jurisdiction may not challenge such action in the district court.¹⁹¹ Persons for whom the protest or petition procedures might someday be available may not challenge Customs action in the district court without invoking those procedures, even if the Customs Court remedy is alleged to be ineffective.¹⁹²

A few decisions have stated that in "exceptional and extraordinary" circumstances a district court might properly enjoin Customs Service action if such action threatened irreparable injury, even though the subject matter was within the exclusive jurisdiction of the Customs Court.¹⁹³ However, this exception has never been

¹⁸⁸ See cases cited in note 129 *supra*. In at least one case, a district court has reviewed administrative action that would normally be within the exclusive jurisdiction of the Customs Court without considering the jurisdictional issue. *Norman G. Jensen, Inc. v. United States*, 355 F. Supp. 466 (D. Minn. 1973) (in declaratory judgment action, court ruled that Customs Service had lawfully imposed duties on imported merchandise that was not later exported as promised).

¹⁸⁹ See, e.g., *SCM Corp. v. Int'l Trade Comm'n*, 549 F.2d 812, 815 (D.C. Cir. 1977); *J.C. Penney Co. v. United States Treasury Dep't*, *supra* note 174; *Fritz v. United States*, 535 F.2d 1192 (9th Cir. 1976).

¹⁹⁰ *Argosy, Ltd. v. Hennigan*, 404 F.2d 14, 20-21 (5th Cir. 1968) (quoting *Cottman Co. v. Dailey*, 94 F.2d 85, 88 (4th Cir. 1938)).

¹⁹¹ See *Kocher v. Fowler*, 397 F.2d 641 (D.C. Cir. 1967), *cert. denied*, 391 U.S. 920 (1968); *Consumers Union of the United States, Inc. v. Comm. for the Implementation of Textile Agreements*, No. 76-1064 (D.C. Cir. Apr. 20, 1977), *petition for rehearing denied*, (D.C. Cir. Sept. 2, 1977).

¹⁹² *J.C. Penney Co. v. United States Treasury Dep't*, *supra* note 187. *Cf.* *SCM Corp. v. Int'l Trade Comm'n*, 549 F.2d 812 (D.C. Cir. 1977) (Customs Court must initially rule on its own jurisdiction before a district court can proceed to exercise jurisdiction).

¹⁹³ E.g., *Argosy, Ltd. v. Hennigan*, 404 F.2d 14, 21 (5th Cir. 1968); *Cottman Co. v. Dailey*, 94 F.2d 85, 89 (4th Cir. 1938); *Horton v. Humphrey*, 146 F. Supp. 819, 821 (D.C.C. 1956).

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invoked.¹⁹⁴ Increasingly courts have recognized that because of the limitation on its jurisdiction and power the Customs Court may not provide a "complete system of corrective justice" for matters within its jurisdiction. Such courts have taken jurisdiction over matters seemingly within the jurisdiction of the Customs Court, refusing to hold that limitations on Customs Court jurisdiction necessarily imply limitations on their own jurisdiction. Thus, even though the Customs Court normally reviews administrative action of the Secretary of the Treasury under the Antidumping Act of 1921 and district courts do not,¹⁹⁵ in *Timken Co. v. Simon*,¹⁹⁶ the district court took jurisdiction over a suit by a U.S. manufacturer to consider whether a refusal of the Secretary of the Treasury to exact dumping duties on certain importations was lawful. In affirming, the court of appeals reasoned that because the action was not subject to a petition under section 516, it was not within the exclusive jurisdiction of the Customs Court, thus rejecting the notion that section 516 limits reviewability of actions not specifically subject to review through the protest and petition procedures.

Similarly, in *Massachusetts v. Simon*¹⁹⁷ the district court took jurisdiction over a suit challenging license fees imposed by the President on imported oil, even though traditionally the Customs Court has reviewed Presidential actions which result in increased duties.¹⁹⁸ Although it is not clear from the opinion, jurisdiction may have been exercised simply because some of the plaintiffs before the court could not have filed a protest or challenged the license fees in the district court. These cases suggest that confusion concerning the respective jurisdictions of the Customs Court and district courts will continue as long as the jurisdiction and powers of the Customs Court are narrowly limited.

¹⁹⁴ The narrow scope of this exception is exemplified by *Horton v. Humphrey*, 146 F. Supp. 819 (D.D.C. 1956), where the court declined to take jurisdiction even though the challenged Customs action was alleged to have put plaintiff out of business and Customs Court review was alleged to be too untimely to provide effective relief.

¹⁹⁵ See, e.g., *Cottman Co. v. Dailey*, 94 F.2d 85 (4th Cir. 1938); *Horton v. Humphrey*, 146 F. Supp. 819 (D.D.C. 1956). Compare 19 U.S.C. § 169 (1970) with *id.* § 1516 (Supp. V 1975).

¹⁹⁶ 539 F.2d 221 (D.C. Cir. 1976).

¹⁹⁷ No. 75-0129 (D.D.C. Feb. 21, 1975), *rev'd sub nom.*, *Algonquin SNG, Inc. v. Federal Energy Administration*, 518 F.2d 1051 (D.C. Cir. 1975), *rev'd*, 426 U.S. 548 (1976).

¹⁹⁸ *United States v. Star Indus., Inc.* 462 F.2d 557 (C.C.P.A.) (review of duty assessed on brandy imported from Spain), *cert. denied*, 409 U.S. 1076 (1972); *United States v. Best Foods, Inc.*, 47 C.C.P.A. 163 (1960) (review of fee imposed on peanuts); *United States v. Schmidt Pritchard & Co.*, 47 C.C.P.A. 152, *cert. denied*, 364 U.S. 919 (1960) (presidential proclamation under the escape clause).

ANALYSIS AND RECOMMENDATIONS

Introduction

Except when it revokes or suspends a broker's license, the Customs Service acts through informal procedures. Decisions are made and actions are taken without a formal record, without an opportunity to examine or cross-examine witnesses or formally test the validity of information, without articulated support for decisions, and without an independent decision-maker. In part, these procedures are required by the nature of the work Customs does. Many of the functions Customs performs could not be carried out through formal adjudicatory proceedings at the administrative level. The assessment and collection of duties, for example, would absorb an enormous amount of resources if Customs were required to establish the classification and value of all merchandise in a formal adjudicatory setting. Informal procedures permit the Customs Service to take action without first demonstrating to an independent trier of fact that the information it relies upon is accurate. This is generally appropriate because a significant number of issues resolved by the Service are relatively easy to decide or are noncontroversial. Informal procedures facilitate disposal of most issues without controversy, and resolution of most controversies without the burdens of formal proceedings.

On the other hand, much of what Customs does involves adjudication:¹⁹⁹ import specialists, customs inspectors, district directors and their staffs, and lawyers at headquarters make (even if they do not articulate) findings of fact and apply general standards contained in legislation and regulations.²⁰⁰ Accordingly, the procedural formalities normally associated with a trial-type hearing may be important to ensure fair and correct determinations.

Tension therefore exists between the need for the administrative system to be fast and flexible and the need for the safeguards of more formal adversary proceedings. Present procedures resolve

¹⁹⁹ This is generally true whether "adjudication" is defined as broadly as in section 551(7) of the Administrative Procedure Act ("agency process for the formulation of an order") or more narrowly and conventionally as Professor Davis would define it (disposition of an issue, other than by rulemaking, involving legal right or legal obligations of named parties). See Davis, *Revising the Administrative Procedure Act*, 27 AD. L. REV. 35, 40 (1977).

²⁰⁰ As long ago as 1810, Chief Justice Marshall referred to a customs collector (the official who then assessed duties) as a "quasi-judge." *Scott v. Negro Ben*, 10 U.S. (6 Cranch) 1, 3 (1810).

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this tension by combining informal administrative procedures with judicial review for those aggrieved by administrative decisions. After duties are assessed informally, an importer may protest the assessment, and if the protest is denied, challenge the assessment in the Customs Court. There, "review" is a hybrid of review and *de novo* adjudication. The Customs Court does not review an administrative record; decisions are based on a record compiled *de novo* before it.²⁰¹ But this is not, strictly speaking, a trial *de novo* because the Customs Court does not make an independent determination of contested issues. Instead, the action of the Customs Service is presumed to be correct and the party challenging that action has the burden of proving that the action is incorrect.²⁰²

The administrative-judicial process just described appears to be proper in most instances (although the recommendations of this article would eliminate the additional burden of proof now borne by parties challenging Customs action). The present informal decision-making process should be retained at the administrative level so that most issues can be disposed of quickly and flexibly. Resolving disputed issues through judicial proceedings rather than through formal administrative procedures permits the administrative process to proceed expeditiously, but provides the adversary context and procedural formalities which are necessary to assure sound decisions and judicial control over Customs action. At the same time, the presumption of correctness underlying Customs decisions facilitates the informal administrative process by shifting the burden of proof to persons challenging Customs action.

Even though the framework in which issues are raised and resolved appears to be sound, much can be done to improve the operation of administrative and judicial procedures within that framework. The informality of the present administrative process used by Customs places a heavier responsibility on the process of judicial review than there would otherwise be. A court is the only forum in which issues arising from administrative action can be decided in an adversary proceeding by an impartial decision-maker on the basis of an evidentiary record. Accordingly, judicial

²⁰¹ However, 28 U.S.C. § 2632(f) (Supp. V 1975) provides that when the summons is served the Customs Service is to transmit a copy of certain entry documents, the protest and denial thereof, any laboratory reports, and official samples of the merchandise "as part of the official record of the civil action" in the Customs Court.

²⁰² *Id.* § 2635(a).

review should be available and timely, as well as sufficiently broad in scope to overturn incorrect administrative action.

Courts improve the administrative process by creating substantive standards for channelling discretionary action and requiring the agency to develop rules, procedures, and statements of policy.²⁰³ The recommendations discussed below would assist the Customs Court in fulfilling that role by broadening its subject matter jurisdiction, increasing its powers to enable it to grant timely relief, revising the rules concerning the burden of proof that currently preclude the reversal of erroneous administrative action, and modifying procedures that preclude judicial review in penalty cases.

There are, however, limits to the ability of a court to structure administrative discretion or require an agency to do so;²⁰⁴ it may be too restrained by resources, natural conservatism, or the complexity of the task to control agency discretion effectively. It is likely that nonjudicial scrutiny of administrative procedures themselves may yield more productive procedural changes than attention focused in the context of an adversary proceeding. While it is recommended that direct attention be given to revising the procedures Customs uses in performing its function, analysis of such revision is beyond the scope of this article.

Courts are also limited in their ability to improve administrative procedures, because their only opportunity to do so is when a

²⁰³ K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 57-59 (1969); K. DAVIS, *POLICE DISCRETION* 121-38 (1975); Wright, Book Review, 81 *YALE L. J.* 575 (1972). The efficacy of judicial control of informal and discretionary agency action is just beginning to be studied. Freedman, *Summary Action by Administrative Agencies*, 40 *U. CHI. L. REV.* 1, 55-64 (1972). Sofaer *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 *COLUM. L. REV.* 1293 (1972); Thomforde, *Controlling Administrative Sanctions*, 74 *MICH. L. REV.* 709, 734-51 (1976); Vicery, *Judicial Review of Informal Agency Action: A Case Study of Shareholder Proposal Letters*, 28 *HAST. L.J.* 307 (1976); Wright, *New Judicial Requisites for Informal Rulemaking: Implications for the Environmental Impact Statement Process*, 29 *AD. L. REV.* 59 (1977).

²⁰⁴ Sofaer, *supra* note 203, at 1375; Stewart, *The Reformation of American Administrative Law*, 88 *HARV. L. REV.* 1669, 1696 (1975); Williams, *Securing Fairness and Regularity in Administrative Proceedings*, 29 *AD. L. REV.* 1, 33 (1977). The Supreme Court almost seems to have accepted these limitations as precluding effective judicial innovation. *See, e.g.*, *Renegotiation Bd. v. Grumman Aircraft Eng'r Corp.*, 421 U.S. 168 (1975) (agency need not explain decisions, even if public interest suffers otherwise); *Butz v. Glover Livestock Co.*, 411 U.S. 182 (1973) (reversing appeals court decision requiring agency to explain inconsistent decisions); *Camp v. Pitts*, 411 U.S. 138 (1973) (*de novo* review of informal adjudication not required); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971) (formal findings not required for informal action). *But see* *Morton v. Ruiz*, 415 U.S. 199 (1974) (agency must let standards be known to avoid reality and appearance of arbitrary denial of benefits).

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dispute is brought before them. If persons whose interests an agency should protect do not, or may not, challenge agency action, there is no opportunity for judicial correction.²⁰⁵ This problem is particularly significant in the administration of the customs laws. Much of what Customs does will go unchallenged if Customs exercises its discretionary powers in favor of its primary and most immediate constituency, the importers. This is true because many persons with interests the Service is designed to protect (*e.g.*, consumers) either lack a sufficient interest to challenge Customs actions or lack standing to seek administrative or judicial correction of erroneous Customs action. The proposals herein would provide procedures so that such persons could challenge Customs actions.

Many of the recommendations included herein would strengthen the role of the Customs Court in overseeing substantive and procedural aspects of Customs activity, sometimes by taking review authority away from the district courts. When this is so, it is because the issues raised require the experience or expertise of the Customs Court and because of the advantages in having a unified body of customs law established through a national court.

The question arises whether the Customs Court is qualified for the task. It is clear that the recommendations made here will be effective only if the judges of the Customs Court use new authority imaginatively and forcefully. Because the quality of appointments to the court will influence whether the goals underlying the recommendations can be achieved, the process of selecting judges should be reviewed to ensure that the best possible appointments are made.

As an institution, the Customs Court seems capable of fulfilling the role envisioned in this article. The national jurisdiction of the court assures uniformity of treatment. The court is well funded and staffed. It has the authority to compel the attendance of witnesses and the production of documents, and may punish persons for contempt.²⁰⁶ The rules of the Customs Court were revised and modernized along the lines of the Federal Rules of Civil Procedure soon after passage of the Customs Court Act of 1970,²⁰⁷ and now

²⁰⁵ For the view that administrative law should reflect the fact that agencies mediate disputes between various interests see Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1671 (1975).

²⁰⁶ See note 165 and accompanying text *supra*.

²⁰⁷ Pub. L. No. 91-271, tit. I, 84 Stat. 274 (1970) (codified in scattered sections of 28 U.S.C.).

provide for full discovery and motion procedures. The Act strengthened the Customs Court as an institution by enabling the court to reduce its substantial backlog of cases.²⁰⁸ These reforms not only streamlined Customs Court procedure, but left the resources of the court relatively underutilized. Indeed, one of the attractive features of relying on the Customs Court for more judicial control over Customs action is that the court appears able to take on new responsibilities without requiring significant additional resources. This conclusion is supported by the available statistics²⁰⁹ and by the fact that some Customs Court judges frequently sit on federal district courts.

If there is a drawback in relying upon the Customs Court for strengthened review of Customs action, it is that the Customs Court sits primarily in New York City, while district courts are more accessible to other ports. Litigants at ports other than New York presumably would prefer to challenge Customs actions in their local district courts. However, this drawback can be overcome. The Customs Court can use its authority to hear cases at places other than New York.²¹⁰ Some judges of the court might sit permanently in locations outside of New York—particularly on the West Coast, where customs work has grown most rapidly in recent years.²¹¹ Finally, the court might experiment with using long dis-

²⁰⁸ *Id.* The Act consolidated into one trial issues previously raised in separate consecutive trials (one on valuation and a second on classification of merchandise). In addition, the Act reduced Customs Court congestion by allowing the Service to revise appraisements while a suit is pending in court, by reducing from three to one the number of judges assigned to hear cases, by dropping the rule that all protests denied by Customs be referred automatically to the Customs Court, and by lengthening the time within which a denied protest could be appealed, thus decreasing the number of cases appealed by importers merely to preserve the possibility of appeal. See H.R. REP. NO. 1067, 91st Cong., 2d Sess. 9 (1970).

²⁰⁹ The statistical information available is difficult to appraise because it does not necessarily reflect factors such as the time spent at trial or difficulty of the issues. Over 23,000 "cases" were terminated during fiscal year 1976, but many were disposed of collectively by trying a single test case. In fact, only 64 cases were tried that year (an average of seven per judge), while an additional 869 cases were disposed of on the basis of stipulations or dispositive orders. Seventy-three written decisions were published, and 721 decisions were made with only short abstracts summarizing the subject matter. See U.S. Customs Court, Report for the Fiscal Year Ending June 30, 1976 (1976) (available from the U.S. Customs Court, New York, N.Y.). These figures are consistent with statistics concerning the workload of the court in prior years. Of course, these figures—which seem to indicate that the court has substantial unused judicial resources—do not necessarily reflect the time spent in the trial or decision of cases or the time spent on deciding nondispositive motions.

²¹⁰ 28 U.S.C. § 256 (1970).

²¹¹ Between 1970 and 1975 the total value of foreign trade from West Coast ports—including both imports and exports—rose 160 percent. For ports in California alone, foreign

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tance video communications in emergency situations so that litigants can present arguments to the court without appearing in New York in person.

Jurisdiction and Powers of the Customs Court

1. *Customs Court Jurisdiction Without a Protest or Petition*

Congress should amend 28 U.S.C. § 1582 to broaden the jurisdiction of the Customs Court by giving the court exclusive jurisdiction of any civil action brought to challenge final agency action (as defined in the Administrative Procedure Act) of the Customs Service. Two types of actions should be excepted from this jurisdiction: those specifically subject to review in another court, and those pertaining to the exclusion of merchandise under a law that is not a customs law taken by the Customs Service on the request or at the direction of another federal agency.

Because under present law a protest by an importer or a petition by a U.S. manufacturer, producer, or wholesaler must be filed and denied before the Customs Court has jurisdiction, the administrative process at Customs is insulated from challenge in the Customs Court until the protest or petition process has run its course. Neither Customs action nor inaction can be reviewed or controlled by the Customs Court except through those procedures.²¹²

This system has three adverse effects. First, it unduly limits the subject matter jurisdiction of the Customs Court, because final Customs action that is not subject to a protest or petition under 19 U.S.C. § 1514 (1970) is never reviewed in the Customs Court.²¹³

trade increased 20 percent in the first 10 months of 1976, with imports increasing more than 28 percent. Wall St. J., Jan. 20, 1977, at 1, col. 5.

²¹² See text accompanying notes 112-34 *supra*.

²¹³ There are many examples. Refusal to license a broker is not subject to either protest or petition or to any other articulated procedure leading to judicial review (although revocation or suspension of a broker's license is subject to judicial review). Suspension of immediate delivery privileges as well as the amount required to be filed as a bond are not subject to protest or petition and therefore are not subject to review in the Customs Court. It has been suggested that an importer required to file an unduly large bond might refuse to file the bond and then protest the subsequent exclusion of his merchandise (which would follow if no bond were filed). However, this is an uncertain and circuitous remedy. One seeking review concerning the amount of a bond should not be forced to give up control of his merchandise in order to challenge the decision.

It is not possible or desirable to list all of the Customs actions which are final and which would be subject to review in the Customs Court under this recommendation. The purpose of the recommendation is to give the Customs Court general jurisdiction to ensure that a forum is always available to review final decisions of the Customs Service.

Although such actions might be reviewed in a district court,²¹⁴ challenges there are inadequate. There is no certainty that the district court will take jurisdiction; it may not if it concludes that the action is within the exclusive jurisdiction of the Customs Court or that Congress intended the action to be nonreviewable.²¹⁵ Uncertainty concerning the availability of judicial review is in itself sufficient reason to provide for review of all final actions of the Service. Moreover, even assuming that the district court would take jurisdiction, Customs Court review would be preferable, since the judges of the Customs Court are more familiar with Customs procedures and terminology and have a level of expertise not possessed by the district court bench. This recommendation would therefore expand the subject matter jurisdiction of the Customs Court to include review of all final actions of the Customs Service, and would make such jurisdiction exclusive.

The recommendation would also dispel confusion concerning review of actions resulting in exclusion of merchandise. Presently, exclusion of merchandise under a law that is not a customs law is not subject to a protest or to review in the Customs Court, even if it is Customs that decides that the merchandise is prohibited or restricted. Instead, review is in a district court, although district courts have no special expertise or experience which favors them as a reviewing forum in those cases. Review of Customs exclusion decisions should be in the Customs Court so that substantive and procedural aspects of all such decisions are uniformly adjudicated.²¹⁶

A second adverse effect of the limitations on Customs Court jurisdiction is that the Customs Court is not authorized to review Customs inaction—that is, failure or refusal of Customs to act when it should. Normally, the failure of an agency to act when it should is considered “agency action” which may be final for purposes of judicial review.²¹⁷ But unlawful inaction at the Customs Service

²¹⁴ See, e.g., *Gallagher and Ascher Co. v. Simon*, No.76C-3499 (N.D. Ill. Oct. 12, 1976) (granting temporary restraining order against withdrawal of immediate release privileges).

²¹⁵ See notes 189-90 *supra* and accompanying text. See, e.g., *J.C. Penney Co. v. United States Treasury Dep't*, *supra* note 187, at 98.

²¹⁶ However, the recommendation would not authorize the Customs Court to review exclusion cases for which the court has no special expertise or experience. Obscenity cases, for example, would continue to be brought in district courts. The portion of the recommendation governing which exclusion cases will be reviewed in the Customs Court is discussed in more detail below.

²¹⁷ 5 U.S.C. § 551(13) (1970). See, e.g., *Deering Milliken, Inc. v. Johnston*, 295 F.2d 856, 862 (4th Cir. 1961).

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generally is not subject to protest or petition and therefore is not subject to review in the Customs Court.²¹⁸

A significant instance of inaction is refusal or failure of the Service to proceed with liquidation when it otherwise could and should. Because Customs is not required to complete liquidation within any period of time, the courts afford the sole remedy when a liquidation (or other action) is unjustifiably delayed. Yet present jurisdictional limitations preclude the court from deciding whether such inaction is unlawful. Two recent cases challenging delay in completing liquidation illustrate the problem.²¹⁹ In both cases the Customs Court was found to lack jurisdiction since liquidation had not taken place, and therefore, no protest had been filed and denied. This result should be changed.

Judicial review is not the only way of controlling unlawful delay in agency action. Legislation before the House of Representatives, for example, would impose time limits on liquidation decisions.²²⁰ The recommendation here would not preclude such procedural improvements; nor would it be rendered obsolete by them. Judicial review of agency inaction is an important control on the discretionary functions of administrative agencies and should be available with respect to the Customs Service. The Administrative Procedure Act requires a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed,"²²¹ a general standard to which the Customs Service should be held.²²²

²¹⁸ One particularly striking example of erroneous, but unreviewable, Customs inaction is provided by *United States v. Astra Bentwood Furniture Co.*, 28 C.C.P.A. 205 (1940). There the importer was denied Customs Court jurisdiction to challenge the assessment of duties because no notice of liquidation had been posted (though plaintiff had received one). Customs' failure to post a notice of liquidation was held not subject to a protest and thus not subject to challenge in the Customs Court.

²¹⁹ *United States v. Boe*, 543 F.2d 151 (C.C.P.A. 1976) (under All Writs Act, Chief Judge of Customs Court ordered not to take jurisdiction over case before a protest has been filed and denied); *Dexter v. United States*, 11 CUST. BULL. 50 (Cust. Ct. Feb. 9, 1977) (Customs Court has no jurisdiction under the All Writs Act to consider whether liquidation is unreasonably withheld).

²²⁰ Under the legislation, merchandise not liquidated within 1 year of entry or withdrawal from a warehouse is deemed liquidated at the amount of duties paid at the time of entry or withdrawal, unless the time is extended to obtain additional information or liquidation is suspended pursuant to statute or court order. H.R. 8149, 95th Cong., 1st Sess. § 218 (1977).

²²¹ 5 U.S.C. § 706 (1970).

²²² At least one district court has taken jurisdiction and ordered Customs to proceed with appraisement. In *Alto Plastics Mfg. Co. v. Hann*, No. 70-2056-JWG (C.D. Cal. Nov. 3, 1971), the district court found that Customs had "unreasonably delayed appraisement" and ordered that appraisement be completed, basing jurisdiction on 28 U.S.C. § 1361 (1970). The fact that district courts might be available to provide relief in such instances does not detract

Limited Customs Court jurisdiction produces a third adverse effect—inability of the system to afford protection against irreparable injury in the customs context. As George Bronz, a former leader of the customs bar, has said:

If Customs officers exclude merchandise from entry or delivery, the importer cannot always wait four months for administrative reconsideration, plus an even longer period for a full-scale trial and decision by the Customs Court. An importer with an unresolved duty issue can assume the financial risk, and continue his imports. An importer whose product is refused entry must suspend his business until the conclusion of judicial proceedings. Apart from the expense of warehousing in bond, the merchandise may be perishable, or, when quotas are involved, the quota period may run out. Today, the importer has no real access to judicial review in such cases.²²³

The recommendation here would permit the Customs Court to provide timely relief if exclusion (or other Customs action) threatens irreparable injury where the normal protest process has not been completed.

Basing Customs Court jurisdiction on the denial of a protest or petition is consistent with the general principle that administrative remedies should be exhausted before action is subject to review. In most routine cases involving review of duty assessments this premise is appropriate since importers are guaranteed a refund if they have overpaid estimated duties, and there is generally little harm in delay. The exhaustion principle thus avoids disruption of the administrative process. However, there are recognized exceptions and qualifications to that principle which permit courts

from the importance of the recommendation here. The remedy in a district court is uncertain; district court might hold that the matter is within the exclusive (but unobtainable) jurisdiction of the Customs Court. See notes 189-90 *supra*.

²²³ *Hearings on S. 2624 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 205 (1969) (statement of George Bronz). See also address by George Bronz, Second Judicial Conference of the United States Court of Customs and Patent Appeals (May 29, 1975), reprinted in 69 F.R.D. 119, 181-88 (1976). The American Bar Association, without recommending an expansion in the jurisdiction of the Customs Court, has recommended that Congress authorize the court to "assume jurisdiction prior to the otherwise required exhaustion of all administrative remedies to prevent irreparable injury." That principle is incorporated in legislation now before the Senate. S. 1430, 95th Cong., 1st Sess. (1977).

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to review agency action before all administrative remedies have been exhausted,²²⁴ particularly when the administrative remedy is inadequate because it fails to offer relief commensurate with the plaintiff's claim²²⁵ or to protect against irreparable injury.²²⁶ The recommendation here, by adopting the more flexible concept of final agency action from the Administrative Procedure Act,²²⁷ incorporates these considerations.

The deficiencies in Customs Court review that result from the jurisdictional prerequisite of a denied protest or petition—limitations on subject matter jurisdiction, inability to review Customs inaction, and inability to protect against irreparable injury—operate with respect to all of the Customs functions described in this article, as well as to other Customs actions for which there is no judicial review. The recommendation would correct these deficiencies by giving the Customs Court authority to review Customs action outside of the normal procedure, while preserving the protest and petition procedures for those cases to which they are applicable. The question of standing to challenge final agency actions which are subject to review is addressed separately below.

Two types of cases would be exempted from the expanded jurisdiction of the Customs Court. The first, cases specifically subject to review in another court, includes several types of administrative action not reviewable in the Customs Court: actions under the Freedom of Information Act (now subject to review in a district court); actions involving personnel (now subject to review in the Court of Claims); and actions revoking or suspending a broker's license (now subject to review in a court of appeals). This proviso, particularly as it pertains to the revocation or suspension of brokers' licenses, was not based upon a decision that present

²²⁴ K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* 446 (1976); B. SCHWARTZ, *ADMINISTRATIVE LAW* § 173 (1976). See Fuchs, *Prerequisites to Judicial Review of Administrative Agency Action*, 51 *IND. L.J.* 817, 859 (1976).

²²⁵ The phrase is that of Professor Jaffe. L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 426 (1965), *citing* *Skinner and Eddy Corp. v. United States*, 249 U.S. 557 (1919) (to attack ICC authorization of railroad rates without a hearing it is not necessary to seek remedy in administrative proceedings) and *R.A. Holman & Co. v. SEC*, 299 F.2d 127 (D.C. Cir. 1962) (to attack order requiring petition for exemption from securities registration requirements it is not necessary to first seek such an exemption).

²²⁶ See, e.g., *Utah Fuel Co. v. Nat'l Bituminous Coal Comm.*, 306 U.S. 56 (1939) (in course of proceeding, agency proposes to reveal a document claimed to contain confidential information).

²²⁷ *Deering Milliken, Inc. v. Johnston*, 295 F.2d 856, 865-66 (4th Cir. 1961).

judicial review procedures are adequate. More adequate review might be had in the Customs Court or the Court of Customs and Patent Appeals, particularly of revocation or suspension of brokers' licenses. Contemplation of such a change, however, would require a much more thorough review of the subject than the scope of this article would allow.

The second exemption is more complicated. Under present law, decisions to exclude merchandise may be made by the Customs Service, the President, the International Trade Commission, or one of a number of other federal agencies. All such decisions are implemented by the Customs Service. For purposes of review, present law distinguishes between exclusion under a customs law and exclusion under other laws. If exclusion is pursuant to a customs law, review is obtained by filing a protest and appealing denial of the protest to the Customs Court, rather than to a district court. This is true whether the exclusion decision is made by the Customs Service (*e.g.*, by interpreting the statute requiring country-of-origin marking) or by the President (*e.g.*, by imposing a quota). Where exclusion is under a law that is not a customs law, no protest may be filed and therefore the Customs Court has no jurisdiction, even if the exclusion decision is made by the Customs Service (*e.g.*, under the law barring switchblade knives) rather than by another agency.

The recommendation and the second exemption would change this scheme in only one respect. As previously mentioned, each exclusion decision made by the Customs Service would be subject to review in the Customs Court rather than in a district court, whether taken pursuant to a customs law or a law that is not a customs law. The recommendation would not change the forum for review in other exclusion cases. Exclusion decisions by the President or another agency under a customs law would continue to be subject to protest and review in the Customs Court. This is desirable because such cases raise trade policy issues which the Customs Court is well suited to hear. Exclusion decisions by other agencies or by a court pursuant to a law that is not a customs law would be subject to review in the forum in which they are presently reviewed.²²⁸ These cases generally raise issues for which the Customs Court has no expertise and which usually are decided by

²²⁸ Thus, obscenity cases under 19 U.S.C. § 1305 (1970) would continue to be brought in district courts rather than the Customs Court.

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the district court when the law is applied to domestic goods. Consequently, there would be no advantage and some disadvantages to transferring jurisdiction over such cases to the Customs Court.²²⁹

2. *Power to Enjoin or Compel Actions*

Congress should amend 28 U.S.C. § 1581 to confer upon the Customs Court the remedial powers of a district court in respect of actions properly pending before it.

This recommendation is a corollary to the preceding recommendation expanding the jurisdiction of the Customs Court. Both the Customs Court and the Court of Customs and Patent Appeals have taken a narrow view of the powers of the Customs Court. Decisions refer to the lack of "equity power" of the court and raise doubts about the ability of the court to provide effective relief in appropriate circumstances under the All Writs Act or the Declaratory Judgment Act.²³⁰ To the extent that such decisions are premised on the fact that the court may provide no relief until the protest or petition procedure has been completed, they would be modified by the previous recommendation. To the extent that such decisions indicate that the judicial power of the court is inferior to that of other courts, they would be changed by this recommendation. To the extent that such decisions reflect a judgment on the merits concerning the claim before the court, they would not be modified.

The proposed change is necessary to ensure that the Customs Court can provide timely and effective relief by, for example, "compel[ling] agency action unlawfully withheld or unreasonably delayed;"²³¹ "postpon[ing] the effective date of agency action or preserv[ing] the status or rights" of persons pending appeal;²³² issuing writs in aid of its jurisdiction;²³³ or declaring the rights and other legal relations of parties before it in any case of actual controversy within its jurisdiction.²³⁴ The recommendation is expressed broadly so that the court may not disclaim the authority to

²²⁹ This Article does not address the adequacy of judicial review of exclusion decisions made by agencies other than the Customs Service.

²³⁰ See notes 169-79 *supra* and accompanying text.

²³¹ 5 U.S.C. § 706(1) (1970).

²³² *Id.* § 705.

²³³ 28 U.S.C. § 1651(a) (1970).

²³⁴ *Id.* § 2201.

grant proper relief in appropriate cases. Its language is adopted from a proposal of the American Bar Association which has been incorporated in legislation introduced by Senator DeConcini.²³⁵

3. *Political Affiliation of Court Appointees and Selection of the Chief Judge*

Congress should amend 28 U.S.C. § 251 to delete the requirement that not more than five of the nine judges of the Customs Court be appointed from the same political party and to provide that the chief judge be appointed by the President with the advice and consent of the Senate.

The Customs Court is unique among Article III courts in the selection of its judges and chief judge. Section 251 of Title 28 of the U.S. Code requires that not more than five of the nine judges of the Customs Court be appointed from the same political party and that the chief judge be selected by the President. Both requirements were originally enacted when the Board of General Appraisers (the precursor of the Customs Court) was established in 1890 as a quasi-administrative, quasi-judicial body to review classification and valuation of imports.²³⁶ The Board of General Appraisers evolved into a judicial body²³⁷ and in 1926 was renamed the Customs Court, but the provisions concerning the political affiliation of its judges and the appointment of a chief judge were never changed. They are outdated, unnecessary, and inconsistent with the notion of an impartial judiciary.

²³⁵ S. 1430, 95th Cong., 1st Sess. (1977). See 123 CONG. REC. S6787 (daily ed. Apr. 29, 1977). Similar legislation was introduced in the previous session of Congress by Senator Hruska. S. 3871, 94th Cong., 2d. Sess. (1976). See 122 CONG. REC. S17,121 (daily ed. Sept. 29, 1976).

²³⁶ Customs Administrative Act of June 10, 1890, ch. 407, § 12, 26 Stat. 131 (1890) (current version at 28 U.S.C. § 251 (1970)). See generally W. FUTRELL, THE HISTORY OF AMERICAN CUSTOMS JURISPRUDENCE 136-37 (1941); R. SMITH, CUSTOMS VALUATION IN THE UNITED STATES 131 (1948).

²³⁷ The evolution of the Board of General Appraisers from an administrative-judicial body to a judicial body was recognized in *Stone v. Whitridge*, 129 F. 33 (4th Cir. 1904), *rev'd on other grounds sub nom. United States v. Whitridge*, 197 U.S. 135 (1905) ("the Board is an independent tribunal, empowered by law to pass upon certain controversies between the Government and the importer, and in this respect the Board is no more subordinate to the Treasury Department than is any other Court"). Thereafter, in the Payne-Aldrich Tariff Act, ch. 6, § 28, ¶ 12, 36 Stat. 11 (1909) (repealed 1913), Congress gave the Board "all the powers of a circuit court of the United States;" in the Tariff Act of 1922, ch. 356, § 518, 42 Stat. 972 (1922), the Board was given all the powers of a district court to preserve order, compel attendance of witnesses and production of evidence, and punish for contempt; and in the Tariff Act of 1930, ch. 497, § 518, 46 Stat. 737 (1930) (current version at 28 U.S.C. § 252 (1970)), the judges of the Customs Court were given life tenure, subject to good behavior, thus rendering them immune to executive removal.

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It is recommended that the language concerning the political affiliation of court appointees be deleted by Congress.²³⁸ The appointment of a chief judge should follow one of the methods used with respect to other courts. The chief judges of the Court of Claims and the Court of Customs and Patent Appeals are appointed by the President, with the advice and consent of the Senate, and hold office for their judicial tenure.²³⁹ In the courts of appeals and district courts, the chief judge is a judge in regular service "who is senior in commission and under seventy years of age."²⁴⁰

Because of the significant responsibilities and authority of the chief judge, it is proposed that the chief judge of the Customs Court, like the chief judge of the other national courts, be appointed by the President with the advice and consent of the Senate. The chief judge of the Customs Court supervises administration of the court;²⁴¹ promulgates the dockets, designates the judge or (in three-judge cases) judges to try cases, and reassigns them "when circumstances so warrant;"²⁴² decides when three-judge courts are appropriate,²⁴³ and assigns judges to hear cases at other ports or in foreign countries.²⁴⁴ These responsibilities make it desirable that the selection of the chief judge be made with a view to his administrative abilities, which is only possible if the chief judge is an appointee.²⁴⁵

Standing to Seek Administrative and Judicial Review

Congress should amend 19 U.S.C. § 1516 to allow any person adversely affected by an incorrect determination of the appraised value or classifica-

²³⁸ This recommendation is now before Congress in S. 1430, 95th Cong., 1st Sess. (1977), following a similar recommendation of the American Bar Association.

²³⁹ 28 U.S.C. § 171 (1970) (Court of Claims); *id.* § 211 (Court of Customs and Patent Appeals).

²⁴⁰ 28 U.S.C. § 45 (1970) (courts of appeals); *id.* § 136 (district courts).

²⁴¹ 28 U.S.C. § 253(a) (1970).

²⁴² *Id.* § 255(b)-(c). Three-judge courts are provided whenever the action "(1) raises an issue of the constitutionality of an Act of Congress, a proclamation of the President or an Executive order; or (2) has broad or significant implications in the administration or interpretation of the Customs laws." *Id.* § 255(a).

²⁴³ 28 U.S.C. § 255 (1970).

²⁴⁴ *Id.* § 256.

²⁴⁵ This proposal is similar to one under consideration by the Department of Justice. The Department's proposal, however, would require the chief judge selected by the President to step down as chief judge when he reached the age of 70.

tion of, or rate of duty assessed upon, imported merchandise to obtain from the Customs Service information concerning such decision and to petition for a change. Denials of such petitions should be reviewable in the Customs Court.

Congress should enact a new statutory provision giving any person adversely affected by an action of the Customs Service concerning merchandise that is (or should be) excluded from entry or delivery, a means of seeking administrative review of such action. Subsequent review in the Customs Court should be provided. However, such a procedure should not be available to challenge action excluding merchandise upon request or order addressed to the Customs Service by a court or another federal agency taken under a law that is not a customs law.

If Congress broadens the jurisdiction of the Customs Court as recommended above it should also provide that actions within the broadened jurisdiction may be brought by any adversely affected person who has exhausted his administrative remedies.

Public participation in the administrative process has been called one of the "cornerstones for contemporary administrative law and for the future."²⁴⁶ But public participation has not been a noticeable part of the administrative process at the Customs Service. This is unfortunate. The Customs Service makes decisions that affect many interests, including those of importers, competing U.S. companies, foreign suppliers and exporters, and purchasers of imported merchandise. When those interests are adversely affected, Customs' action should be subject to challenge through administrative procedures and judicial review. These recommendations would revise the laws which preclude such challenges.²⁴⁷

Presently, the only formal means of seeking administrative review of decisions made by the Customs Service is to file a protest or petition. Protests may be filed only by the importer or consignee of

²⁴⁶ Williams, *Securing Fairness and Regularity in Administrative Proceedings*, 29 AD. L. REV. 1, 15 (1977).

²⁴⁷ The Customs Service has procedures to provide "interested parties" with an administrative ruling setting forth "a definitive interpretation of applicable law, or other appropriate information." 19 C.F.R. § 177.1 (1977); see text accompanying notes 71-73 *supra*. This procedure is not a substitute for the right to challenge Customs action, however, and is often inadequate because of delays in issuing rulings. The rulings are only given to persons "with a direct and demonstrable interest in the question or questions presented;" they are issued only with respect to prospective transactions to a person who submits all relevant facts; and they are not subject to review until after they are applied to particular transactions. 19 C.F.R. § 177 (1977). As a result, rulings are of little value to a person not directly involved in the transaction for which the ruling is sought.

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the merchandise subject to the protested Customs action, by their agents,²⁴⁸ or by a person to whom merchandise placed in a bonded warehouse has been transferred.²⁴⁹ A petition may be filed only by a U.S. manufacturer, producer, or wholesaler of the same class or kind of merchandise as that affected by the Customs action challenged. Moreover, the petition procedures allow challenges to only three types of action: (1) decisions concerning the classification or appraised value of, or rate of duty on, merchandise; (2) decisions not to impose countervailing or antidumping duties; and (3) determinations that merchandise is not being, or is not likely to be, sold at less than fair value under the Antidumping Act of 1921, or has not received a bounty or grant under the Countervailing Duty Act. U.S. manufacturers, producers, and wholesalers seeking to challenge Customs actions concerning a class of merchandise in which they do not deal, and other persons wishing to challenge Customs action through the administrative process, have no means of doing so.

Similar limitations restrict standing to seek judicial review of Customs actions. The Customs Court has no jurisdiction to review Customs action unless a protest or petition has been denied by Customs. District courts may take jurisdiction over Customs actions that are not in the exclusive jurisdiction of the Customs Court,²⁵⁰ but the Customs Court, because of its expertise and continuing control of Customs actions, would provide a better forum for review. Moreover, district courts have no jurisdiction over actions subject to a protest or petition procedure (since review of such actions is exclusively in the Customs Court) even if the plaintiff is not authorized to file a protest or petition.²⁵¹ In short, many persons who may be adversely affected by decisions of the Customs Service have no effective means of challenging those decisions at either the administrative or the judicial level. These recommendations would provide such means.

²⁴⁸ 19 U.S.C. § 1514 (1970).

²⁴⁹ *Id.* § 1557(b).

²⁵⁰ *See, e.g.,* Timken Co. v. Simon, 539 F.2d 221 (D.C. Cir. 1976) (suit to challenge failure to withhold appraisement under the Antidumping Act).

²⁵¹ *See, e.g.,* Consumers Union of the United States, Inc. v. Comm. for the Implementation of Textile Agreements, No. 76-1064 (D.C. Cir. Apr. 20, 1977), *petition for rehearing denied* (D.C. Cir. Sept. 2, 1977) (discussed in text accompanying notes 253-55 *infra*); Kocher v. Fowler, 397 F.2d 641 (D.C. Cir. 1967), *cert. denied*, 391 U.S. 920 (1968) (discussed in note 257 *infra*).

To understand the impact of these proposals, one should consider the effect they would have on those who may be adversely affected by Customs actions—U.S. manufacturers, producers, and wholesalers, competing importers, foreign suppliers, and consumers. U.S. companies whose products compete with imported merchandise have an important stake in decisions made by the Customs Service. Indeed, many of the laws administered by Customs were enacted to protect such firms. But a U.S. manufacturer, producer, or wholesaler may challenge Customs actions under the petition provisions of section 516 only if he deals in the same class or kind of merchandise as that to which the challenged action pertains. As a result, a cattle producer may not challenge duty assessments on imported hides or leather goods (a different class or kind of merchandise), even if his sales to producers of hides suffer because imports are facilitated by erroneous Customs action. Similarly, a manufacturer of steel may not challenge duty assessments on auto bodies even if he is injured when Customs fails to collect the proper duties.²⁵²

The recommendation would amend section 516 so that any adversely affected person could challenge decisions on classification, rates of duty, and appraisalment.

The types of decisions U.S. companies may challenge formally also are restricted. The procedures under section 516 do not provide for challenges to the admission of merchandise or to the procedures Customs employs to inspect, assess, weigh, or otherwise process merchandise. Yet those actions, if erroneous or inadequate, could adversely affect U.S. businesses which Congress intended to protect through many of the trade laws.

This proposal also would authorize standing for persons who buy merchandise from importers: manufacturers, wholesalers, retailers, and consumers. Such persons are not authorized to file a protest or petition or otherwise challenge Customs action, despite the fact that they may be injured by the actions—for example, decisions concerning duties directly affect the price of merchandise, and decisions to exclude merchandise directly affect both availability and price. Normally, interests of these persons are pro-

²⁵² No case has been found which directly raises this issue, but the statute seems fairly clear on this point. The term "class or kind" of merchandise is not defined in section 516 or any other provision of the customs laws, although it is used in other provisions. *E.g.*, 19 U.S.C. § 160 (Supp. V 1975).

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tected by importers (who are affected most directly by the decisions). However, importers may have neither resources nor incentive to challenge erroneous Customs action, especially if they can pass price increases on to their customers or otherwise avoid the impact of the decisions. Thus, customers of importers may be left without a remedy against erroneous Customs action.

In *Consumers Union of the United States, Inc. v. Comm. for the Implementation of Textile Agreements*,²⁵³ for example, Consumers Union brought suit in a district court to challenge textile quotas imposed by the President under Section 204 of the Agricultural Act of 1956. After questioning the plaintiff's standing to sue in federal court,²⁵⁴ the Court of Appeals directed dismissal of the case because the subject matter—exclusion of merchandise under a customs law²⁵⁵—was within the exclusive jurisdiction of the Customs Court. However, the Customs Court may not be able to hear the case. If Consumers Union itself does not import the textiles subject to a quota, it may not file a protest against the exclusion of the textiles, and therefore, may not seek review of the exclusion in the Customs Court. Under these circumstances, there may be no court available to adjudicate the claim made by Consumers Union.

Foreign suppliers also have an important stake in decisions made by the Customs Service, but have no means of challenging such decisions. Customs decisions to increase duties or exclude merchandise may cost them outlets for their merchandise by causing importers to switch suppliers. If this occurs, there is no sound

²⁵³ No. 76-1064 (D.C. Cir. Apr. 20, 1977), *petition for rehearing denied* (D.C. Cir. Sept. 20, 1977).

²⁵⁴ The Court of Appeals intimated that plaintiff's interest in the matter was too indirect and not within the relevant "zone of interest" since plaintiff's purchases of textiles were for testing purposes rather than consumer use. *Id.* slip op. at 6.

²⁵⁵ This is the first case holding that merchandise excluded under a quota imposed by the President is excluded under the provisions of a customs law. A case cited by the court, *W. Dairy Products, Inc. v. United States*, 373 F. Supp. 568 (Cust. Ct. 1974), *aff'd*, 510 F.2d 376 (C.C.P.A. 1975), involved review of a classification decision that triggered a licensing restriction imposed by the President, but not review of the licensing restriction itself. Compare *Massachusetts v. Simon*, No. 75-0192 (D.D.C. Feb. 21, 1975), *rev'd sub nom.*, *Algonquin SNG, Inc. v. Federal Energy Administration*, 518 F.2d 1051 (D.C. Cir. 1975), *rev'd*, 426 U.S. 548 (1976) (reviewing license fees imposed by President on imported oil and petroleum products) with cases cited in note 186 *supra*. The Customs Court has traditionally reviewed Presidential action that results in increased duties. *United States v. Best Foods, Inc.*, 47 C.C.P.A. 163 (1960) (fee imposed on peanuts); *United States v. Schmidt Pritchard & Co.*, 47 C.C.P.A. 152, *cert. denied*, 364 U.S. 919 (1960) (Presidential proclamation under the escape clause); *Star Indus., Inc. v. United States*, 462 F.2d 557 (C.C.P.A.), *cert. denied*, 409 U.S. 1076 (1972) (Presidential proclamation suspending certain trade agreement concessions).

reason for prohibiting foreign suppliers from challenging the action. Foreign suppliers are an important source of competition and provide consumers with many products which could not otherwise be obtained. When Customs is erroneously protectionist, these companies should not be barred from protecting their own and their customers' interests.

The most controversial aspect of this recommendation is that it would enable importers to challenge Customs decisions made with respect to the merchandise of competing importers. Under present law, only the importer or consignee of merchandise may protest decisions concerning that merchandise. Other importers may not, and therefore may not seek review in the Customs Court. Moreover, since such decisions are within the exclusive jurisdiction of the Customs Court,²⁵⁶ district courts do not have jurisdiction to review them. But an importer may be injured by Customs decisions concerning the merchandise of his competitor. The adversely affected importer, like the adversely affected domestic competitor, should be afforded an opportunity to challenge the decision.

There have been two principal objections to this proposal. The first is that there is neither pressing need nor demonstrable support for it. Importers, it is claimed, have other means of protecting their interests. If Customs makes a decision that favors one importer over another importing the same merchandise, the second importer usually can protect his interest by seeking (through the protest procedure) to have his merchandise treated in the same manner. However, this is not always true. Customs may appraise one importer's merchandise at the correct value, but appraise that of another at an incorrectly low value; the first importer could neither successfully challenge the correct appraisal of its own merchandise nor eliminate the advantage given its competitor by the erroneous decision. The same situation can arise if the two companies import different, but nonetheless competing, merchandise (*e.g.*, copper and aluminum).²⁵⁷

²⁵⁶ See, *e.g.*, *Kocher v. Fowler*, 397 F.2d 641, 642-43 (D.C. Cir. 1967), *cert. denied*, 397 U.S. 920 (1968).

²⁵⁷ See, *e.g.*, *id.* There Customs decided to permit duty-free treatment for watch movements imported from the Virgin Islands. T.D. 54,821(2), 94 TREAS. DEC. 154 (1959). Appellant was an importer of Swiss watches who claimed "injury in his business relations" as a result of this allegedly unlawful interpretation of the statute. 397 F.2d at 642. Yet plaintiff's suit was dismissed because exclusive jurisdiction over the matter (the assessment of duties) was in the Customs Court. Plaintiff, who could not sue in the Customs Court, was denied any effective remedy.

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The second objection raised to this proposal is that the procedures could be used to harass competitors or seek confidential business information. Importers, in particular, are concerned that competitors might seek the names of foreign suppliers or information concerning prices or costs—information which is asserted to be of commercial value.²⁵⁸

A partial response to these concerns is that for 50 years U.S. manufacturers, producers, and wholesalers have been authorized to challenge Customs duty assessments,²⁵⁹ but there is no evidence that such procedures have been misused. Although importers may have more incentive than U.S. manufacturers, producers, or wholesalers to learn the sources and commercial practices of their importing rivals, the apparent lack of abuse of existing procedures suggests that concerns about the disclosure of confidential information may be exaggerated.

More importantly, procedures already adopted by the Customs Service and the Customs Court to protect information that is legitimately confidential reduce the likelihood that the standing procedures recommended here would be abused. Customs will not disclose to any person "information pertaining to trade secrets, business operations, and commercial or financial information of importers, exporters, and other persons who transact Customs business."²⁶⁰ Specifically:

Information contained in invoices, entries, vessel manifests, export declarations, official reports of investigating officers, records pertaining to the licensing of and the revocation or suspension of a license of a customhouse broker, and other papers or documents filed with Customs officers for any official purpose which contain trade secrets, or commercial or financial information, is exempt from disclosure except for the purpose for which such documents are required to be filed.²⁶¹

²⁵⁸ Similar concerns have been raised with respect to the disclosure of confidential business information under the Freedom of Information Act. For a comparison, see Patten and Weinstein, *Disclosure of Business Secrets under the Freedom of Information Act: Suggested Limitations*, 29 AD. L. REV. 193 (1977).

²⁵⁹ Act of September 21, 1922, ch. 356, tit. IV, § 516, 42 Stat. 970 (current version at 19 U.S.C. § 1516(b) (1970)).

²⁶⁰ 19 C.F.R. § 103.10(c) (1977). This Freedom of Information Act rule is also applied to requests for information filed by a U.S. manufacturer, producer, or wholesaler under section 516. *Id.* § 175.21(b).

²⁶¹ 19 C.F.R. § 103.10(d)(1) (1977).

Moreover, confidential information developed in connection with an investigation under the Antidumping Act of 1921 is exempt from disclosure²⁶² and criminal penalties may be imposed for the unauthorized release of confidential information by government employees.²⁶³ The Customs Court will also protect the confidentiality of information. The statute which would be amended pursuant to these recommendations provides that "in an action instituted by an American manufacturer, producer, or wholesaler, the plaintiff may not inspect any documents or papers of a consignee or importer disclosing any information which the Customs Court deems unnecessary or improper to be disclosed."²⁶⁴ This has been applied in cases brought by U.S. manufacturers, producers, and wholesalers wherein the Customs Court has issued protective orders restricting information developed through discovery to attorneys and experts for the parties.²⁶⁵ These procedures decrease the likelihood that broadening standing to challenge Customs action would result in disclosure of confidential information.

The recommendation made here does not specifically identify the persons who could challenge Customs actions. Rather, it adopts the general standard of the Administrative Procedure Act that persons adversely affected by an administrative action may challenge that action.²⁶⁶ In many instances, the firms discussed above would be considered adversely affected because they would be within the "zone of interests"²⁶⁷ protected by the statutes enforced by Customs and would be injured in fact.²⁶⁸ The ultimate determination of standing would be a judicial decision. This recommendation is intended to lower the procedural barriers that now prevent the operation of that judicial process.

Persons adversely affected by actions now subject to challenge

²⁶² 19 U.S.C. § 160(d)(3) (Supp. V 1975).

²⁶³ 18 U.S.C. § 1905 (1970).

²⁶⁴ 28 U.S.C. § 2637 (1970).

²⁶⁵ CUST. CT. R. 6.1(c). *See, e.g.,* A.S.G. Indus., Inc. v. United States, No. 76-3-00667 (Cust. Ct. May 10, 1977) (order granting defendant's motion for protective order).

²⁶⁶ 5 U.S.C. § 702 (1970).

²⁶⁷ *See* Ass'n of Data Processing Service Organizations v. Camp, 397 U.S. 150, 153 (1970).

²⁶⁸ *See also* Barlow v. Collins, 397 U.S. 159 (1970) (farmers eligible for government payments have standing to challenge validity of regulation expanding circumstances in which payments may be assigned); Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970) (regulations concerning national banks may be challenged by nonregulated competitors); United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973) (general member of public has standing if he alleges "that he has been or will in fact be perceptibly harmed by the challenged agency action").

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under section 516 would use the administrative procedures already available. For those adversely affected by action excluding or admitting merchandise, the recommendation provides both new administrative procedures to challenge that action and subsequent judicial review. For those affected by any other final agency action, the recommendations of this Article permit suit in the Customs Court once administrative remedies are exhausted. These proposals do not attempt to articulate what those remedies would be, but instead would permit the Customs Service to design the administrative remedy most appropriate in the context of the action subject to challenge.

Burden of Proof in the Customs Court

Congress should amend 28 U.S.C. § 2635(a) to revise the Customs Court's standard of review in the following way: The presumption of correctness of Customs Service decisions, and the imposition upon the party challenging a decision of the burden of proving otherwise would be retained. However, the additional requirement (read into the statute by the Customs Court and the Court of Customs and Patent Appeals) that the challenging party prove not only that the Customs Service was wrong, but also what a correct decision would be, would be eliminated.

Specifically, the amended statute should provide that, if the Customs Court determines that action taken by the Customs Service is erroneous, the court will modify or set aside such action; if the court is able to determine what action is correct, it should so determine and order that the correct action be taken; if the court cannot determine what action is correct, it should remand the case to the Customs Service with instructions to take action consistent with the decision of the court. Any redetermination made by the Customs Service pursuant to a remand should be subject to a new protest or petition, and any decision by the Customs Court to remand a case should be appealable.

This recommendation is necessary to eliminate an anomaly in Customs Court judicature that precludes the court from reversing or modifying Customs Service actions found to be erroneous. A plaintiff challenging Customs action in the Customs Court has a dual burden of proof: he must first overcome a statutory presumption that the Customs action was correct, and if successful, he must prove what action would have been correct. Curiously, if the plaintiff proves only that the action of the Customs Service was incorrect, the court neither modifies the action nor remands the

case to the Customs Service. Rather, the action is permitted to stand unless the plaintiff also proves what the correct action should have been. As a result, even after Customs Court review admittedly incorrect Customs action often remains uncorrected under this system.

The origins of the dual burden of proof are obscure. The presumption of correctness of Customs actions arises from 28 U.S.C. § 2635(a), which provides that in matters before the Customs Court: "The decision of the Secretary of the Treasury, or his delegate, is presumed to be correct, and the burden to prove otherwise shall rest upon the party challenging a decision." Although the Court of Customs and Patent Appeals has cited this provision as authority for requiring the party challenging Customs action to prove the correct decision as well,²⁶⁹ in fact the dual burden of proof had been judicially imposed before this provision was enacted in 1930. The Tariff Act of 1909 instructed the Board of General Appraisers (the precursor of the Customs Court) to "proceed by all reasonable ways and means in [its]power to ascertain, estimate and determine the dutiable value of the imported merchandise, and in so doing [to] exercise both judicial and inquisitorial functions."²⁷⁰ Because the Act contemplated that the Board would make its own determination rather than simply review the determination of Customs, the Board assigned the importer the burden of supporting a final determination.²⁷¹ The Board did not alter this procedure when it became a court of review in 1922.

Several cases illustrate the inequity of placing this dual burden of proof on the plaintiff.²⁷² Proof of valuation and classification is too

²⁶⁹ *Hayes-Sammons Chemical Co. v. United States*, 55 C.C.P.A. 69 (1968); *Minkap of California, Inc. v. United States*, 55 C.C.P.A. 1 (1967); *United States v. Acme Steel Co.*, 51 C.C.P.A. 81 (1964); *Kobe Import Co. v. United States*, 43 C.C.P.A. 136 (1956). Moreover, although Customs may estimate the amount of duties on the basis of reasonable evidence, the plaintiff must prove every material issue by a preponderance of the evidence in order to satisfy his burden. *Globemaster Midwest, Inc. v. United States*, 337 F. Supp. 465 (Cust. Ct. 1971); *Park Ave. Imports v. United States*, 299 F. Supp. 528 (Cust. Ct. 1969).

²⁷⁰ Tariff Act of 1909, ch. 6, § 28(13), 36 Stat. 11 (1909).

²⁷¹ *Id.* See *United States v. Edsen Keith & Co.*, 5 Ct. Cust. App. 82 (1914).

²⁷² In *Dana Perfumes, Inc. v. United States*, 524 F.2d 750 (C.C.P.A. 1975), the Court of Customs and Patent Appeals found that Customs erroneously calculated the cost of production of imported merchandise by including the usual general expenses—or overhead—of selling in the country of exportation, rather than including (as it should have) the usual general expenses incurred for products to be exported. Because the importer could not prove the amount of usual general expenses for exports—which would have required the importer to prove expenses incurred by other exporters—the erroneous Customs decision was affirmed. Cases of this type are not uncommon. See, e.g., *United States v. T.D. Downing*

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difficult to require it as a prerequisite for the successful challenge of Customs decisions. For instance, a plaintiff required to prove "usual general expenses" may not have access to the information necessary to prove the expenses incurred by foreign exporters. Similarly, proof of "United States value" would require proof of the price at which such or similar merchandise (not just that of the importer) is freely sold in the United States, plus proof of proper allowances for "usual" commissions or profits, the "usual" cost of transportation, and similar factors. Proving these dollar amounts can be an exceedingly difficult task.²⁷³ The unfairness of the rule is increased by the fact that Customs itself need only "estimate" on the basis of the best available evidence.²⁷⁴ An additional consideration is that Customs often has readier access to the necessary information than does the importer.²⁷⁵

Because of the dual burden of proof, importers and U.S. competitors are inhibited from challenging Customs decisions, thus reducing the effectiveness of judicial review in assuring that Customs decisions are correct and fair. Since there is no good reason for requiring the party challenging Customs action to prove what the correct action should be, the rule should be changed. If after trial the Customs Court lacks the information necessary to determine the correct action, it can remand the case to Customs. Customs then can ascertain the necessary additional facts as it normally does

Co., 20 C.C.P.A. 251 (1932) (prior to 1955 amendments to valuation standards, importer must prove foreign value and export value, or that one was nonexistent, in order to show which is preferred). *See also* Brooks Paper Co. v. United States, 40 C.C.P.A. 38 (1952) (plaintiff must establish usual wholesale quantities in which such or similar merchandise was freely offered). Similarly, importers have demonstrated that the classification made by Customs was erroneous, but have lost by failing to demonstrate the correct classification. *United States v. Enrique C. Lineiro*, 37 C.C.P.A. 5 (1949); *New York Credit Men's Adjustment Bureau, Inc. v. United States*, 314 F. Supp. 1246 (Cust. Ct. 1970).

²⁷³ The evidence needed to prove the value of merchandise is often in the exporter's files and may be inaccessible to the importer.

²⁷⁴ *See* note 47 *supra* and accompanying text.

²⁷⁵ The dual burden of proof is not always difficult for the plaintiff to satisfy. When the same evidence can be used both to show that the Customs action was wrong and to establish the plaintiff's contentions, there is effectively a single burden of proof on the plaintiff. Thus, where the imports could be classified under one of two possible classifications, proof that Custom's classification is in error may also demonstrate that the classification relied upon by the importer is correct. *See Associated Metals & Minerals Corp. v. United States*, 426 F. Supp. 568 (Cust. Ct. 1977). Or, if the only issue is whether a buying commission is *bona fide* (in which case it is not included in value), the same evidence used to rebut the presumption that Customs correctly decided the issue also may establish that the buying commission was *bona fide*.

(by all "reasonable means"), making a new administrative determination, which again would be presumptively correct and subject to a protest or petition.

The recommendation here would preserve the presumption of correctness underlying action of the Customs Service, but would give the Customs Court authority either to modify or reverse the action, and to remand the proceeding to the Customs Service for a new determination. It is expected that the court would use its remand authority flexibly; were the necessary facts readily available, the court might order the parties to produce them so that the court could make a final determination without remand. Often the parties themselves might introduce evidence facilitating a final decision, or the Service might avoid remand by making alternative findings at the administrative level.

The proposed change specifies that the court may determine what action is correct. This would enable the court to make findings which were more detrimental to the plaintiff than the original Customs decision. The court might, for example, find a classification which bore a higher rate of duty than the classification relied on by Customs or the plaintiff. Although some have argued that this threat of an adverse Customs Court decision might chill the interest of potential plaintiffs in judicial review, the rule contained in the recommendations seems appropriate since it attempts to ensure that correct determinations will be made.

Finally, the recommendation provides that a remand order of the Customs Court would be appealable to the Court of Customs and Patent Appeals. That court now has jurisdiction to review any "final order" of the Customs Court, but it is not clear whether this would by itself enable immediate review of remand orders;²⁷⁶ the proposal would make this explicit. Such review is necessary to protect the right of the government to have decisions of the Customs Court reviewed. Without it, if on remand the Customs Service made a determination with which the plaintiff agreed, there could

²⁷⁶ Circuit courts have split on whether their authority to review a district court's "final order," 28 U.S.C. § 1291 (1970), includes authority to review a district court order remanding a case to an administrative agency for further consideration. Compare *Gueory v. Hampton*, 510 F.2d 1222, 1224-25 (D.C. Cir. 1974) (remand order to Civil Service Commission appealable as a "final order") and *Cohen v. Perales*, 412 F.2d 44, 48 (5th Cir. 1970), *rev'd on other grounds sub nom. Richardson v. Perales*, 402 U.S. 389 (1971) with *Pauls v. Secretary of the Air Force*, 457 F.2d 294, 297-98 (1st Cir. 1972) and *United Transport Union v. Ill. Cent. Ry.*, 433 F.2d 566, 568-69 (7th Cir.), *cert. denied*, 402 U.S. 915 (1970).

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be no appeal and no means of having the remand decision reviewed. Therefore, immediate review of the remand decision should be permitted.

Review of Decisions to Exclude Merchandise

Merchandise entered through Customs control may be excluded from the United States in a variety of ways and for a variety of reasons. Customs may refuse to release the merchandise, seize the merchandise, or demand redelivery of merchandise already released. The decision to take such exclusionary action may be made by Customs personnel or by personnel of another agency.

Exclusion cases raise a multiplicity of issues. The recommendations made here address two: availability of timely review by the Customs Court, and exclusion under the trademark and copyright statutes.

1. *Expedited Review*

Congress should amend the statutes giving preference to certain types of cases in the Customs Court, 28 U.S.C. § 2633, and the Court of Customs and Patent Appeals, 28 U.S.C. § 2602, to ensure a similar preference for cases properly before either court involving exclusion of merchandise from entry or delivery.

There is justification for Customs continuing the present practice of holding merchandise pending an exclusion decision. Congress has prohibited some goods from entering the United States because of a legislative determination that use or circulation of the goods within the United States would be harmful; release of goods pending an exclusion decision would jeopardize the interests Congress intended to protect. Moreover, because all merchandise must go through import processing, it is convenient to have Customs ensure that the merchandise meets regulatory standards.²⁷⁷

²⁷⁷ Sometimes the practice of first holding or seizing merchandise and later deciding whether it should be excluded results in inconsistent treatment between imported merchandise and domestic merchandise. For example, the owner of a U.S. trademark cannot enjoin a domestic firm from infringing the trademark without first demonstrating to a court (at least in a preliminary hearing) the validity of his trademark and the fact of infringement. However, he can effectively enjoin allegedly infringing imports merely by convincing Customs of the infringement and having the merchandise detained and seized. Similarly, an imported article allegedly infringing a copyright may be seized (even from the importer's customer) prior to adjudication of the fact of infringement; a domestic article could not be. See, e.g., *Foreign & Domestic Music Corp. v. Licht*, 196 F.2d 627 (2d Cir. 1952) (imported article infringing copyright can be seized even if in third party's hands, but infringing

However, unless the procedures for securing administrative and judicial review of a decision to exclude or seize merchandise are timely, it is often extremely prejudicial to hold the goods pending a decision. Imports may be perishable or seasonal merchandise, or the importer may need the merchandise to fulfill production or marketing commitments. In such instances, even temporary exclusion may have a permanent and irreparable effect on the importer. Moreover, issues surrounding exclusion should be dealt with promptly to enable importers to make future purchasing and shipping plans knowledgeably.

Administrative and judicial decision-making processes now used in exclusion cases are sometimes inadequate. Exclusion of merchandise under a customs law can be protested immediately and will be reviewed by Customs within 30 days after the protest is filed. However, no procedures protect against irreparable injury while decisions are being made and reconsidered or permit the Customs Court to review the decisions expeditiously. As one prominent customs attorney has said: "There is no way to get speedy judicial review when speed is essential if the review is to be effective."²⁷⁸

This proposal, coupled with the previous recommendations to authorize the Customs Court to exercise the remedial power of district courts, should enable the Customs Court to provide a forum within which disputed issues in exclusion cases under its jurisdiction can be speedily resolved.

2. *Customs Service Authority Under the Trademark and Copyright Statutes*

Congress should amend the statutes under which the Customs Service is authorized to detain and seize merchandise that allegedly infringes a trademark, 19 U.S.C. § 1526, or copyright, 17 U.S.C. § 603, to provide that the Customs Service may take no such action until the owner of the trademark or copyright obtains an order in the district court enjoining the importation. Alternatively, Congress should amend the trademark statute, as it has the copyright statute, to authorize the Customs Service to establish by regulation such a condition precedent to its acting to detain and seize

articles which are domestic cannot be so seized). This consideration influenced the recommendation below that Customs be divested of authority to exclude merchandise for trademark and copyright infringement.

²⁷⁸ Address by George Bronz, Second Judicial Conference of the U.S. Court of Customs and Patent Appeals (May 29, 1975), *reprinted in* 69 F.R.D. 119, 182 (1976).

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allegedly infringing merchandise, and the Customs Service should promulgate such a regulation. In any event, the Customs Service should adopt express procedures that would enable the owner of a trademark or copyright to identify imported merchandise that may infringe his mark or copyright.

There are several reasons for this recommendation. First, as already noted, the detention and seizure of such merchandise by Customs places imported merchandise in a different position from domestically produced merchandise. No government agency enforces trademark or copyright laws against domestic merchandise; domestic merchandise is not detained or seized because a government employee believes it infringes a U.S. trademark or copyright. The owner of a trademark or copyright who wishes to enjoin commerce in allegedly infringing domestic merchandise must first prove the infringement and the validity of his trademark or copyright in court.

The different treatment of imported merchandise is harmful and unjustified. Importers risk substantial delays because of decisions made by an import specialist. In effect, the importer can be enjoined from dealing in his merchandise even before there is an adjudicated decision concerning the infringement claim. Moreover, owners of U.S. trademarks have ample incentive and ability to protect their own interests. Unlawful importation can be enjoined, and importers can be sued for damages resulting from past unlawful importations.²⁷⁹

Congress has recognized that under the copyright act “[t]he Customs Service is often in no position to make determinations as to whether particular articles are piratical.”²⁸⁰ As a result, Congress has given the Treasury Department authority to require by regulation that the person seeking exclusion either obtain a court order enjoining importation or furnish proof of his claim and post a bond to cover damages resulting from Customs’ unjustified detention or exclusion of merchandise.²⁸¹ Similar considerations influence the recommendation concerning the action Customs takes

²⁷⁹ There is some risk that foreign exporters desiring to sell infringing merchandise in the United States (and not themselves subject to suit in the United States) could avoid liability by dealing through importers who would be judgment proof. This appears to be an unlikely occurrence, and an acceptable risk that can be minimized through effective enforcement of judgments.

²⁸⁰ H.R. REP. NO. 1476, 94th Cong., 2d Sess. 171, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5659, 5787.

²⁸¹ General Revision of Copyright Law, Pub. L. No. 94-553, § 101, 90 Stat. 2541 (1976) (to be codified at 17 U.S.C. § 603).

under the trademark act. The expertise of the Customs Service is not geared toward deciding the sensitive issues surrounding possible consumer confusion in trademark disputes, and Customs' decision-making in such disputes cannot encompass all of the substantive questions that need to be examined. For example, when deciding whether imports infringe a registered trademark, Customs has no authority to consider the validity of the trademark registration. As a result, in at least one case Customs has seized and destroyed merchandise for allegedly infringing a trademark even though the trademark did not qualify for registration and was therefore not entitled to protection.²⁸²

Imposition of Civil Penalties

The means by which the Customs Service assesses and collects civil penalties, particularly under section 592 of the Tariff Act of 1930, have been under attack for a number of years.²⁸³ Knowledgeable observers have correctly noted the "unfairness and obsolescence"²⁸⁴ of this "antiquated"²⁸⁵ provision that leads to "arbitrary and irresponsible behavior."²⁸⁶

David R. Macdonald, then Assistant Secretary of the Treasury, referred to "the Section 592 magnum," combining the qualities of a "Gatling gun and a 10-pound smooth bore cannon." The only problem with using section 592, he said, "is that sometimes it's difficult to identify the victim afterwards."²⁸⁷ It is easy to see why. The statutory penalty for section 592 violations is usually disproportionate to the nature of the conduct and degree of culpability involved and to the revenue deficiency or other injury resulting from the violation. The mitigation procedure is intended to ameliorate the harsh effects of the statutory penalty, but instead it

²⁸² See *Platilite Corp. v. Kassnar Imports*, 508 F.2d 824 (C.C.P.A. 1975) (following seizure and destruction of merchandise bearing allegedly infringing mark, the trademark alleged to have been infringed was found to be invalid).

²⁸³ For a discussion of enforcement of section 592, see text accompanying notes 111-34 *supra*.

²⁸⁴ Dickey II, *supra* note 112, at 694.

²⁸⁵ *Modernization Act Hearings*, *supra* note 9, at 188 (statement of Robert E. Herzstein).

²⁸⁶ American Importers Ass'n, *Why Customs' Penalty Statute (Sec. 592) Must be Changed!* (unpublished position paper on file with the Administrative Conference of the United States).

²⁸⁷ Address by David R. Macdonald, Ass't Secretary of the Treasury, before the American Importers Ass'n (Sept. 10, 1974), *reprinted in* U.S. Dep't of Treasury News Release (Sept. 10, 1974).

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shields the administrative action of penalty assessment from judicial review.²⁸⁸ Persons against whom a penalty is assessed by Customs virtually always accept a mitigated penalty and thus forego judicial review. As a result, Customs is not held accountable through the judicial review process for what it does.

There are many proposals for the reform of section 592.²⁸⁹ The recommendations below articulate a number of principles for its reform.²⁹⁰

1. Penalties

Section 592 should be amended to provide for civil money penalties against the person violating the statute rather than for forfeiture of the merchandise or the full value thereof. Congress should establish maximum penalties based upon the revenue deficiency, if any, resulting from the violation, and upon the degree of culpability of the violator. In any case in which the violation does not result in a revenue deficiency, the maximum penalties should be based upon a portion of the value of the imported merchandise and upon the degree of culpability of the violator. If the violator is an importer, he should be given the option of surrendering his merchandise in lieu of payment of any penalty assessed.

The first principle of these recommendations is that section 592 should be revised so that forfeiture of merchandise, or its full value, is no longer the penalty for section 592 violations. Establishing penalties based upon the value of merchandise means that penalties often bear no relation to the conduct constituting the violation or to the culpability of the violator. This leads to unequal treatment: for example, two persons who separately misstate the invoice price of imports would be subject to differing penalties solely because the value of their merchandise is different. It also leads to denial of judicial review: the assessed penalty often is so disproportionate to the violation that companies may feel compelled to accept mitigation offered by the Customs Service rather than take

²⁸⁸ See generally Dickey I, *supra* note 112; Dickey II, *supra* note 112; Herzstein, *supra* note 112.

²⁸⁹ See, e.g., Dickey II, *supra* note 112, at 729. In addition, the Chamber of Commerce of the United States, the American Importers Association, and many other persons and organizations have proposed reforms. The recommendations made here are similar to provisions of legislation now before the House of Representatives.

²⁹⁰ The recommendations do not address several issues raised by other proposals to reform section 592, e.g., the definition of conduct that violates section 592; the applicable statute of limitations (see 19 U.S.C. § 1621 (1970)); and reduced penalties for the voluntary disclosure of violations. See 19 C.F.R. § 171.1 (1977).

the risk of seeking judicial review. Therefore, forfeiture should be dropped as a sanction for section 592 violations.

It is also recommended that the penalty in section 592 be stated as a maximum amount rather than a fixed amount, and that the court reviewing the penalty assessment should have the authority to determine independently the amount of penalty to be imposed. Penalties in fixed amounts for prohibited conduct have some advantages over maximum penalties; they are predictable and uniform and avoid problems of disparity in the sanctions applied in different cases.²⁹¹ For these reasons the Administrative Conference of the United States rejected, in its study of penalties imposed by the Internal Revenue Service, the idea that IRS penalty statutes should contain maximum penalties and recommended instead that penalties be in a fixed amount.²⁹² However, there is no standard model to follow; penalties are sometimes fixed by statute and sometimes determined by the decision-maker within maximum penalties established by statute.²⁹³

In the context of section 592, penalties in fixed amounts would be unwise because often they would be disproportionate to the violation. Conduct challenged under section 592 varies widely. Violations of section 592 include misstatements of: the invoice price of the merchandise; its quantity or weight; and its country of origin. Each may result from different motivations, require different degrees of volition or subject the violator to different risks of detection. In addition, the culpability of the violator is often a matter of degree. Even negligent conduct—the failure to adopt procedures reasonably designed to ensure that mistakes do not occur—is not a single concept, but can embody various degrees of culpability depending upon the circumstances.

Many mitigating and aggravating circumstances should be taken

²⁹¹ See Gellhorn, *Administrative Prescription and Imposition of Penalties*, 1970 WASH. U.L.Q. 265, 276; Goldschmid, *Report in Support of Recommendation 72-6: An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies*, 2 RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 896, 942 (1972).

²⁹² ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, *ADMINISTRATIVE PROCEDURES OF THE INTERNAL REVENUE SERVICE*, S. DOC. NO. 266, 94th Cong., 2d Sess. 646-49 (1975) [hereinafter cited as IRS REPORT].

²⁹³ Compare I.R.C. § 6653 (penalties in fixed amounts for civil fraud, negligence, and intentional disregard of rules or regulations) with Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 819(a)(1) (1970) (maximum penalties). Over half the penalties administered by federal agencies provide for variable or maximum penalties. Goldschmid, *supra* note 291, at 957-64.

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into account so that penalties reflect the seriousness of the violation. The Customs Service lists the following seven factors it considers when ruling on petitions for mitigation: the fact that loss of revenue from the violation is small in relation to the forfeiture value; contributory error by a Customs employee; cooperation of the offender in the investigation; inexperience in importing; remedial action taken after the violation was discovered, including rectification of any revenue deficiency resulting from the violation; prior good record; and inability to pay.²⁹⁴ It also lists several aggravating factors: conduct impeding the investigation; previous record of a violation; or experience in importing.²⁹⁵ Regardless of the relevance of, or the weight to be given to, these particular factors, it is clear that many variables determine the seriousness of any section 592 violation.

As a result of the many variables in section 592 cases, it would be virtually impossible to establish fixed statutory penalties to reflect all of the different elements that should be taken into account in determining an appropriate sanction. Therefore, the fixed penalties, unless mitigated by administrative discretion, would be inequitably high in some cases; in other cases they would be ineffective as a deterrent.

Moreover, with penalties in fixed amounts the Customs Service would continue to be able to shield its administrative determinations from judicial review by making a mitigation offer the alleged violator would accept in order to avoid the fixed penalty which would be imposed if the finding of a violation were upheld by a reviewing court. This power of "administrative blackmail" makes the present enforcement of section 592 unfair and should not be continued.

For these reasons, Congress should enact a maximum penalty, and should authorize the court reviewing section 592 assessments to make an independent determination of the amount of the penalty to be imposed. Maximum penalties for section 592 violations will be most realistic and effective if they are based upon some multiple of the loss of revenue to the government ensuing from the

²⁹⁴ 39 Fed. Reg. 39,061 (1974). Customs also lists as a "mitigating" factor the "probable difficulty in collecting because offender is outside the jurisdiction of the United States." Although practicality may induce Customs to mitigate penalty assessments in order to collect something on assessments that would otherwise be uncollectible, this does not seem to be a "mitigating" factor as that term is generally used.

²⁹⁵ *Id.* at 39,062.

violation. This is true because such loss measures both the injury to the government from the violation and the benefit of the prohibited conduct in question to the violator. Such penalties deter violations and compensate the government for losses and risks of undetected violations. Determining the multiple of the loss of revenue that should be established as a penalty will require careful examination of the difficulty of detecting violations and the deterrent effect of various penalty amounts. Congress could consider the multiples of revenue deficiency now used by Customs in mitigating penalty assessments as a starting point for its analysis of these questions.

It is recommended that the penalties under section 592 be established for three degrees of culpability.²⁹⁶ This is necessary because often conduct may be intentional (*i.e.*, with knowledge that underpayment of duties will result) or reckless (*i.e.*, with disregard of a substantial risk that underpayment will result) without being severe enough to warrant a heavy penalty for fraudulent conduct.²⁹⁷ In such cases, a middle category of defined culpability will help to ensure that the sanction fits the violation.

A small percentage of section 592 proceedings involve violations which harm the interests Customs is charged with protecting, but do not cause a loss of revenue. This occurs, for example, when a false or fraudulent practice enables an importer to avoid a quota restriction, but the importer pays the proper duty on the merchandise. In such cases it is difficult to establish a statutory penalty that compensates the government for injury to its interests and also deters violations. In order to promote certainty and flexibility in setting the penalty, the recommendation would provide that when there is no loss of revenue to the government the maximum pen-

²⁹⁶ This proposal is derived from the recommendations of the Administrative Conference of the United States concerning penalties imposed for understatement of federal income taxes. See Recommendation 75-7 of the Administrative Conference of the United States, 41 Fed. Reg. 3981, 3984-85 (1976), 1 C.F.R. § 305.75-.77 (1977). There, three degrees of culpability—negligence, reckless or intentional conduct, and fraud—were found to be necessary. With only two standards of culpability (one for negligent conduct and one for fraudulent conduct) “a surprisingly broad range of conduct is covered by the negligence penalty. Intentional misstatements are often penalized with the same degree of harshness as mere negligence. Such whimsical and unequal results are probably quite different from what Congress intended.” REPORT ON THE ADMINISTRATIVE PROCEDURES OF THE INTERNAL REVENUE SERVICE, *supra* note 281, at 641.

²⁹⁷ The Customs Service already employs three standards of culpability in deciding whether to mitigate assessed penalties: negligence, gross negligence, and fraud. 39 Fed. Reg. 39,061 (1974).

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alty would equal some portion of the value of the imported merchandise. This would reduce the coercive impact of the present forfeiture penalty while maintaining a high penalty as a deterrent.

The recommendation also provides the alleged violator of section 592 with the option of surrendering the imported merchandise in lieu of paying the statutory penalty. This will occur rarely, because in most circumstances the value of the merchandise to the alleged violator will be very much greater than the potential monetary penalty. This option is necessary, however, because of peculiarities in the appraisal of merchandise. An imported manuscript for a book, for example, may be appraised at a value which includes the value of the research undertaken to write the book. In such cases the appraised value of the merchandise, and thus the potential loss of revenue, is greatly disproportionate to the value of the merchandise to the importer. Accordingly, the option allowing the violator to surrender the merchandise will ensure that penalties based upon loss of revenue are not themselves disproportionate to the violation.

2. *Administrative Procedures and Judicial Review*

The Customs Service should have the authority to assess and to mitigate civil penalties. If an assessment is contested, action by the government to enforce a penalty should be in the Customs Court. In such an action, the government should have the burden of proving the act or omission constituting a violation and, if so alleged, the intentional nature thereof. The Customs Court should be authorized to determine de novo the amount of the penalty.

It is recommended that the Customs Service maintain the penalty assessment and mitigation procedures it uses now. If an assessment is contested, the Service should be required to bring an enforcement action in a court. Customs' informal administrative procedures enable it to dispose of large numbers of cases without unnecessary procedural burdens. At the same time, procedural fairness should be guaranteed to alleged violators through full judicial review. The Administrative Conference of the United States has recommended that civil money penalties be assessed in most cases through adjudicatory procedures at the agency level.²⁹⁸ The proposal here, while it deviates in form from that recommendation, is

²⁹⁸ See Recommendation 72-6: *Civil Money Penalties as a Sanction*, 2 REPORTS AND RECOMMENDATIONS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 67 (1973).

consistent with the basis of the recommendation—that assessing and collecting penalties would be facilitated if the agency were not required to initiate assessment actions in a federal district court. Since the Customs Court is a specialized court with expertise in the underlying substantive issues, many of the factors normally supporting adjudication at the administrative level support adjudication of Customs penalty cases in the Customs Court.²⁹⁹

A significant issue raised by proposals to reform section 592 is whether government enforcement actions³⁰⁰ under section 592 will be brought in a district court, in the Customs Court, or both. Most other proposals for the reform of section 592 contemplate that such actions will continue in the district court,³⁰¹ although another possibility would involve concurrent jurisdiction in the Customs Court and district courts. Under the latter option, cases could be brought in the district court, but the defendant would have the option of transferring the case to the Customs Court under procedures patterned after those used in removing a suit from a state to a federal court.³⁰² The recommendation of this article would place exclusive jurisdiction over penalty cases in the Customs Court.

Three factors support this arrangement, although there are countervailing considerations. First, the Customs Court has more experience than district courts with the issues that often arise in section 592 proceedings. Although questions of fact can be decided with equal ease by the Customs Court and district courts, the resolution of section 592 issues often requires interpretation and application of the customs law, a function that in nonpenalty cases is generally performed exclusively by the Customs Court.³⁰³ Such

²⁹⁹ Thus, crowding of district court dockets is not a factor favoring administrative adjudication in this instance. The need for specialized knowledge and expertise, the degree to which issues of law are likely to arise, the importance of consistency of outcome, and the likelihood that an agency will establish an impartial forum—factors mentioned by Professor Goldschmid in his report, *supra* note 291 at 932-33—all support adjudication in the Customs Court.

³⁰⁰ The term “government enforcement actions” is used because this Article does not consider whether the Customs Service should be authorized to directly enforce section 592 in court without relying, as it now does, upon Department of Justice enforcement actions.

³⁰¹ This is true of both H.R. 8149 and H.R. 8367, 95th Cong., 1st Sess. (1977), as well as the proposals advanced by the American Bar Association, the Chamber of Commerce of the United States, and the American Importers Association. Most of these private groups, however, appear not to have focused on which forum is most appropriate for the review of section 592 cases.

³⁰² The procedures for removing a case from a state to a federal court are in 28 U.S.C. § 1446 (1970).

³⁰³ The Customs Court is best able to decide, for example, whether blueprints given by an

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issues frequently arise in section 592 proceedings, and adjudication in the Customs Court should facilitate and ensure consistency in the resolution of these issues.

A second factor favoring enforcement of section 592 in the Customs Court is the likelihood that it will impose more uniform penalties. With enforcement in district courts, cases would be brought before judges throughout the country, each judge would hear few cases, and judges would not be familiar with decisions made by other judges. By contrast, centralizing the decision-making in one court with a small number of judges would facilitate (although not necessarily ensure) the development of a consistent judicial consensus concerning penalties to be imposed.

The third factor favoring Customs Court enforcement of section 592 is that the Customs Court can assure speedier adjudication because its docket is less crowded than the dockets of the district courts. Indeed, the underutilization of the resources of the Customs Court suggests that it could assume at least some new responsibilities without need for additional resources.³⁰⁴ Thus, enforcement of section 592 in the Customs Court would promote a better allocation of judicial resources.

Two potential drawbacks to enforcing section 592 in the Customs Court can be overcome. The first is that the Customs Court sits primarily in New York City while district courts may be more accessible to persons at ports in other cities. However, the Customs Court is authorized to hold trials at any place within its jurisdiction and does sit at trials in many places.³⁰⁵ The judges of the Customs Court can "ride circuit," ensuring that those subject to section 592 proceedings are not unduly prejudiced by the location of a trial. Although this would involve some delay in scheduling trials, the delay is likely to be shorter than the delay attendant upon litigation in a district court.

The second potential drawback is that in the Customs Court issues of fact are decided by a judge, not a jury. Some defendants in section 592 cases may feel the loss of a right to a jury trial to be significant. It seems clear that the constitutional guarantee of a

importer to a foreign supplier should have been declared as a dutiable "assist" and whether the failure to make such declaration violates section 592. Similarly, questions concerning the declaration of "selling commissions" and interpretations of other intricate customs laws and regulations raise issues which by experience the Customs Court is best suited to handle.

³⁰⁴ See notes 208-09 *supra* and accompanying text.

³⁰⁵ 28 U.S.C. § 256 (1970).

right to a jury trial does not extend to enforcement proceedings brought by the government to assess or collect civil penalties. Recently, in *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*,³⁰⁶ the Supreme Court held that:

in cases in which 'public rights' are being litigated—*e.g.*, cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact—the Seventh Amendment does not prohibit Congress from assigning the fact-finding function and initial adjudication to an administrative forum with which the jury would be incompatible.³⁰⁷

Because section 592 suits are brought by the government in its sovereign capacity to enforce a "public right," Congress could assign the fact-finding function in section 592 proceedings to an administrative tribunal, and *a fortiori* to a federal judge without a jury.

A more difficult question is whether Congress *should* make jury trials available in section 592 proceedings even though the Constitution does not require it to do so. It is not necessary to decide that question, however, to determine that the Customs Court is the preferred forum. In view of the advantages the Customs Court offers for section 592 enforcement, should it see fit to do so, Congress could authorize the Customs Court to empanel juries for that purpose.

Under present law, when the government sues to recover a penalty under section 592 (or any of the other penalty provisions enforced by Customs) it need only show probable cause for the institution of the suit. If it does so the penalty is imposed unless the respondent proves that the statute was not violated.³⁰⁸ In view of the informal administrative process used by Customs to determine whether section 592 has been violated,³⁰⁹ this rule is unsatisfactory. It shields the administrative determination from review by requiring alleged violators to assume the difficult burden of demonstrating that an alleged act did not occur.

³⁰⁶ 97 S. Ct. 1261 (1977).

³⁰⁷ *Id.* at 1266. This conclusion was reached by some scholars even before the *Atlas Roofing* decision. See, *e.g.*, Goldschmid, *supra* note 291, at 943.

³⁰⁸ 19 U.S.C. § 1615 (1970). See, *e.g.*, *United States v. One 1971 Chevrolet Corvette Auto*, 496 F.2d 210 (5th Cir. 1974); *United States v. Fields*, 425 F.2d 883 (3d Cir. 1970).

³⁰⁹ See notes 121–32 *supra* and accompanying text.

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The proper allocation of the risk that the trier of fact, faced with conflicting reasonable inferences, will doubt the inference asserted by a party, depends on considerations of fairness, convenience, and policy.³¹⁰ The party seeking to change the present state of affairs or impose a sanction normally bears the risk of nonpersuasion.³¹¹ This is generally desirable because it reduces the chance that the status quo will be changed or the sanction imposed erroneously. The risk may also be imposed on the party who contends that the more unusual event has occurred,³¹² and is often allocated to avoid requiring a party to prove a negative—so that a party need not prove that an act did not occur.

Based upon these factors, it is recommended that in proceedings to enforce section 592 the government have the burden of proving the acts constituting the violation and, if it seeks penalties for intentional (*i.e.*, non-negligent) conduct, that the acts were done intentionally.³¹³ This should be required because in section 592 cases the government seeks to impose a heavy penalty. As long as the penalty assessment is based upon informal procedures the government should bear the burden of proof so that the facts underlying the assessment are subjected to full and impartial scrutiny. The burden of proving that conduct was intentional is not unduly severe, since such conduct generally requires an overt act (*e.g.*, double invoicing) which is capable of discovery and proof.

On the other hand, if the government seeks penalties for allegedly negligent conduct, this recommendation would not require the government to demonstrate that the plaintiff failed to exercise due care. It need only prove that the false statement or practice occurred; the defendant would then have the burden of proving that he exercised due care (*i.e.*, that he employed practices reasonably designed to avoid acts of the type alleged to constitute the violation).³¹⁴ Shifting the burden of proof in this way relieves the

³¹⁰ IX J. WIGMORE, EVIDENCE, § 2486, at 275 (3d ed. 1940); E. MORGAN, BASIC PROBLEMS OF EVIDENCE 28 (1962).

³¹¹ C. MCCORMICK, EVIDENCE 786 (2d ed. 1972); Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 7 (1959).

³¹² C. MCCORMICK, *supra* note 311, at 787.

³¹³ Thus, the presumption of correctness of Customs action, 28 U.S.C. § 2635(a) (1970), would not be applicable in section 592 cases.

³¹⁴ The recommendation contemplates that proof of false statements or practices will create a rebuttable presumption that the act or practice resulted from negligence. Even if this were not explicitly stated, it is likely to happen as a practical matter in the trial of negligence cases.

government from proving a negative (the absence of due care) and decreases the risks that false statements will go unsanctioned because of uncertainty over the required standard of care.

This recommendation is inconsistent in one respect with a similar recommendation the Administrative Conference of the United States made concerning the enforcement of penalties by the IRS. Under that recommendation the alleged violator would have the burden of persuasion if the government sought penalties for an intentional or reckless violation,³¹⁵ primarily because "the facts concerning his state of mind are in his possession."³¹⁶ The premise supporting that approach is undoubtedly accurate, but the recommendation does not necessarily follow from the premise. Although a person knows what he intended, he should not necessarily have the burden of persuasion on that issue³¹⁷ since that would require him to prove a negative—that he did not know the consequences of his conduct.³¹⁸ In view of the high penalties which are likely to be adopted for intentional violations of section 592³¹⁹ the alleged violator should not have that burden.

3. Publishing Standards

In order to ensure that those subject to possible penalties under section 592 know what is expected of them under the laws administered and enforced by the Customs Service, the Service should, to the maximum extent feasible, adopt and publish standards that will guide its determinations under those laws.

This recommendation is proposed because a significant number of penalty assessments are attributable to misinterpretation of Customs requirements by the alleged violator, or failure to understand one of his duties as an importer. For example, an importer must furnish on the entry documents all information necessary to establish the value of goods. He may, however, fail to declare (as is required) the value of blueprints or drawings or other assists given to the foreign supplier, and thus submit a "false" statement to the

³¹⁵ Recommendations 75-77 of the Administrative Conference of the United States, 41 Fed. Reg. 3981, 3984 (1976); 1 C.F.R. § 305.75-77 (1977).

³¹⁶ IRS REPORT, *supra* note 292, at 649-50.

³¹⁷ See J. WIGMORE, *supra* note 310, at 275; E. MORGAN, *supra* note 310, at 28.

³¹⁸ For example, under section 592 an importer charged with failing to declare an assist would have the burden of proving that he did not know that the assist should be declared.

³¹⁹ See, e.g., H.R. 8149, 95th Cong., 1st Sess., § 112(a) (1977), which sets the penalty for violations resulting from gross negligence at four times the loss of revenue resulting from the violation or the domestic value of the merchandise, whichever is less.

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Customs Service. Yet there are no regulations defining an assist or even stating that it must be declared. The alleged violator therefore may be penalized unfairly for violating a rule that was difficult for him to interpret or know of at all. To alleviate such problems, the Customs Service should adopt and publish standards that will guide its determination of what conduct constitutes a violation.

4. Seizure

The authority of the Customs Service to seize and hold merchandise under section 592 (other than prohibited or restricted merchandise) should be limited to instances where it is necessary to protect Customs' ability to collect any revenue deficiency or penalty, and the Service should be required to release the merchandise to the owner upon his provision of security for payment of that revenue or penalty. Where no such release is effected by the owner, the Customs Service should be required to release the merchandise not later than 60 days after seizure, unless the government has initiated an action in the Customs Court within that period and obtained an extension for good cause from the court. In instances where the Customs Court permits the Service to hold merchandise for sale by the Service to satisfy any revenue deficiency or penalty determined by the court, the net proceeds of such sale, after allowance for the judgment and costs of the sale, should be paid to the owner.

Seizure of merchandise is a drastic, coercive sanction, with effects usually disproportionate to the section 592 violation. The authorization for seizure in section 592 reflects the antiquated conception of section 592 as *in rem* remedy, which is no longer appropriate. Because virtually all importers (and others potentially subject to section 592) are solvent, and most do business regularly in the United States, seizure is generally unnecessary to ensure collection of penalty assessments.

The Customs Service recently amended the Customs regulations to reflect evolving practice, providing that merchandise shall only be seized for violations of section 592 if the district director is satisfied that the violator appears to be, or may soon become, insolvent; the violator or his assets appear to be beyond the jurisdiction of the United States; or for some other reason a claim for the domestic value of the merchandise would not protect the revenue.³²⁰ This is sound practice and should be adopted in legisla-

³²⁰ 42 Fed. Reg. 25,323 (1977) corrected by 42 Fed. Reg. 27,599 (1977) (to be codified in 19 C.F.R. § 162.41(a)(3)).

tion.³²¹ The recommendations of this article would do so by authorizing the Customs Service to seize merchandise under section 592 only when the merchandise is itself prohibited from entering the country, or when seizure is necessary to protect the ability of Customs to collect any revenue deficiency or penalty. The recommendation would also require the Customs Service to release non-prohibited merchandise upon the provision of security for the payment of such revenue or deficiency. Forfeiture would not be a sanction; it would be used only when necessary to satisfy the judgment of the court. The net proceeds of the forfeiture sale, after allowance for the judgment and costs of sale, would be paid to the owner.

The recommendation also includes procedures to ensure that any seizure by the Customs Service under section 592—a drastic sanction based on an informal administrative determination—is subject to prompt and impartial judicial review. If the owner has not obtained the release of merchandise which has been seized, the Customs Service would be required to release the merchandise not later than 60 days after seizure unless the government initiated a collection action and obtained an extension for good cause from the court.

5. *Other Statutes*

Each of the other penalty provisions enforced by the Customs Service should be reviewed and revised where appropriate in a manner consistent with the foregoing recommendations.

Section 592 is only one of 40 provisions that authorize the Customs Service to impose civil penalties or fines, some of which have the same undesirable characteristics as section 592.³²² Penalties are often enormously high in relation to the nature of the violation or the culpability of the violator. The mitigation procedures that impede judicial review of section 592 penalty cases are used in the enforcement of the other penalty provisions as well.³²³ Accord-

³²¹ H.R. 8149, 95th Cong., 1st Sess. § 112(a) (1977), contains a similar provision. H.R. 8367, 95th Cong., 1st Sess. (1977), the proposal drafted by the Department of Treasury, does not.

³²² See, e.g., 19 U.S.C. § 1586 (1970) (Customs may seize vessels unloading merchandise without a permit); *id.* § 1585 (Customs may seize vessel if its master fails to report the entry of the vessel); *id.* § 1584 (Customs may seize merchandise not included on a vessel's manifest). Although such sanctions may be appropriate when smuggling is involved, they do not seem appropriate if the conduct results from negligence.

³²³ See *Procedural Reform Hearings*, *supra* note 14, at 241 (statement of Philip Steinberg),

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ingly, the other penalty provisions should be reviewed to assess how they can be changed to better serve both the trading community and the other interests Customs is mandated to protect.

249 (statement of Wiley R. George), and 450 (statement of Independent Freight Forwarders and Customs Brokers Ass'n).

