**Northwestern Journal of International Law & Business**

Volume 5
Issue 2 *Summer*

Summer 1983

# Worker Adjustment Assistance: The Failure & The Future

Steven T. O'Hara

Follow this and additional works at: http://scholarlycommons.law.northwestern.edu/njilb

 Part of the International Law Commons

Recommended Citation
Steven T. O'Hara, Worker Adjustment Assistance: The Failure & The Future, 5 Nw. J. Int'l L. & Bus. 394 (1983-1984)

This Comment is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of International Law & Business by an authorized administrator of Northwestern University School of Law Scholarly Commons.

# Worker Adjustment Assistance: The Failure & The Future

## I. INTRODUCTION

> There will be differences of opinion as to whether these [unemployment] problems are always brought about directly by tariff concessions. . . . Even if they are not always directly attributable to . . . imports, they are sometimes thought to be; and what people think to be the truth has a very controlling influence on their decisions. This is a political fact that many of us have to live with.
>
> Senator Hubert H. Humphrey
> May 4, 1955[1]

Free trade has long raised the specter of job loss to a wide range of American workers, particularly in periods of recession. Today, with the weakening of free-trade supporters,[2] and the corresponding protectionist pressure mounting,[3] Congress may be taking its eye off the long-term benefits of free trade[4] and focusing instead on the short-term, politically attractive benefits of protectionism.[5] This Comment argues, however, that protectionism will in fact add many new faces to America's unemployment lines, and prolong the world recession—for protectionism invites retaliation, and no nation is so insulated from the world economy that it can pursue protectionism without suffering itself from resulting protectionism.[6]

More importantly, this Comment argues that from an economic point of view, liberal trade policies provide more benefits than costs.[7] Combined with an effective marketing strategy for United States exports, free trade creates jobs.[8] Therefore, Americans should see liberal trade policies not as a threat to American jobs, even though some job displacement will inevitably result.[9] Rather, Americans should recognize the job-creating potential of such policies.

---

1 101 CONG. REC. 5572 (1955).
2 *See infra* note 43 and accompanying text.
3 *See infra* notes 31-33 and accompanying text.
4 *See infra* notes 73-84 and accompanying text.
5 *See infra* notes 31-33 and accompanying text.
6 *See infra* notes 59-62 and accompanying text.
7 *See infra* notes 73-78 and accompanying text.
8 *See infra* notes 79-84 and accompanying text.
9 *See infra* notes 27-29 and accompanying text.

Americans would be better able to adopt this view if the federal government designed a program that enabled import-affected workers to adjust to foreign competition. This was the theory of Congress when it created worker adjustment assistance.[10] Simplified, the theory is that through supplemental unemployment insurance, retraining, job search grants and relocation allowances, import-affected workers would move from domestic industries in a condition of permanent decline due to comparative disadvantage, to existing or new industries in fields in which the United States possesses a comparative advantage.[11]

Originally proposed in 1954,[12] the first program of worker adjustment assistance was part of the Trade Expansion Act of 1962.[13] In 1974 the program was made part of the Trade Act of that year.[14] Today, however, the future of worker adjustment assistance is uncertain. Under the Trade Act, the current program expires September 30, 1983.[15]

Unfortunately, worker adjustment assistance has not enabled many workers to adjust. The program has been an abysmal failure. This Comment reveals two fundamental reasons for this failure. First, the program is underinclusive. Although clearly victims of trade readjustments, service and component-parts workers have been excluded from the program.[16] Second, the program has not been administered by the federal government, but by state agencies lacking national perspective. As a result, the program has not been administered uniformly, and the assistance that truly enables workers to adjust—retraining, job search grants and relocation allowances—has gone unused.[17] Rather than enabling import-affected workers to gain new employment in more promising industries, the program has merely

---

10 In its broadest sense, adjustment assistance encompasses aid to workers, employers, and communities that have been adversely affected by imports. This Comment, however, focuses exclusively on the assistance provided to import-affected workers.

11 *See infra* notes 93, 108 and accompanying text.

12 *See infra* note 91 and accompanying text.

13 Pub. L. No. 87-794, 76 Stat. 872 (1962).

14 Pub. L. No. 93-618, 88 Stat. 1978 (1975).

15 Pub. L. No. 97-35, § 2512, 95 Stat. 358, 888 (1981). On June 23, 1983, the House Ways and Means Committee cleared legislation that would extend the program beyond September 30, 1983. Wall St. J., June 24, 1983, at 42, col. 4. The bill is H.R. 3391, 98th Cong., 1st Sess. (1983), and would "authorize $200 million to help train workers who lose their jobs because of increased imports." *Id.* Although its trade subcommittee has conducted hearings on the matter, the Senate Finance Committee has not, as of June 24, 1983, scheduled any sessions to write a similar bill of its own. *Id.*

16 *See infra* notes 126, 139, 144 and accompanying text.

17 *See infra* notes 104-06, 110 and accompanying text.

provided supplemental unemployment insurance.[18]

This Comment argues, however, that America cannot afford to throw the concept of worker adjustment assistance out with the current program's bath water. From an economic point of view, tariffs and quotas inhibit the flow of international trade, while worker adjustment assistance does not. Moreover, assistance targeted specifically to import-affected workers costs far less nationally than tariffs and quotas. Finally, a redesigned program must replace the current program because, from a political point of view, free trade policies cannot be pursued without it.[19]

In response to this need, this Comment presents a six-point plan to create a fairer, more effective worker adjustment assistance program for the future.[20] The cornerstone of this new program is its emphasis on retraining and private sector involvement. The State Job Training Coordinating Councils created under the Job Training Coordinating Partnership Act[21] would be authorized to facilitate the retraining of import-affected workers through cooperative efforts by businesses, schools and state government.[22] The Training Councils would function as a catalyst by providing grants on a competitive basis to nonprofit training and education institutions that in turn obtain an equal financial match from one or more businesses.[23]

In sum, the Training Councils would be endowed with funds to target to import-affected workers, identify growth industries and promising fields, and then provide grants to training institutions that develop innovative retraining programs and that have obtained an equal financial match from one or more businesses.[24] Thus, import-affected workers would be retrained for available positions in cooperating firms, and the theory of worker adjustment assistance would be realized.

## II. The Protectionist Mood

There is a growing protectionist sentiment among American voters and in Congress. Increased foreign competition has inflicted severe damage on vulnerable American industries. Nearly everyone can recall the Arab oil embargo of 1973-74, and the dramatic gasoline price

---

18 *Id.*

19 *See infra* notes 201-07 and accompanying text.

20 *See infra* notes 210-31 and accompanying text.

21 Pub. L. No. 97-300, 96 Stat. 1322 (1982).

22 *See infra* notes 215-19 and accompanying text.

23 *See infra* notes 218-21 and accompanying text.

24 *Id.*

increases. With the high cost of gasoline and concern for its continued availability, demand for automobiles shifted from large and mid-size models to more efficient compact and sub-compact models. Almost overnight, foreign carmakers captured a major share of that market. In California, for example, foreign imports account for nearly half the sub-compact market.[25]

The American auto industry has been in a profound slump for nearly four years.[26] General Motors has closed four assembly plants, Ford has closed three, and Chrysler has closed two.[27] As a result, more than 346,000 auto-making jobs have disappeared since 1978.[28]

Most Americans blame foreign auto imports for the unemployment of American auto workers. Their blame is probably well placed, although recession and high interest rates are also primary causes of the auto workers' plight.[29] Moreover, Americans are insecure about the auto industry's ability to compete with foreign competitors in the future. They believe the ominous projection of one General Motors official, who said that "[i]f we were sure right now that [American] car sales were never going to get better, you'd see another whole wave of plant closings at least as large as what's happened already."[30] Congressmen are listening to the fears of their constituents. Last session, more than half the members of the House of Representatives cosponsored a labor-backed "domestic content" bill that would require a set percentage[31] of United States-made components in foreign autos sold in this country.[32] Presidential aspirant Walter Mondale has joined the drive by Douglas Fraser, president of the United Auto Workers, for the passage of this proposal.[33] If enacted, it could force foreign auto mak-

---

25 Wall St. J., Nov. 19, 1982, at 2, col. 2.

26 *Id.*

27 *Id.*

28 *11 Million Jobless, and Worst Is Yet to Come*, U.S. NEWS & WORLD REP., Oct. 18, 1982, at 72.

29 *See id.*

30 Wall St. J., *supra* note 25. Depressed American car sales have forced the auto industry to operate remaining assembly plants at an average of just over half of capacity. *Id.*

31 The bill would impose a gradually increasing percentage. By 1986, for example, 90% of the components in a car made by a company with annual sales of over 900,000 vehicles would have to be domestically made. If annual sales were 700,000 vehicles, 70% of the components would have to be domestically made. Car makers with annual sales below 100,000 vehicles would be unaffected. *Require U.S. Parts in Foreign Cars?*, U.S. NEWS & WORLD REP., Feb. 7, 1983, at 47. For a comprehensive outline of the proposal, see Fraser, *Domestic Content of US Automobile Imports: A UAW Proposal*, COLUM. J. WORLD BUS., Winter 1981, at 57.

32 Bacon, *Protectionism Rising in New Castle, Ind., and Across the Nation*, Wall St. J., Dec. 2 1982, at 1, col. 6.

33 Stone, *Time to Junk "Free Trade"?*, U.S. NEWS & WORLD REP., Nov. 22, 1982, at 96.

ers to build more cars in the United States.[34]

Foreign competition has stiffened in other domestic markets over the past twenty years, most notably in the textile, apparel, and leather goods markets.[35] In 1960, the value of imports constituted less than five percent of the gross national product.[36] Today it exceeds thirteen percent.[37] Even in the specialty steel market, where domestic production is generally regarded as efficient and technologically up to date,[38] imports have made tremendous inroads. During the first eight months of 1982, imports captured enough of the United States specialty steel market to trigger emergency action under international trade rules.[39]

America's competitive position has also slipped in world markets over the past twenty years. In 1960, the United States share of world exports of manufactures was twenty-five percent.[40] By 1980, it had slipped to less than seventeen percent.[41] Many Americans blame the Common Market for the loss of overseas markets for American products. The Common Market heavily subsidizes credit to foreign customers, thereby winning sales from American firms. In addition, American farmers argue that aggressive European farm export subsidies have eroded their overseas markets.[42] In the summer of 1982, the American Farm Bureau Federation, long a leader in the free trade movement, overcame "a strong distaste for export subsidies" and asked the Reagan administration for help.[43] Sensing the protectionist mood of the nation, the Reagan administration responded in early 1983 by subsidizing the sale of one million metric tonnes of wheat flour to Egypt.[44] Egypt has been a major market for subsidized flour exports from the Common

---

34 Bacon, *supra* note 32. Toyota Motor Company's motivation to enter into a joint venture with General Motors Corp. to make small cars in the United States appears to be based on a desire to mollify anti-import sentiment in the United States. Koten and Kanabayashi, *G.M. "90% Sure" of Joint-Venture Accord with Toyota in U.S. as the Talks Drag On*, Wall St. J., Jan. 24, 1983, at 14, col. 2-3; Koten, *How Toyota Stands to Gain From the GM Deal*, Wall St. J., Feb. 14, 1983, at 14, col. 3-5.

35 *See* Schoepfle, *Imports and Domestic Employment: Identifying Affected Industries*, MONTHLY LAB. REV., Aug. 1982, at 13.

36 Choate and Epstein, *The Work Force of the Future*, NATION'S BUS., Nov. 1982, at 58.

37 *Id.*

38 *U.S. to Probe Aid to Steelmakers in Six Countries*, Wall. St. J., Nov. 17, 1982, at 2, col. 2.

39 Imports captured between 11% and 50% of the United States specialty steel market during this period. *Id.*

40 Choate and Epstein, *supra* note 36.

41 *Id.*

42 Birnbaum, *Wheat Grows the Same in Kansas and France, But Not the Subsidies*, Wall St. J., Jan. 24, 1983, at 1, col. 1.

43 Bacon, *supra* note 32, at 14, col. 4 (quote from Robert Delano, president, American Farm Bureau Federation). The federation represents over three million farm families. *Id.*

44 Birnbaum, *U.S. Will Subsidize Wheat Sales to Egypt to Protest European Farm-Export Pol-*

Market, particularly France.[45]

## III. Recession and the Consequences of Protectionism

The nation endured a painful recession in 1982. The gross national product, adjusted for inflation, fell 1.8% from the 1981 average, the steepest decline in thirty-six years.[46] The unemployment rate rose to 10.8% of the labor force,[47] the highest jobless rate in forty-one years.[48] Over eleven million Americans were unemployed.[49] With this high number of jobless Americans, existing jobs naturally become more valuable, and their holders more defensive. Notwithstanding the benefits of free trade, shielding domestic industries from foreign competition so as to keep people working has become an increasingly persuasive alternative.[50] In short, a protectionist sentiment among voters and in Congress exists naturally as a result of the nation's unacceptably high number of people out of work.[51] By contrast, in a full-employment economy, dislocations resulting from imports, while unpleasant, are tolerable because import-affected workers can find alternative employment with less difficulty.

Moreover, the 1982 recession was worldwide.[52] Given America's weak economy, this is somewhat natural. Worldwide economic health is dependent to a large degree on a healthy and growing United States

---

*icy*, Wall St. J., Jan. 19, 1983, at 2, col. 4. This sale represents one-sixth of the world's annual trade in wheat flour. *Id.* at col. 3.

To subsidize the sale, the federal government will give United States millers enough federally owned wheat to bring the price of wheat flour down to roughly the world market price. As of January 1983, the United States price is about $100 higher then the world market level of approximately $175 a metric tonne. *Id.*

45 *Id.* at col. 3. The sale will capture about two-thirds of the Egyptian wheat flour market. *Id.*

46 Powell, *"Real" GNP in '82 Fell 1.8%, but '83 Growth Forecast*, Wall St. J., Jan. 20, 1983, at 3, col. 1.

47 *Id.*

48 *See* U.S. News & World Rep., *supra* note 28, at 71. In 1941, the nation's rate of unemployment was 10.9%, with 5.7 million people out of work. *Id.*

49 *Id.*

50 *See* Bacon, *supra* note 32.

51 *See* McGinley, *Some Threats Economists See to Recovery*, Wall St. J., Feb. 1, 1983, at 33, col. 2; Schachter and Tryon, *Protectionism in EC-US Trade Relations*, 1978 Intereconomics, at 123.

52 In the Common Market, for example, the 1982 jobless rates ranged from 14.9% in Belgium, 11.9% in Britain, 11.4% in the Netherlands, and 11.2% in Italy to 9.5% in France and 7.7% in West Germany. In total, about 11.6 million workers were unemployed in the 10-nation Common Market. That figure is about 10.5% of the total work force, up from 4.5% in 1975 and less than 3% in the 1960s. Zanker, *Behind Mass Unemployment in Europe*, U.S. News & World Rep., Jan. 31, 1983, at 82.

economy.[53] Sluggish economies abroad have severely hampered our ability to increase employment in export industries. Yet Americans should not forget that sixteen percent of the current factory jobs depend on exports.[54] Moreover, while twenty percent of United States manufactured goods are currently exported, forty percent of United States agricultural produce is exported.[55] United States Trade Representative William E. Brock argued early in 1983 that five million American jobs are directly related to exports, and some eight to ten million more American jobs are indirectly related to exports.[56]

The interconnection of imports and exports should be kept in mind. Steps to restrict imports may indirectly restrict exports by inviting retaliation from other nations.[57] Thus, any security American workers may enjoy from protectionism may be offset by decreased employment resulting from decreased exports. Indeed, since the labor content of United States exports is greater than the labor content of foreign imports, if retaliation abroad merely offsets the trade effects of American protectionism there would be a net reduction in United States employment.[58] Further, if protectionism gets out of hand, the United States and the rest of the world may find themselves in a 1930s-style trade war, and a 1930s-like depression.[59] With the stock market crash of 1929, America's knee-jerk reaction was protectionism. After the passage of the Smoot-Hawley Tariff Act of 1930,[60] American exports fell from $5.5 billion in 1929 to $1.7 billion in 1932.[61] Our trade partners had simply retaliated. In short, just as the Smoot-Hawley

---

53 Ruttenberg, *Development of Third World Would Affect U.S. Supply of Raw Materials*, MONTHLY LAB. REV., Mar. 1977, at 39, 40.

54 Bacon, *supra* note 32.

55 *Id.*

56 *Require U.S. Parts in Foreign Cars?, supra* note 31.

57 *Id.*

58 Hays and Willett, *Two Economists' View Of The Case for Trade Liberalization*, COLUM. J. WORLD BUS., Fall 1973, at 20, 25.

59 *Require U.S. Parts in Foreign Cars?, supra* note 31 (statement by Trade Rep. Brock); *An Interview with Nakasone*, TIME, Jan. 24, 1983, at 54; *see* Long, *The Protectionist Threat to World Trade Relations*, 1977 INTERECONOMICS, at 283, 285; *Joining the Subsidy Wars*, Wall St. J., Feb. 24, 1983, at 26, col. 1. *But see* Bruce-Briggs, *The Coming Overthrow of Free Trade*, Wall St. J., Feb. 24, 1983, at 26, col. 3 (arguing that just as a nation's national defense measures may be accepted by its allies as sensible policy decisions, so a nation's trade protectionism may be perceived by its trade partners as "merely sensible economic defense measures"). Mr. Bruce-Briggs fails, however, to address the obvious distinction that whereas national defense measures generally do not threaten a nation's allies, trade protectionism invariably injures a nation's trade partners. *Cf.* Schachter and Tryon, *supra* note 51, at 126.

60 Ch. 497, 46 Stat. 590 (1930).

61 Wilcke, *Free Trade, Fair Trade: Prosperity and Economic Freedom*, SPEAKING OF JAPAN, Sept. 1982, at 8, 13 (published by the Japan Institute for Social and Economic Affairs).

Tariff led foreign countries to retaliate by increasing their tariffs against American goods, so large scale protectionism today would be self-defeating. Indeed, some economists have identified increased protectionism, along with a reescalation of interest rates, a slowdown in spending and international financial problems, as a major obstacle along the road to America's economic recovery.[62]

The Reagan administration appears to believe that its decision to subsidize a huge wheat sale to Egypt is confined enough so as not to spark a trade war with the Europeans.[63] To date this belief has proven correct.[64] The administration has not been so lucky, however, with the Chinese. On January 13, 1983, the United States announced that it was freezing Chinese textile imports at current levels.[65] Less than a week later, China barred purchases of cotton, synthetic fibers and soybeans from the United States, and announced that it intended to "reduce its planned imports of other United States agricultural products."[66] China's retaliation sent tremors through United States grain markets.[67] China imports more United States wheat than any other nation, about one-sixth of United States wheat exports.[68] Moreover, while China is obligated by a long-term agreement to buy six million tons of United States grain a year, China may now look to other nations to fill its additional grain needs.[69] Thus, China's natural response to our protectionism illustrates that such policies are likely to be self-defeating.

## IV. Working With Free Trade

Proponents of free trade often argue that lowering trade barriers, such as tariffs and quotas, leads to lower market prices not only for imported goods, but also for like goods produced domestically due to

---

62 McGinley, *supra* note 51.

63 Birnbaum, *supra* note 44.

64 Shortly after the sale was announced, the European Community said it would contest the United States sale of subsidized flour to Egypt at the General Agreement on Tariffs and Trade. *Common Market Sets GATT Protest of U.S. Flour Sale to Egypt*, Wall St. J., Feb. 4, 1983, at 20, col. 3.

65 Ching, *China Bars U.S. Cotton, Synthetic Fibers, Soybeans to Protest American Trade Curb*, Wall St. J., Jan. 20, 1983, at 25, col. 3. This decision came after the two sides failed to agree in a fourth round of negotiations on a new textiles agreement to replace the old agreement which had expired December 31, 1982. *Id.*

66 *Id.*

67 *Id.*

68 *Id.* United States wheat exports account for 65% of the total United States production of wheat. *Id.*.

69 *Id.* In the past, China has required considerably more than six million tons of grain a year. *Id.*

the increased competition.[70] By paying lower prices, the American consumer indirectly captures the economies enjoyed by importing nations who possess comparative advantages in the relevant industries. Since the early 1970s, however, many labor leaders have challenged the applicability of the doctrine of comparative advantage in today's world, and the concept of international specialization generally.[71] They have argued that the flow of trade between borders no longer simply involves firms of one nation dealing with firms of another nation. Rather, multinational firms transfer to their American plants goods produced overseas with cheaper labor and sell them in the American market at American prices, thus making larger profits rather than passing on their cost savings to American consumers.[72]

Even in the age of the multinational firm it is clear that the benefits of free trade greatly exceed the costs.[73] For example, one economist estimated in 1972 that eliminating tariffs on all imports other than those subject to quotas would result in a long-run net gain to consumers of about $1.4 billion annually.[74] He concluded that quotas on petroleum, steel, textiles, sugar, meat and dairy products result in a long-run net cost of about $3.5 billion annually.[75] Another economist estimated in 1973 that petroleum quotas cost consumers $5 billion annually, textile quotas $2.5 to $4.8 billion annually, and sugar quotas $580 to $700 million annually.[76]

In addition, it is important to recognize that the benefits of free trade will continue as long as free trade continues. By contrast, the costs of free trade are limited.[77] Import-affected workers, for example, should only remain unemployed as long as it takes them to develop

---

70 Hays and Willett, *supra* note 58, at 21.

71 Shelton, *The Changing Attitude of U.S. Labor Unions Toward World Trade*, MONTHLY LAB. REV., May 1970, at 51, 52.

72 *Id.* at 53.

73 Hays and Willett, *supra* note 58, at 23. The costs of free trade include: (1) temporary unemployment as workers and resources are forced out of some industries by increased competition and attracted into others by new export opportunities; (2) reduction in domestic producers' incomes as prices are lowered due to increased competition; and (3) reduction in government revenues from the elimination of tariffs. *Id.* at 21-22.

Noneconomic costs, such as to America's national security, are not considered in this Comment. National security interests may justify some protectionism. *See, e.g.*, Lewis, *The Real Security Issue—Rice*, FAR EASTERN ECON. REV., June 19, 1981, at 70-71. But the "national security" argument should not be used to justify broad-ranging protectionist measures unless the threats to national security are correspondingly broad. *See Policies for Adjustment: Some General Orientations*, THE OECD OBSERVER, July 1978, at 10, 11.

74 Hays and Willett, *supra* note 58, at 21.

75 *Id.*

76 I. MINTZ, U.S. IMPORT QUOTAS: COSTS AND CONSEQUENCES 10 (1973).

77 Hays and Willett, *supra* note 58, at 22.

marketable skills. Thus even if the costs of free trade exceeded the benefits over several years, free trade still would be desirable over the long run.[78]

Moreover, the primary focus of United States trade policy should not be on imports, but on exports, for the more important benefits of free trade are higher domestic productivity and greater exports. Combined with an aggressive marketing strategy for exports, free trade creates jobs. In this regard, the Export Trading Company Act of 1982[79] is a healthy beginning. This Act provides for the development of international general trading companies, consortia of similar manufacturing companies, so that their wares may be marketed more effectively abroad. Japan's success in exporting goods is primarily a result of such general trading companies, known there as *sogoshosha*.[80] In fact, Japan's Mitsui Trading Company is the sixth largest exporter of American goods.[81]

Although our foreign trade partners have practiced protectionism, the United States must restrain itself from reacting with trade barriers of its own that would prostrate the Export Trading Company Act. The potential of this Act for job creation in the United States cannot be overemphasized. By helping small- and medium-sized firms crack new export markets without large initial investments, the Act could help to create between 200,000 and 400,000 jobs.[82]

Moreover, despite the low income levels and low growth of the Third World in the early 1970s, almost half of every dollar increase in United States exports in those years came from developing nations.[83] Today the growing affluence of the Third World continues to offer new potential for United States exports and thus for the creation of American jobs.[84] In this regard, the United States should be commended for its proposal at the November 1982 meeting of the General Agreement on Tariffs and Trade to begin a new round of talks between developed and developing nations, aimed at getting each to open more of their

---

78 *Id.*

79 Pub. L. No. 97-290, 96 Stat. 1233 (1982).

80 Dziubla, *International Trading Companies: Building On The Japanese Model*, 4 Nw. J. Int'l L. & Bus. 422, 423 (1982).

81 *Id.*

82 *JOBS—Putting America Back to Work*, Newsweek, Oct. 18, 1982, at 78, 91. *See generally* Dziubla, *supra* note 80.

83 *America's Labor's Stake In A Changing World Economy*, Monthly Lab. Rev., Mar. 1977, at 34, 37.

84 Choate and Epstein, *supra* note 36.

markets to the other.[85]

## V. The Birth and Development of Worker Adjustment Assistance

Traditional trade barriers are antiquated. While the escape clause,[86] for example, may provide industry-wide relief, the better remedy for import-related injuries is assistance targeted to only those workers and firms adversely affected by liberal trade policies.[87] This argument assumes that assistance directed specifically to disruptions caused by imports will cost less nationally than tariffs and quotas. More fundamentally, raising tariffs or imposing quotas is not always the better remedy for individual workers or firms in an adversely affected industry.[88] Abandoning liberalized trade policies does not guarantee firms needed capital to diversify or change lines of production, nor does it guarantee workers needed retraining and assistance in relocating.[89] Indeed, for the worker, the escape clause remedy may provide only cosmetic relief, enabling him to work a while longer in an industry that is suffering a permanent decline due to comparative disadvantage.[90]

A comprehensive plan for targeting federal assistance to import-affected workers and firms was first proposed in 1954 by David J. McDonald, president of the United Steelworkers of America.[91] The proposal, as submitted by the Commission on Foreign Economic Policy, called for retraining and relocation benefits for workers, as well as extended unemployment compensation.[92] Capsulizing the underlying theory of the McDonald adjustment assistance plan, a commentator wrote in 1956:

Transfer of resources is the guiding purpose of the McDonald plan. It

---

85 Pine, *Trade Ministers Promise to Avoid New Curbs, Shrink Existing Ones*, Wall St. J., Nov. 29, 1982, at 3, col. 1.

86 The underlying notion of this concept is that "escape" from trade-related injuries should be available to American firms. If trade liberalization results in undue harm to American firms or workers, such policy is abandoned. A 1947 executive order by President Truman established this remedy as part of the United States trade agreements program. C. Frank, Foreign Trade and Domestic Aid 2 (1977). It was later codified in the Trade Agreements Act of 1951, and is endorsed in Article 19 of the GATT. *Id.*

87 1 U.S. Comm'n on Int'l Trade and Investment Pol'y, United States International Economic Policy in an Interdependent World 322-23 (1971).

88 *Id.*

89 C. Frank, *supra* note 86.

90 *See id.*

91 *Id.* at 3.

92 U.S. Comm'n on Foreign Econ. Pol'y, Report to the President and the Congress 57-58 (1954).

> aims to help investors, management and workers to shift their capital and their skills out of industries injured or threatened by foreign competition and into branches of manufacturing or other economic activities where they would be more effective and less vulnerable. Thus the plan would supplement and reinforce a basic purpose of tariff reduction, viz., to raise the general level of productivity of the American economy.[93]

By 1954, therefore, the concept of worker adjustment assistance had entered American politics. The theory was that through supplemental unemployment insurance, retraining, job search grants and relocation allowances, import-affected workers would gain employment in more promising industries, with benefits accruing both to them and to the general economy. Thus the "adjustment" intended by McDonald was the transfer of workers out of domestic industries in a condition of permanent decline due to comparative disadvantage, to existing or new industries in fields in which the United States possesses a comparative advantage.

The Commission on Foreign Economic Policy rejected the McDonald plan, however, because it determined that import-affected workers were no more deserving of a special program than any other group of unemployed workers. The Commission said:

> [N]o matter how great our sympathy may be for the problems of a displaced worker, . . . this is but one phase of a much broader problem . . . . In a free economy, some displacement of workers . . . is unavoidable. It may come about through technological change, alterations in consumer preferences, exhaustion of a mineral resource, new inventions, new taxes, or many other causes. Since it has never been seriously proposed that the burden of all such injury arising in a free economy should be assumed by the Government, the Commission felt that it was not appropriate to propose such a plan in the tariff area only.[94]

Despite the Commission's rejection of the McDonald plan, the concept of worker adjustment assistance soon gained many adherents in Congress. By the end of 1954, an adjustment assistance bill, incorporating many features of the McDonald plan, had been introduced in the House.[95] Similar bills were proposed in 1955 in the Senate by senators Kennedy and Humphrey.[96] Between 1954 and the early 1960s, numerous adjustment assistance bills were introduced in Congress.[97]

In 1962, with the passage of the Trade Expansion Act (TEA),[98]

---

93 P. BIDWELL, WHAT THE TARIFF MEANS TO AMERICAN INDUSTRIES 274 (1956).

94 U.S. COMM'N ON FOREIGN ECON. POL'Y, *supra* note 92, at 54.

95 P. BIDWELL, *supra* note 93.

96 *Id.*

97 *See* Clubb and Reisher, *The Trade Adjustment Bills: Their Purpose & Efficacy*, 61 COLUM. L. REV. 490 (1961); U.S. COMM'N ON INT'L TRADE AND INVESTMENT POL'Y, *supra* note 87, at 323.

98 Pub. L. No. 87-794, 76 Stat. 872 (1962).

adjustment assistance became, at least ostensibly, a reality for the American worker.[99] The Act's provision for worker adjustment assistance was essential in generating support from labor for the Act.[100]

The worker adjustment assistance program under the TEA was a complete failure. Between 1962 and late 1969 not a single worker received adjustment assistance.[101] Between December 1969 and April 1975,[102] $86 million was dispensed to workers in the form of supplemental unemployment insurance.[103] But a mere $3 million was spent

---

99 The TEA created, with the adjustment assistance program for workers, a program for adjustment assistance for firms adversely affected by increased imports. Loans and loan guarantees, tax breaks, and technical assistance such as managerial advice and research and development assistance, were offered under the Act. Strict eligibility criteria and a large number of administrative procedures, however, prohibited all but the most declining and poorly managed firms from eligibility. C. FRANK, *supra* note 86, at 58.

100 *Id.* at 3-4. Organized labor generally supported liberal trade legislation until the late 1960s. *Id.* at 4. The economy was booming during most of the early and middle 1960s, and the instances of trade-related injury to American workers were relatively infrequent. *See id.* at 46.

101 *Id.* at 45. It must be noted, however, that 1,943 trade-impacted workers in the automotive industry received adjustment assistance under the Automotive Products Trade Act of 1965, Pub. L. No. 89-283, 79 Stat. 1016 (codified at 119 U.S.C. §§ 2001-2033 (1976)). C. FRANK, *supra* note 86, at 57.

The authority to provide adjustment assistance under this Act was limited to three years, and expired in 1968. *See* 19 U.S.C. § 2022(a) (1970) (obsolete). Such limited authority was intended to remedy problems arising from the creation of a tariff-free United States-Canadian market for automotive parts. *See id.* For a review of the Act, see Manley, *Adjustment Assistance: Experience Under the Automotive Products Trade Act of 1965*, 10 HARV. INT'L L. J. 294 (1969); Metzger, *The United States-Canada Automotive Products Agreement of 1965*, 1 J. OF WORLD TRADE L. 103 (1967).

The general view is that adjustment assistance under this Act was more successful than adjustment assistance under the TEA, since benefits were at least doled out under it while the TEA lay idle. The explanation given is that the 1965 Act focused on a single industry, involved less severe eligibility criteria, and enjoyed more lenient administrative interpretations. *See, e.g.*, Rosenblatt, *Trade Adjustment Assistance Programs: Crossroads or Dead End?*, 9 LAW & POL'Y INT'L BUS. 1065, 1070 (1977). For a discussion of eligibility criteria under the TEA, see Comment, *"In Major Part"—The New Causation Problem in the Trade-Agreements Program*, 44 TEX. L. REV. 1331 (1966); Note, *Adjustment Assistance Under the Trade Expansion Act of 1962: A Will-O'-The-Wisp*, 33 GEO. WASH. L. REV. 1088, 1102-03 (1965).

102 The worker adjustment assistance program under the TEA expired in April 1975. C. FRANK, *supra* note 86, at 49.

103 *Id.* at 53. The transfer of human resources out of the automobile industry to another industry was probably not achieved under the Automotive Products Trade Act of 1965. Of the $4.1 million expended under this adjustment assistance program, nearly all of it went to the import-affected worker through supplemental unemployment compensation, rather than through retraining or relocation benefits. *Id.* at 57.

It must be further noted that while the transfer of human resources into industries enjoying comparative advantage was a goal under the TEA, it was not its exclusive goal. Section 326(b) of the Act, for example, required the Secretary of Labor to attempt to develop a worker retraining plan with the import-affected firm or worker's union, thus keeping the worker associated with the firm and in the area of his residence. *See* Note, *Title II of the Trade Act of 1974: What Changes*

on reemployment services during that period.[104] Thus, by the expiration of the program, 35,000 workers had actually received adjustment assistance.[105] Yet only approximately 3,500 workers had received placement services or retraining, and less than 125 workers had received relocation allowances.[106]

With the passage of the Trade Act of 1974,[107] Congress believed that it had designed a new worker adjustment assistance program that would focus on reemployment services.[108] Thus, in addition to easing the eligibility criteria for supplemental unemployment compensation, Congress added new "measures aimed at helping adversely affected workers to find new employment, including job search, training and relocation allowances."[109]

By 1980, however, the new program under the Trade Act of 1974 was generally recognized as having failed as abysmally as the program under the TEA. The Senate Finance Committee, after considering amendments to the program in 1981, reported:

> The program clearly has not functioned as intended. In a study released in January 1980 the General Accounting Office found that . . . weekly . . . cash payments have helped very few unemployed workers adjust to

---

*Hath Congress Wrought to Relief from Injury Caused by Import Competition?*, 10 J. INT'L L. & ECON. 197, 222-23 (1975). This requirement was dropped under the Trade Act of 1974. *Id.*

It should be pointed out, however, that the transfer of human resources into industries enjoying comparative advantage may be achieved solely within a large, diversified firm. Comment, *Letting Obsolete Firms Die: Trade Adjustment Assistance in the United States and Japan*, 22 HARV. INT'L L. J. 595, 607 (1981). This is currently done in Japan, where large firms typically seek to retrain their permanent employees even during recessions. *Id.*; *see* C. FRANK, *supra* note 86, at 144.

104 C. FRANK, *supra* note 86, at 53.

105 *Id.*

106 *Id.*

107 Pub. L. No. 93-618, 88 Stat. 1978 (1975) (codified at 19 U.S.C. §§ 2101-2487 (1976)), *amended by* Pub. L. No. 97-35 §§ 2501-2529, 95 Stat. 881-93 (1981). *See also* 19 U.S.C. §§ 2251-2394 (portions of the 1974 Act outlining import relief procedures). With the exception of tax assistance, the Trade Act continued to offer the same assistance to adversely affected firms as under the TEA. S. REP. NO. 1298, 93d Cong., 2d Sess. 131 (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7186 [hereinafter cited as S. REP. NO. 1298]. For further information on TEA benefits see *supra* note 99. Procedures for certifying proposals for adjustment assistance were simplified, and the qualifying criteria significantly relaxed. S. REP. NO. 1298, at 7284.

108 The staff of the Subcommittee on Trade of the House Committee on Ways and Means has explained that "[t]he basic purpose of a program of benefits to trade-impacted workers . . . is to assist their adjustment to reemployment in the same or different industry, as opposed to producing compensation for unemployment." STAFF OF SUBCOMM. ON TRADE OF THE HOUSE COMM. ON WAYS AND MEANS, 95th Cong., 1st Sess., BACKGROUND MATERIALS ON THE TRADE ADJUSTMENT ASSISTANCE PROGRAMS UNDER TITLE II OF THE TRADE ACT OF 1974 14 (Comm. Print 1977) [hereinafter cited as BACKGROUND MATERIALS].

109 S. REP. NO. 1298, *supra* note 107, at 7205. See the appendix for an outline of the procedure and benefits under the current program.

> their changed circumstances. Of the . . . recipients interviewed, 85 percent had returned to work, 67 percent for the same employer who laid them off. . . . Seventy-three percent of those surveyed used none of the employment services, job search and relocation allowances because they were not aware the services were available to them, they had little need for the services, and they were not willing to move to take advantage of a job in another community.[110]

Congress also noted in 1981 that local officials believed that the cash payments under the program, which in many instances were well above state unemployment insurance levels, created a disincentive for some import-affected workers to seek new careers.[111] As a result, the program was amended in 1981 to provide supplemental unemployment compensation only after import-affected workers have exhausted their entitlement to state unemployment insurance.[112] Moreover, the 1981 amendments to the Trade Act limited the weekly amount payable under the program to the weekly amount payable under state unemployment insurance programs.[113]

The 1981 amendments also provided some teeth to the theory un-

---

110 S. REP. NO. 139, 97th Cong., 1st Sess. 534, *reprinted in* 1981 U.S. CODE CONG. & AD. NEWS 396, 801 [hereinafter cited as S. REP. NO. 139].

111 *Id.*

112 The maximum number of weeks of combined state unemployment compensation and cash benefits under the worker adjustment assistance program is 52 weeks. An additional 26 weeks of cash benefits, however, may be provided to help an import-affected worker complete an approved training program. 19 U.S.C. §2293(a)(1)-(3) (1976 & Supp. V. 1981).

To be eligible for adjustment assistance, an import-affected worker must have 26 weeks or more of employment at a weekly wage of $30 or more in adversely affected employment with a single firm or subdivision of a firm. 19 U.S.C. § 2291(a)(2) (Supp. V 1981), *amending* 19 U.S.C. § 2291(2) (1976). Under the 1981 amendments, the 26 week pre-layoff employment requirement has been liberalized so that qualifying weeks include up to three weeks of employer-authorized leave for vacation, sickness, injury, maternity, military service, or service as a full-time union representative; or up to seven weeks of disability covered by workers' compensation; or up to seven weeks combining disability leave and not more than three weeks of employer-authorized or union leave. *Id.*

The 26 week pre-layoff employment requirement appears to have been assiduously upheld. For example, in *Felcyn v. Commonwealth, Unemployment Compensation Bd. of Review*, — Pa. Commw. —, 445 A.2d 847 (1982), the petitioner had been employed as a tire builder by a tire company for over 11 years. *Id.* at —, 445 A.2d at 848. For most of the year preceding his layoff, however, he was absent from work due to a work-related injury. *Id.* Citing a series of cases where the court held that work-related absences should not be counted as weeks of employment, *Id.* at —, 445 A.2d at 849, the court found that Felcyn was ineligible for adjustment assistance. *Id.* at —, 445 A.2d at 850. The court noted, however, that Felcyn would have been eligible for assistance had he been covered under the 1981 amendments. *Id.* at —, 445 A.2d at 850 n.5.

113 The Senate Finance Committee reported that this limitation "will achieve a greater equity between those who are unemployed as a result of trade impact and those unemployed for other reasons." S. REP. NO. 139, *supra* note 110, at 802. Under these limitations, the Congressional Budget Office estimated that outlays for cash benefits will fall from $1.4 billion in fiscal year 1981 to $118 million in fiscal year 1982. CONG. BUDGET OFF., DISLOCATED WORKERS: ISSUES AND FEDERAL OPTIONS 28 (1982).

derlying the worker adjustment assistance program. The Secretary of Labor was authorized to order all import-affected workers in a labor market area to enter an available training program or extend their job search beyond the area.[114] Cash payments under the program would be cut off if the worker did not comply with the order.[115]

The future of worker adjustment assistance is uncertain. The current program expires at the end of September 1983.[116] This renders timely and, indeed, necessary an analysis of whether the federal government should fund a special program for import-affected workers and, if so, what that program should provide, and how it should operate. Before such analysis, however, it is important to discuss the major defects of the worker adjustment assistance programs to date.

## VI. ELIGIBILITY FOR ADJUSTMENT ASSISTANCE

### A. Exclusion of Service & Components Workers

The worker adjustment assistance provisions of the Trade Act of 1974 give an exceedingly vague mandate. The terms "article" and "like or directly competitive," for example, are crucially important for import-affected workers petitioning for certification.[117] Yet Congress did not define these terms in the Act. As a result, the Trade Act has been interpreted to exclude service and component-parts workers from the program.

In *Fortin v. Marshall*,[118] the petitioners were former workers of Pan American World Airways' Boston operation. In 1978, the Civil Aeronautics Board stripped Pan Am of its Detroit-Boston-London route, and named Trans World Airlines as the single American airline to provide service from Boston to London.[119] The cause of this transfer

---

114 19 U.S.C. § 2291(b) (Supp. V 1981).

115 Before such an order may be issued, however, the state employment security office must determine that high unemployment exists in the worker's labor market area, and that no suitable employment opportunities are available there. Although the Trade Act of 1974 provides that the Secretary shall make this determination, *id.*, in fact the state employment security office makes such determination as the Secretary's agent. Telephone interview with Joseph E. Wojcik, Manager, Insured Federal Programs Unit, Illinois Department of Labor (Mar. 14, 1983) [hereinafter cited as Wojcik Interview].

Of 1,338,090 workers who were certified for adjustment assistance between 1975 and 1981, only 48,811 entered training programs. Moreover, only 9,795 received job search or relocation allowances. Twenty-sixth Annual Report of the President of the United States on the Trade Agreements Program, 1981-82, 201, 203 (1982) [hereinafter cited as President's Report].

116 *See supra* note 15 and accompanying text.

117 *See infra* notes 238-40 and accompanying text.

118 608 F.2d 525 (1st Cir. 1979).

119 *Id.* at 526.

of authority was a trade agreement the United States had entered into with Great Britain.[120] Soon British Airways dramatically increased its share of the Boston-London market.[121] After other routes from Boston proved unprofitable, Pan Am closed down its Boston operation.[122]

The issue in *Fortin* was whether the service Pan Am sold could be considered an "article" for purposes of the Trade Act.[123] This issue was fundamental because the Secretary of Labor must find that increases of imports of articles like or directly competitive with articles produced by petitioners' firm caused the petitioners' separations.[124]

The First Circuit expressed sympathy with the plight of the workers in this case,[125] but said that it is "clear that the term 'article' was plainly meant to refer to a tangible thing and not to a service."[126] The court reasoned that although the term "commerce" was intended in the Act to include services associated with international trade,[127] and the term "international trade" was intended to include trade in both goods and services,[128] Congress used those terms when it meant "services" but "article" when it meant "a thing."[129]

Legislative disparity of treatment among import-affected workers was also identified by the Sixth Circuit in *Morristown Magnavox Former Employees v. Marshall*.[130] Involved here was a Magnavox Corporation plant which produced only electronic components for Magnavox color televisions.[131] In August 1979 the plant closed, displacing 575 workers.[132] Prior to the closing, in 1976, Japanese imports of color television sets increased 179.8% over the previous year.[133] These imports, plus those in 1978 and 1979, caused an enormous displacement of American color television sales.[134] The petitioners alleged, therefore, that the cause of their separation was increased imports of Japanese color television sets.[135]

---

120 *Id.*
121 *Id.*
122 *Id.*
123 *Id.*
124 *See infra* notes 238-40 and accompanying text.
125 608 F.2d at 529.
126 *Id.* at 527.
127 *See* 19 U.S.C. § 2481(10)(1976).
128 19 U.S.C. § 2112(g) (1976).
129 608 F.2d at 527.
130 671 F.2d 194 (6th Cir. 1982).
131 *Id.* at 195.
132 *Id.*
133 *Id.* at 196.
134 *Id.*
135 *Id.* at 195.

The Sixth Circuit, however, did not consider whether increased imports of color television sets was an important cause of the closing of the Magnavox plant.[136] Rather, the court affirmed the Secretary's denial of certification on the narrow ground that the Trade Act requires that the petitioners must have produced an article for which the demand was decreased by the importation of a *like article*.[137] The court held that "like" must be construed to mean "identical."[138] In other words, although the workers may have been adversely affected by the increased importation of color television sets, they were not entitled to adjustment assistance because they only produced component parts of color television sets. They could not obtain adjustment assistance unless the increased importation of like components caused their separation.

Recognizing the harsh result in this case, the Sixth Circuit blamed Congress: "While it seems clear to us that the petitioners here may have suffered loss of jobs from the general impact on the television market of foreign competition, it does not appear that Congress has ever provided adjustment [assistance]" to workers who produced only a component of a product, when the foreign competition complained of involved the importation of the finished product.[139] Moreover, the court emphasized, "Congress ha[s] made a policy decision and drawn a line; our duty is to give the language of the statute a meaning that will carry out that policy."[140]

The District of Columbia Circuit has also expressed dissatisfaction with the Trade Act's apparent components exclusion. In *Machine Printers & Engravers Association of United States v. Marshall*,[141] a union alleged that its members were losing work because increased imports of textile fabrics had reduced the demand for the engraved rollers produced by their employers.[142] No increase in the importation of engraved rollers was alleged.[143] Although it affirmed the Secretary's denial of adjustment assistance, the court said:

> The business of the workers' employers has been hurt by the imports of textile fabrics. . . . The Union's claim and the workers' apparent plight should and do provoke sympathy. . . . We are bound, however, by what Congress has enacted and our interpretation of it is authoritatively con-

136 *Id.* at 197.
137 *Id.*
138 *See id.*
139 *Id.*
140 *Id.*
141 595 F.2d 860 (D.C. Cir. 1979).
142 *Id.* at 861.
143 *Id.*

> trolled by the decision of this court on an earlier petition seeking a generous interpretation of the present statute. *United Shoe Workers of America, AFL-CIO v. Bedell*, 165 U.S. App. D.C. 113, 506 F.2d 174 (1974).[144]

Whether the circuit court's interpretation of the Trade Act of 1974 in *Machine Printers* was controlled by its decision in *Bedell* is questionable, since *Bedell* involved an interpretation of the Trade Expansion Act of 1962.[145] The court should have recognized that Congress expressed a new attitude toward import-affected workers in the Trade Act by relaxing the qualifying criteria for certification.[146]

Both *Machine Printers* and *Morristown* suggest that Congress gave careful thought to the meaning of the term "like or directly competitive," and intended to incorporate the substance of the *Bedell* decision into the statute.[147] In reality, however, the legislative history of the Trade Act included only a single, neutral reference to *Bedell*:

> The Committee notes that the term "like or directly competitive" as used in . . . the Trade Expansion Act of 1962 has been the subject of recent court action. The courts . . . concluded that imported finished articles are not like or directly competitive with domestic component parts thereof. *United Shoe Workers of America, et al. v. Catherine Bedell, et al.* . . . .[148]

Far from showing that Congress gave careful thought to the substance of *Bedell*, this citation appears to have been designed to show mere awareness, not approval, of the decision.[149] Moreover, this reference to *Bedell* is scarcely the type of congressional mandate that precludes a court's reinterpretation of the term.[150]

### B. State Administration

While the worker adjustment assistance program is conducted under the auspices of the United States Department of Labor, it is administered through state employment security offices.[151] This dual-level administrative structure frustrates the formulation of a uniform national program. For example, under the rule that all questions of individual eligibility and unemployment insurance law shall be left to

---

144 *Id.* at 861-62.

145 506 F.2d 174, 177 (D.C. Cir. 1974).

146 *See supra* note 109 and accompanying text.

147 *See Machine Printers, supra* note 141, at 862; *Morristown, supra* note 130, at 197.

148 S. REP. No. 1298, *supra* note 107, at 7266.

149 The Secretary of Labor has argued that by citing *Bedell* in the Trade Act's legislative history, Congress intended to incorporate the substance of the decision into the Act. Cprek, *Worker Adjustment Assistance: Black Comedy in the Post-Renaissance*, 11 LAW & POL'Y INT'L BUS. 593, 610-11 (1979).

150 *Id.* at 610 n.44.

151 *See infra* notes 247-48 and accompanying text.

the states,[152] a worker covered by a certification who accepts an early retirement may or may not receive adjustment assistance—depending on the state in which he resides.

The Supreme Court of Hawaii, the only state supreme court to deal with an adjustment assistance issue, recently struggled with the vexing question of early retirements. In *Wailuku Sugar Co. v. Agsalud*,[153] the court was faced with a determination by the state that two workers were ineligible for adjustment assistance because they had accepted early retirement.[154] Reversing, the high court said that the appellants, supervisory employees of Wailuku Sugar Company, had reason to believe that some supervisory employees would be laid off since the firm's work force had been recently reduced due to foreign sugar competition.[155] The court emphasized that the appellants' employer had, for "a little better pension," invited them to retire early, "appealing to their loyalty to the company and to their concern for younger supervisory employees who had young wives and children to support and who might otherwise be laid off without the appellants' pension advantages."[156] Therefore, the court found that the appellants' early retirement was not voluntary, but "was due to pressure and persuasion on the part of the employer, and to the circumstances . . . ."[157]

By contrast, in *York v. Review Board of Indiana Employment Security Division*,[158] the Indiana Court of Appeals, faced with fact situations similar to *Wailuku Sugar*, affirmed the denial of adjustment assistance to the workers.[159] Here the court consolidated the separate appeals of York and Lazar, both of whom had accepted early retirement from Ford Motor Company.[160]

York, who had worked as a process engineer for over sixteen years, was given five days to accept an early retirement offer.[161] Although he had rejected numerous other early retirement offers with ostensibly no retaliation, this time Ford told him that his job function was

---

152 19 U.S.C. § 2294 (1976). Under this provision, the Secretary of Labor may make exceptions to state unemployment insurance law for import-affected workers. In practice, however, individual eligibility may be challenged only under state procedures applicable to normal unemployment insurance claims. Cprek, *supra* note 149, at 687 n.312.

153 — Hawaii —, 648 P.2d 1107 (1982).

154 *Id.* at —, 648 P.2d at 1109.

155 *Id.* at —, 648 P.2d at 1111.

156 *Id.*

157 *Id.* at —, 648 P.2d at 1111-12.

158 — Ind. App. —, 425 N.E.2d 707 (1981).

159 *Id.* at —, 425 N.E.2d at 709.

160 *Id.*

161 *Id.*

being transferred to Detroit within eight months, and reminded him of his low seniority.[162] When Ford approached Lazar, a superintendent of quality control, the firm reminded him that many jobs had been eliminated, and that it was trying to reduce its work force due to productivity problems.[163] After accepting Ford's offer, he tried to retract his acceptance, but Ford refused to cooperate.[164]

Noting that the purpose of the Indiana Employment Security Act was to provide benefits for persons unemployed through no fault of their own, the court held that "York and Lazar voluntarily accepted retirement and are ineligible to receive TRA benefits."[165] Earlier in the opinion, the court had said that the workers were not entitled to their early retirement bonuses unless they accepted Ford's offer, and that they were free to refuse the offer and continue working under their prior employment contracts.[166]

Thus, in reviewing the administration of the worker adjustment assistance program, one state court has recognized that a potential early retiree may have little real choice other than accepting a bonus for signing some retirement papers.[167] On the other hand, another state court has held that since the potential early retiree could have continued working at least until he was laid off, his separation was voluntary.

The disqualifying provisions of state unemployment insurance law apply only to applications for cash payments, not to applications for reemployment services.[168] Yet cash payments are perhaps the only form of adjustment assistance in which older workers, who are more vulnerable to early retirement offers,[169] may be interested. Their learning a new skill may be unduly onerous, especially as compared to younger

---

162 *Id.*

163 *Id.*

164 *Id.* Moreover, Lazar believed that the section in which he worked would be combined with another section. He feared that if this happened, he would lose his job classification, which could have resulted in a $375 per month loss in income. *Id.*

165 *Id.* at —, 425 N.E.2d at 711.

166 *Id.*

167 In this regard, it is important to point out that since older workers are frequently less productive than younger workers, an employer may find it advantageous to offer early retirement to older workers at a slight cost in order to maintain a younger and more productive work force.

168 19 U.S.C. § 2294 (1976) ("State law . . . shall apply to any such worker who files a claim for trade readjustment allowances"). "Trade readjustment allowances" are adjustment assistance in the form of cash payments.

169 *See supra* note 167. Moreover, one scholar has argued that the average age of import-affected workers is much higher than the average age of all other unemployed workers: "about 44 years in the case of import-affected workers as compared to 32 years for all unemployed workers." Frank, *The United States Needs A Better Adjustment Assistance Program*, COLUM. J. WORLD BUS., Fall 1973, at 68, 70 (footnote omitted).

workers doing the same task. Their residential roots may be deeper also, making their relocation a greater sacrifice. Therefore, Congress should implement a national standard on the perplexing issue of voluntariness of resignations so that the worker adjustment assistance program may be more uniformly and equitably administered.[170]

Moreover, Congress should not leave to state agencies the difficult task of interpreting whether a worker must be laid off *directly* from an import-affected subdivision of a firm to qualify for adjustment assistance.[171] In *Dewhirst v. Review Board of Indiana Employment Security Division*,[172] the state agency strictly construed the Trade Act to require that a worker must be laid off directly from an adversely affected subdivision of a firm.[173] Involved here was a sheet mill division of United States Steel Corporation that had been found by the Secretary to be adversely affected by imports.[174] Dewhirst had worked in the sheet mill division for over two years but, two weeks before his layoff, was transferred to a tin mill division that had not been found to be adversely affected.[175] Stressing the troublesome fact situation, the court said that Dewhirst was totally separated from the adversely affected sheet mill division at the time of his layoff, although he was technically laid off from the tin mill division.[176] It therefore reversed the state agency's denial of adjustment assistance.[177] The court noted that although "the statutory language is unclear, not expressly requiring lay-

---

170 A recent study has shown that of 13,400 offers of early retirement made at 26 United States firms in 1982, 4,100 were accepted. Wall St. J., Jan. 25, 1983, at 1, col. 5. *See generally* Sheller, *As More Firms Nudge Out Employees*, U.S. NEWS & WORLD REP., Feb. 28, 1983, at 65 (more and more firms are encouraging older workers to retire early).

171 Under the Trade Act of 1974, a worker must have 26 weeks or more of employment at a weekly wage of $30 or more "in adversely affected employment with a single firm or subdivision of a firm" to be eligible for adjustment assistance. 19 U.S.C. § 2291(a)(2) (Supp. V 1981), *amending* 19 U.S.C. § 2291(2) (1976).

172 — Ind. App. —, 419 N.E.2d 150 (1981).

173 *Id.* at —, 419 N.E.2d at 152.

174 *Id.* at —, 419 N.E.2d at 151.

175 *Id.*

176 *Id.* at —, 419 N.E.2d at 153.

177 *Id.* at —, 419 N.E.2d at 154. For another example of a state court reversing a state agency's strict interpretation of the Trade Act, see *Anderson v. Review Bd. of Ind. Employment Sec. Div.*, — Ind. App. —, 412 N.E.2d 819 (1980). There the Indiana employment security office had denied Anderson cash benefits because it read the Trade Act to require a certified worker to have 26 weeks of employment with a single firm *after* the impact date identified in the certification. *Id.* at —, 412 N.E.2d at 821. *See supra* note 112, *infra* note 241. This interpretation would have the practical effect of denying cash benefits to all workers who were unable to retain their jobs for one-half year after the Department of Labor had determined that their firms had suffered absolute decreases in sales or production, and that a substantial number of workers were losing or about to lose their jobs. *See infra* notes 236-37, 241 and accompanying text. Recognizing that Congress had eased the eligibility criteria in the Trade Act, the court reversed and said that Anderson was

off from the firm *directly from* the adversely affected subdivision, we believe that the statutory scheme contemplates such direct layoff as the usual way in which separation will occur."[178]

The Secretary of Labor has arguably expressed his position on the *Dewhirst* issue before the Seventh Circuit. In *Paden v. United States Department of Labor*,[179] the Secretary argued that subsection 2272(3) of the Trade Act[180] should be strictly construed to require that a worker must be laid off directly from an adversely affected subdivision of a firm.[181] Involved in *Paden* was a color television subdivision of Motorola Corporation that had been closed, and whose workers were certified.[182] The Secretary determined, however, that November 1, 1975 was the termination date of the certification.[183] Petitioners had worked in the color television subdivision but, prior to November 1, 1975, had been transferred to another subdivision that had not been found to be adversely affected, and from which they were subsequently laid off.[184]

Agreeing with the Secretary, the Seventh Circuit said in effect that the color television subdivision workers, once transferred, were completely divorced from the ill effects of increased imports that the subdivision had suffered.[185] The court said that to become eligible for adjustment assistance, the petitioners must obtain a determination from the Secretary that an important cause of their ultimate separation was increased imports of articles like or directly competitive with the articles produced by their new subdivision.[186] Given the conflicting messages of *Dewhirst* and *Paden*, Congress should clarify whether a worker must be laid off directly from an adversely affected subdivision of a firm in order to qualify for adjustment assistance.

The worker adjustment assistance program would become a more uniform national program if the responsibility for administering it were shifted from the states back to its source, the federal government. In addition, there are two other reasons a federally administered program is desirable. First, in dispensing adjustment assistance other than cash

---

required only to have one-half year's employment out of the year preceding his separation from his firm. — Ind. App. at —, 412 N.E.2d at 823.

178 — Ind. App. at —, 419 N.E.2d at 153 n.3.

179 562 F.2d 470 (7th Cir. 1977).

180 19 U.S.C. § 2272(3) (1976). This subsection is distinct from but analogous in language to the subsection at issue in *Dewhirst*, 19 U.S.C. § 2291(2) (1976).

181 562 F.2d at 475-76. *See infra* note 236 and accompanying text.

182 562 F.2d at 475.

183 *Id.* at 475 n.6. *See infra* note 241.

184 562 F.2d at 475.

185 *Id.* at 476.

186 *Id.*

payments, state employment security offices have focused inadequately on the needs of import-affected workers. Congress has established a special program in the belief that the nature of employment dislocation resulting from foreign competition necessitates that import-affected workers be provided the opportunities to develop new skills in promising fields, and search out and relocate in promising areas of the nation. To provide these opportunities, it has authorized the Secretary of Labor to enter into cooperative agreements with state agencies. As the Secretary's agents, cooperating state agencies are obliged to identify and serve the needs of import-affected workers.

Yet although they have faithfully implemented the cash payments facet of the program, they have been unwilling to implement effectively the heart of the program, the reemployment services facet.[187] Training, job search and relocation benefits are bound to go unused unless there is some outreach to import-affected workers. To encourage import-affected workers to take advantage of these benefits, however, may require state agencies to advertise their reemployment services more to those workers than to other unemployed workers. This would require the agencies to differentiate among their unemployed clients on the basis of the reasons for their unemployment, something the agencies have been reluctant to do.[188]

Second, national administration of the worker adjustment assistance program would bring to the program a national perspective. Since entire industries may be adversely affected by increased imports, workers may not have realistic opportunities to find new employment in these industries. Moreover, the affected industries may be concentrated in a particular state, thereby compounding the difficulties of absorbing the import-affected worker into other types of employment.[189] Yet states may naturally resist the movement of human and capital resources out of their jurisdictions.[190] Therefore, state agencies may intentionally deemphasize job search grants and relocation allowances. The federal government, on the other hand, would be less likely to succumb to local interests.

---

187 *See generally* Rosenblatt, *supra* note 101, at 1082 (helpful criticism of state administration of the program).

188 *Id. See* BACKGROUND MATERIALS, *supra* note 108, at 24. With the 1981 amendments, the state employment offices are in a better position to encourage the use of reemployment services. They may not cut off a worker's cash benefits unless he enters a training program or extends his job search beyond the area. *See supra* notes 114-15 and accompanying text.

189 *See generally* S. REP. No. 1298, *supra* note 107, at 7273.

190 *See Letting Obsolete Firms Die, supra* note 103, at 616.

### C. Conclusions

While it still may be unclear whether import-affected workers should be singled out as deserving a separate program of assistance, if there is to be a special assistance program for import-affected workers, an attempt must be made to avoid unfairly discriminating among those workers. Worker adjustment assistance must be designed and administered more equitably. Service workers and component-parts workers should not be excluded. More consideration must be given to workers who are transferred from adversely affected subdivisions, and subsequently laid off.

Finally, for the sake of uniformity as well as improved program effectiveness, the administrative responsibility for the program must shift to the federal government. Uniformity with regard to the problem of early retirees, for example, will then result. More important, given the underlying theory of adjustment assistance, reemployment services—like training, job search grants and relocation allowances—will then be more effectively emphasized with a national perspective.

## VII. The Need for a Special Program

With the worker adjustment assistance program under the Trade Act of 1974 about to expire, the fundamental question of whether this concept is a fair and useful approach for dealing with unemployment resulting from increased imports naturally arises.

### A. Fairness

The benefits of free trade are widely distributed throughout our nation's economy, while the costs are borne by a relatively small group of industries and workers. Thus free trade causes a redistribution of welfare that appears unfair to many. As a result, worker adjustment assistance has been designed as a program to spread the costs over society as a whole in the form of expenditures to retrain import-affected workers for new jobs.

In this sense, worker adjustment assistance is simply another application of the familiar principle that any governmental policy, presumed to be of net benefit to the nation as a whole, should not impose disproportionate costs on limited segments of society.[191] Under this principle, adjustment assistance takes the form of "just compensation" for a "taking" of American jobs for a public purpose. Indeed, this

[191] C. Frank, *supra* note 86, at 12.

analogy has been used by the District of Columbia Circuit Court, which has said:

> Congress was of the view that fairness demanded some mechanism whereby the national public, which realizes an overall gain through trade readjustments, can compensate the particular . . . workers who suffer a loss—much as the doctrine of eniment domain requires compensation when private property is taken for public use.[192]

Isolating those workers whose jobs have been truly "taken" through liberal trade policies, however, is a fundamental problem that calls into question the fairness and utility of the program. Indeed, the program's fairness rationale is belied by the program's administration. Increased car imports have displaced many American workers who had assembled domestic cars.[193] These workers are eligible for adjustment assistance. Similarly, auto assembly plant closures have "caused a wave of closings of factories that build engines, stamp sheet metal and fabricate other parts, many of them big operations in their own right."[194] Yet these workers are not eligible for adjustment assistance, since the Trade Act has been interpreted to exclude component-parts workers.[195] Moreover, it is impossible to quantify what "just compensation" import-affected workers deserve. A strict determination of this would require the quantification of the gains to the public welfare from liberalized trade policies, less the losses import-affected workers have suffered.

Finally, import-affected workers may have no greater claim for special assistance than do other groups of workers who are made jobless by regular market forces.[196] Just as some unemployment undoubtedly results from liberalized trade policies, so some unemployment undoubtedly results from other governmental policies. For example, if the federal government abandoned its arms production programs, the jobs of thousands of workers in defense industries would be jeopardized. Many would be laid off. Yet it is hard to imagine that Congress would determine that this group of displaced workers deserves more extensive governmental assistance than other groups. Indeed, the United States is the only nation in the world that isolates import-af-

---

192 *UAW v. Marshall*, 584 F.2d 390, 395 (D.C. Cir. 1978). This case is known as "UAW I." For "UAW II," see *UAW v. Marshall*, 627 F.2d 559 (D.C. Cir. 1980).

193 *See supra* notes 25-30 and accompanying text.

194 Wall St. J., *supra* note 25.

195 *See supra* notes 139, 141-44 and accompanying text.

196 *See* Millen, *Providing Assistance to Displaced Workers*, MONTHLY LAB. REV., May 1979, at 17, 20; *supra* note 94 and accompanying text.

fected workers for special treatment.[197] Most Western European countries, for example, provide training, relocation and cash benefits to all unemployed.[198]

In sum, the ultimate justification for worker adjustment assistance is probably not fairness, despite the redistribution it does accomplish, but a political one.[199] Politicians have recognized that the program lessens the political impact of liberalized trade.

### B. The Politics of Adjustment Assistance

Vying for pre-primary advantage, presidential aspirants Mondale and Glenn are campaigning with firm promises to get tough on foreign competition.[200] Suffering intolerably high unemployment, Americans are on the bandwagon against our foreign trade partners. With so many foreign cars on the road it is easy to imagine the great outflow of car sales profits that would otherwise accrue ultimately to the benefit of American workers. For many Americans, the benefits of free trade are forgotten, and it is a clear issue of "us" against "them," particularly those who have practiced protectionism in the past.

With the growing protectionist sentiment among American voters and in Congress, it may be more true today than ever that free trade may not be achieved without the existence of a worker adjustment assistance program.[201] Urging support for his adjustment assistance bill, then-Senator Humphrey told the Senate in 1955:

> There will be differences of opinion as to whether these [unemployment] problems are always brought about directly by tariff concessions. But the problems are there. Even if they are not always directly attributable to tariff cuts and imports, they are sometimes thought to be; and what people think to be the truth has a very controlling influence on their decisions. This is a political fact that many of us have to live with.[202]

From an economic point of view, tariffs and quotas inhibit the flow of international trade, while adjustment assistance does not. Moreover, assistance targeted directly to import-affected workers costs far less nationally than tariffs and quotas.[203] Thus since 1962, with the passage of the Trade Expansion Act of that year,[204] Congress has pro-

197 Henle, *Trade Adjustment Assistance: Should It Be Modified?*, MONTHLY LAB. REV., Mar. 1977, at 40, 45.

198 *Id.*

199 *See* Millen, *supra* note 196, at 22.

200 *See* Bacon, *supra* note 32, at 1, 14.

201 *See* Millen, *supra* note 196.

202 101 CONG. REC. 5572 (1955).

203 *See supra* notes 74-78, 87 and accompanying text.

204 *See supra* note 98 and accompanying text.

vided worker adjustment assistance as the theoretical quid pro quo to gain support for liberal trade policies.[205] Indeed, while trade unions have been reluctant rather than enthusiastic supporters of the program,[206] they have believed since 1962 that they have a foreign trade contract with the federal government. Labor leaders would restrain their members' protectionist sentiment, and in return the government would provide worker adjustment assistance.[207]

In his 1983 State of the Union address, President Reagan expressed a deep commitment to free trade. Recognizing that "[o]ne out of every five jobs in our country depends on trade,"[208] he said that he would propose to Congress an international trade strategy "that increases the openness of our trading system," and would "ask for new negotiating authority to remove barriers and get more of our products into foreign markets."[209] Thus President Reagan is directly confronting the protectionist mood of Congress. In order to prevail, he undoubtedly will have to assure Congress that he has not forgotten the plight of workers who may be displaced as a result of liberalized trade. In practical terms, this may mean supporting a new worker adjustment assistance program.

Therefore, given the political need for worker adjustment assistance, the following proposal is submitted as a program that will serve the needs of import-affected workers more effectively and equitably than previous programs.

## VIII. ADJUSTMENT ASSISTANCE FOR THE FUTURE

The underlying theory of adjustment assistance is that through supplemental unemployment insurance, retraining, job search grants and relocation allowances, import-affected workers will gain employment in more promising industries, with benefits accruing both to them and to the general economy.[210] In other words, the program should provide for the transfer of workers out of domestic industries in a condition of permanent decline due to comparative disadvantage, to existing or new industries in fields in which the United States possesses a comparative advantage. Obviously, retraining is fundamental to achieving this goal. Therefore, worker adjustment assistance must

205 *See* Millen, *supra* note 196.

206 Henle, *supra* note 197, at 44.

207 *Labor Takes A Turn Away From Free Trade*, BUS. WEEK, July 27, 1981, at 24-25.

208 N.Y. Times, Jan. 26, 1983, at 10, col. 3.

209 *Id.*

210 The program's goal must be distinguished from its rationale. In short, fairness and political expediency provide the means through which this goal may be attained.

evince a renewed commitment to providing retraining opportunities to import-affected workers. The following six-point plan will help meet this challenge.

First, the federal government should administer the program. In practice this not only means that the federal government will mail assistance checks, but more fundamentally it means the federal government, and not the states, will determine individual eligibility. Thus, not only will much needed uniformity be achieved,[211] but the worker will no longer be faced with having to coordinate among as many as three governmental agencies.[212] To achieve horizontal equity among all import-affected workers, the program should not exclude service and component-parts workers.[213]

Second, the State Job Training Coordinating Councils created under the Job Training Partnership Act[214] should be authorized to encourage schools and businesses to work together to retrain import-affected workers. The councils, made up of business executives, educators, labor representatives and other state and local leaders,[215] would operate analogously to Massachusetts' Bay State Skills Corporation (BSSC). A not-for-profit, quasi-public corporation, BSSC was set up by the state in 1981 to encourage training through cooperative efforts by businesses, schools and state government.[216] Its board of directors, like the new training councils, includes business executives, educators, labor representatives, and other state and local leaders.[217]

Just as the training councils were created "solely to plan, coordinate, and monitor the provision" of training services,[218] so BSSC functions as a catalyst by providing grants on a competitive basis to nonprofit training and education institutions that in turn obtain an equal financial match from one or more businesses.[219] Any nonprofit training organization—public or private, established university or besieged employment security office—may then compete for BSSC's funds by

211 *See supra* note 152 and accompanying text.

212 To obtain adjustment assistance, a worker under the current program can deal with as many as three government agencies: the United States Department of Labor for certification; the state unemployment insurance agency for cash benefits; and the state employment security office for reemployment services. *See infra* notes 247-48 and accompanying text.

213 *See supra* notes 126, 139, 144 and accompanying text.

214 Pub. L. No. 97-300, 96 Stat. 1322 (1982).

215 96 Stat. 1322, § 122(a)(3) (1982).

216 EMPLOYMENT & TRAINING REP., Aug. 11, 1982, at 1278.

217 *Id.*

218 96 Stat. 1322, § 122(a)(6) (1982).

219 EMPLOYMENT & TRAINING REP., Jan. 21, 1981, at 530 (BSSC was originally named Bay State Skills Commission).

submitting grant proposals.[220] As a condition to a grant, a private company must match the funds, thus creating a relationship between the training institution and the private company.[221] While cash matching grants are sufficient, BSSC prefers matching grants in the form of instructors, classroom equipment, loaned laboratories and the like.[222] George S. Kariotis, chairman of BSSC and Massachusetts' Secretary of Economic Affairs, has explained the benefits that accrue from direct business participation:

> If private businesses put some of their money into a training program, I believe they will want something for that contribution—they may then want to hire these skilled people. The companies gain by getting skilled employees, the trainees gain by getting a job, and the Commonwealth gains through increased tax revenue.[223]

The adaptability of the BSSC concept to the needs of import-affected workers can be illustrated by the Regis-Honeywell program. Regis College, a four-year liberal arts college for women in Weston, Massachusetts, in 1981 solicited Honeywell Corporation in nearby Waltham with the idea of developing an intensive computer programming course to retrain unemployed individuals for entry-level data processing positions.[224] In 1982 thirty-five individuals were enrolled in the course which ran from April 5 through November 12.[225] A Honeywell instructor worked with the students five hours a week, Tuesday nights and Saturday mornings, at Regis, and then the students spent an additional two hours in a Honeywell workshop.[226] Since BSSC and Honeywell underwrote the program, tuition was a nominal $150.[227] Under the BSSC concept, the new State Job Training Coordinating Councils could be endowed with funds to target to import-affected workers, identify growth industries and promising fields, and then provide grants to training institutions that develop innovative retraining programs for import-affected workers, and that have obtained an equal financial match from one or more businesses.

Third, private industry should be provided tax incentives to coop-

---

220 *See supra* note 216.

221 *Id.*

222 Sturdevant, *Perpich Looks Eastward for High-Tech-Industry Advice*, Minneapolis Star & Trib., Nov. 14, 1982, at 1D, 3D, col. 3-4.

223 Telephone interview with Kathy Scherek, Program Specialist, BSSC (Feb. 14, 1983) (discussing BSSC Promotional Brochure (Feb. 1982)).

224 1982 BSSC ANN. REP. at 10.

225 *Regis-Honeywell Program Blunts Professional Layoffs*, INDUSTRY, Oct. 1982, at 61 (INDUSTRY is published by the Associated Industries of Massachusetts (A.I.M.)).

226 *Id.*

227 *Id.*

erate in retraining import-affected workers. In August 1982 Congress passed a $6.7 billion, three-year increase in federal unemployment taxes on employers.[228] Relief from this increase may be enough to encourage firms to recognize that retraining the import-affected worker is ultimately in their best interests. In order to qualify for a tax credit, a firm could simply submit to the Internal Revenue Service a certificate of cooperation issued by the training council. The amount of the credit would, of course, be a function of the amount of resources the firm commits to retraining import-affected workers. Such a tax credit scheme would allow firms to recover some of the retraining costs that the government would otherwise incur directly. At worst, this scheme will cost no more than would direct government financing for retraining. In practice, however, this scheme will give firms the necessary incentive to retrain import-affected workers for available positions in their firms, thus constituting true worker adjustment assistance.

Fourth, all import-affected workers in the United States should be eligible to participate in any cooperative retraining program. This will have the benefit of bringing a national perspective to worker adjustment assistance.[229] Provincialism in the training councils could be discouraged by the federal government providing bonus funds to a training council for every group of fifty nonresident import-affected workers obtaining retraining in its jurisdiction.

Fifth, the federal government should establish a National Worker Adjustment Assistance Fund from federal unemployment tax revenues. One percent of those revenues, for example, could go to this fund, which would be used to provide income support to an import-affected worker whose state unemployment benefits have been exhausted. In this regard, it is important to emphasize the observation of George Denhard, BSSC Program Specialist, who said that unemployed workers cannot enroll in longer, more advanced skill training courses unless they have some kind of income support.[230] Thus, import-affected workers who enroll in a retraining program should obtain income support for the balance of the program. To encourage import-affected workers to search aggressively for a retraining program, workers unable to find a retraining program should not receive income support after they exhaust their state benefits. They should continue, however, to be eligible for job search grants and relocation allowances.

---

228 Lublin, *Unemployment Offices Strained by Staff Cuts and Heavy Caseloads*, Wall St. J., Oct. 27, 1982, at 1, col. 6.

229 *See supra* notes 189-90 and accompanying text.

230 EMPLOYMENT & TRAINING REP., Aug. 11, 1982, at 1279.

Finally, all import-affected workers should be eligible to receive job search grants and relocation allowances. These benefits can be identical to those provided under the current worker adjustment assistance program.[231] To complement these benefits, however, a national Job and Retraining Information Bank should be established. This computer network would provide monthly information to import-affected workers as to what job fields and geographical areas of the nation appear promising.

Whether this six-point plan will work ultimately depends on the attitude of import-affected workers toward retraining and work in general. While they may be economically disadvantaged, they are not subject to easy manipulation. The notion that government can exert leverage and get results quickly is naive and unrealistic. What government can do is design a fair program and, over time, use its influence in the right direction. In order to do that, however, it must provide adjustment assistance that is available to all import-affected workers, not just the most vociferous ones, and provide it effectively. This six-point plan fulfills those requirements.

## IX. CONCLUSION

An unfortunate by-product of liberal trade policies is import-related layoffs. In periods of recession, such displacements are acutely painful. Yet they must be tolerated, since protectionism only invites retaliation and, in the final analysis, liberal trade policies provide more benefits than costs. Moreover, the increased productivity of the United States depends on opening international trade channels, and developing an effective marketing strategy for United States exports. Therefore, Americans should see liberal trade policies not as a threat to American jobs, but as a way out of recession.

To enable more Americans to accept this view, the United States must have a special worker adjustment assistance program that helps import-affected workers adjust to foreign competition. From an economic point of view, tariffs and quotas inhibit the flow of international trade, while worker adjustment assistance does not. Moreover, assistance targeted specifically to import-affected workers costs far less nationally than tariffs and quotas.

The current worker adjustment assistance program expires September 30, 1983. Although this program has largely failed, Congress must boldly face the current protectionist sentiment and redesign the

231 *See infra* notes 249-64 and accompanying text.

program so that import-affected workers are assisted in moving from declining industries to promising ones. Nothing less than America's economic health depends on Congress' moderating the current protectionist mood. With its emphasis on retraining and private sector involvement, enactment of this Comment's six-point plan should help provide an effective worker adjustment assistance program for the future.

## X. APPENDIX

### Current Program Procedure & Benefits

An import-affected worker's eligibility for adjustment assistance is initiated by a petition filed with the Secretary of Labor by "a group of workers or by their certified or recognized union or other duly authorized representative."[232] On receipt of the petition, the Secretary must "promptly publish notice in the *Federal Register* that he has received the petition and initiated an investigation."[233] After notice of the peti-

232 19 U.S.C. §2271(a)(Supp. IV 1980). From April 1975 through June 1982, 77% of the import-affected workers who were certified belonged to trade unions. On the other hand, 44% of the workers whose petitions were denied belonged to trade unions. President's Report, *supra* note 115, at 202. The limited use made of worker adjustment assistance by nonunion workers has been a consistent complaint. COMPTROLLER GENERAL OF THE UNITED STATES, GEN. ACCOUNTING OFF., CERTIFYING WORKERS FOR ADJUSTMENT ASSISTANCE—THE FIRST YEAR UNDER THE TRADE ACT 13, No. 77-28 (May 31, 1977) [hereinafter cited as GAO CERTIFICATION REPORT].

In addition, see *Lacy v. Automobile Workers Local 287*, 88 Lab. Cas. (CCH) ¶ 11,921 (1979), where the court held in part that, since under 19 U.S.C. § 2271(a) the plaintiffs could have filed a petition for themselves, the United Auto Workers union did not breach its duty of fair representation by not filing a petition on plaintiffs' behalf within the prescribed time limits.

Under 19 U.S.C. § 2273(b)(1), a worker may not obtain adjustment assistance if he fails to petition within one year of his last total or partial separation from his former employer. As of 1978, the Department of Labor has estimated that some 26,000 workers have been denied benefits because of this one year cutoff. H.R. REP. No. 1056, 95th Cong., 2d Sess. 6 (1978). For testimony on whether the cutoff period should be extended, see *Eligibility of Workers to Receive Adjustment Assistance: Hearing on H.R. 15421 Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 94th Cong., 2d Sess. 32, 36 (1976). For a brief discussion of the injustice this rule may create, see Cprek, *supra* note 149, at 662-63.

233 19 U.S.C. § 2271(a)(Supp. IV 1980). *See Woodrum v. Donovan*, 544 F. Supp. 202 (Ct. Int'l Trade 1982). In *Woodrum*, the Secretary admitted that he had received a petition on behalf of the plaintiffs, that he had failed to publish a notice in the *Federal Register*, and that he failed to conduct an investigation. *Id.* at 205. He argued, however, that his denial of certification to the workers should be upheld because it was within his discretion to modify the procedural directives of the statute. *Id.* In the alternative, he argued that even if it was wrong for him to take "procedural shortcuts," these lapses constituted harmless error. *Id.* The court did not accept these arguments, and held that "[t]he Secretary's failure to conduct an investigation, and his failure to

tion has been published, the petitioners, or others whom the Secretary deems to be interested in the proceedings, have ten days within which to request a public hearing at which they may be present, produce evidence, and be heard.[234] No later than sixty days after the filing of the petition, the Secretary must determine whether the petitioning group meets the requirements of the Act.[235] These requirements are threefold. First, they require the Secretary to find that a significant number or proportion of the workers in the petitioners' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated.[236] Second, the Secretary must find that the sales or production, or both, of the petitioners' firm, or appropriate subdivision, have decreased absolutely.[237] Finally, the Secretary must find that increases of imports of "articles like or directly competitive" with articles[238] produced by petitioners' firm, or appropriate subdivision, were a "substantial cause"[239] of such

---

provide plaintiffs with an opportunity to request a hearing, thus prejudiced plaintiffs' right to a fair consideration of their petition at the administrative level, as well as their right to meaningful judicial review." *Id.* at 208.

Note that the exclusionary effect of the failure to publish notice was to prohibit the plaintiffs from requesting a hearing. *Id.* at 206. The exclusionary effect of the failure to conduct an investigation was to exclude facts directly relevant to the Secretary's determination from the administrative record. *Id.* at 207.

The Office of Trade Adjustment Assistance (OTAA) is the body within the Department of Labor responsible for investigating petitions for certification of group eligibility for worker adjustment assistance. Under 19 U.S.C. § 2320 (1976), the Secretary is authorized to prescribe such regulations as may be necessary to carry out the provisions of the adjustment assistance program.

234 19 U.S.C. § 2271(b) (Supp. IV 1980). On the enforcement of this provision see *Woodrum v. Donovan, supra* note 233, at 208. On a court's view of the nature of the certification process, see *Local 167 v. Marshall*, 643 F.2d 26 (1st Cir. 1981), where the First Circuit noted the "*ex parte* nature of the certification process," and said that "the certification process does not allow petitioner the opportunity to test credibility that it would have in an adversary proceeding." *Id.* at 31.

235 19 U.S.C. § 2273(a)(Supp. IV 1980), reads in part:

> As soon as possible after the date on which a petition is filed . . . , but in any event not later than 60 days after that date, the Secretary shall determine whether the petitioning group meets the requirements . . . and shall issue a certification of eligibility to apply for assistance . . . covering workers in any group which meets such requirements.

This deadline, however, is admittedly illusory. In 1981, the Senate Finance Committee reported that the Secretary had not met this requirement in a single instance during the prior year. S. REP. No. 139, *supra* note 110, at 799. For a report on the delay in the certification process, see GAO CERTIFICATION REPORT, *supra* note 232, at 37-41.

236 19 U.S.C. § 2272(1)(Supp. IV 1980).

237 19 U.S.C. § 2272 (1976). This requirement appears to ensure that the petitioners' firm has not laid off workers on one product line within a plant, for example, while hiring workers for another line. Cprek, *supra* note 149, at 670.

238 *See supra* notes 139, 144, 147-49 and accompanying text.

239 In 1981, Congress attempted to tighten the causal link between increased imports, on the one hand, and worker layoffs and declining firm production or sales, on the other. S. REP. NO. 139, *supra* note 110, at 802, 1363.

Originally under the Trade Act, the third requirement was that increased imports had to have

total or partial separation, or threat thereof, and of such decline in sales or production.[240]

If the Secretary determines that the requirements are met, he then issues a certification of eligibility *to apply* for adjustment assistance. The certification, significantly, has been interpreted to entitle not only the petitioners to apply for assistance, but to entitle all workers who are separated from the firm within the terms of the certification to do so.[241]

Whether or not the requirements are met, the Secretary must promptly publish a summary of his determination in the *Federal Register*, together with his reasons for his determination.[242] Petitioners denied certification may request reconsideration of their petition.[243] In addition, denied petitioners may obtain judicial review of the Secretary's determination in the United States Court of International Trade.[244] The standard of review is "substantial evidence"; the find-

---

"contributed importantly" to worker layoffs and declining firm production or sales. 19 U.S.C. § 2272 (1976). The 1981 amendments changed this requirement to provide that increased imports must have been a "substantial cause" of the worker layoffs and declining firm production or sales. This change is significant because "contributed importantly" was defined as a cause which is important, but not necessarily more important than any other cause. By contrast, "substantial cause" is defined as a cause which is important *and* not less than any other cause. 19 U.S.C. § 2272 (Supp. V 1981), *amending* 19 U.S.C. § 2272 (1976).

Thus the "substantial cause" standard is considerably more strict. For example, a cause which contributed 40% to worker layoffs and declining firm production or sales is undoubtedly "important," but it is not a "substantial cause" if there also existed a separate cause which contributed 41% or more. The difficulty or impossibility of determining the degree of causation as used above, for example, highlights the considerable discretion given to the Secretary to determine worker eligibility for adjustment assistance.

240 19 U.S.C. § 2272 (Supp. V 1981), *amending* 19 U.S.C. § 2272 (1976).

241 *Lloyd v. United States Dep't of Labor*, 637 F.2d 1267, 1268 (9th Cir. 1980). Here the court explained:

> A certification of eligibility applies to all affected workers at the firm within the terms of the certification, not only to those who brought the petition. The certification of eligibility itself does not entitle the workers to assistance; rather it is akin to a preliminary entitlement step. Only those in the eligibility group may apply for assistance.

The terms of certification include the date on which the total or partial separation began or threatened to begin. 19 U.S.C. § 2273(a) (1976). This date is commonly called the "impact date." When worker layoffs are no longer attributable to conditions meeting the Act's three requirements, the Secretary must terminate certification and publish promptly in the *Federal Register* a "termination date." 19 U.S.C. § 2273(d) (1976).

242 19 U.S.C. § 2273(c) (1976).

243 29 C.F.R. § 90.18 (1980). A request for reconsideration must be filed within 30 days of publication of the Secretary's determination in the *Federal Register. Id.* Administrative reconsideration does not preclude, nor is it a prerequisite to, judicial review of the determination. 42 Fed. Reg. 32,772 (1977) (comment C-5).

244 19 U.S.C. § 2395(a) (Supp. IV 1980), *replacing* 19 U.S.C. § 2322(a) (1976). Formerly under the Trade Act, the Secretary's determinations were reviewed in the federal courts of appeal. 19 U.S.C. § 2322(a) (1976), *replaced by* 19 U.S.C. § 2395(a) (Supp. IV 1980). Despite the thousands of administrative determinations under the Trade Act, there are only eleven appellate court decisions: *Morristown v. Marshall*, 671 F.2d 194 (6th Cir. 1982); *Local 798 v. Donovan*, 652 F.2d 702

ings of fact by the Secretary, if supported by substantial evidence, are conclusive.[245] The court may, of course, remand the case to the Secretary to take further evidence.[246]

Once workers are certified for adjustment assistance, the federal government's administrative responsibilities with respect to those workers effectively ends.[247] The states deliver adjustment assistance under agreements between each state and the Secretary.[248] Thus, once certified, individual workers must apply for adjustment assistance at their state employment security offices.

Although weekly cash benefits have been the most commonly sought form of adjustment assistance,[249] the other forms of adjustment assistance offered under the Trade Act include training, job search grants and relocation allowances, as well as other reemployment services like counseling, testing and job placement. To obtain training, a certified worker may seek approval of a training program by his state employment security office, acting as the Secretary of Labor's agent, or the state agency may approve a training program for the worker on its

(7th Cir. 1981); *Local 167 v. Marshall*, 643 F.2d 26 (1st Cir. 1981); *Pemberton v. Marshall*, 639 F.2d 798 (D.C. Cir. 1981); *Lloyd v. Dep't of Labor*, 637 F.2d 1267 (9th Cir. 1980); *UAW v. Marshall*, 627 F.2d 559 (D.C. Cir. 1980); *Fortin v. Marshall*, 608 F.2d 525 (1st Cir. 1979); *Machine Printers v. Marshall*, 595 F.2d 860 (D.C. Cir. 1979); *United Glass v. Marshall*, 584 F.2d 398 (D.C. Cir. 1978); *UAW v. Marshall*, 584 F.2d 390 (D.C. Cir. 1978); and *Paden v. Dep't of Labor*, 562 F.2d 470 (7th Cir. 1977). In the United States Court of International Trade, there had been only one appeal as of September 1982: *Woodrum v. Donovan*, 544 F. Supp. 202 (Ct. Int'l Trade 1982).

There was no statutory provision for judicial review under the Trade Expansion Act of 1962. Pub. L. No. 87-794, 80 Stat. 872 (1962). *United Shoe Workers v. Bedell*, 506 F.2d 174 (D.C. Cir. 1974), which provides a helpful review of the TEA's legislative history, *id.* at 179-85, is the only case which evolved out of the TEA. Cprek, *supra* note 149, at 598 n.19. According to Cprek, the *Bedell* court held that determinations under the TEA were subject to review under the Administrative Procedure Act, 5 U.S.C. §§ 701-06 (1976). Cprek, *supra* note 149, at 598 n.17.

Currently under the Trade Act, the judgment of the United States Court of International Trade is subject to review by the United States Court of Customs and Patent Appeals. 19 U.S.C. § 2395(c) (Supp. IV 1980), *replacing* 19 U.S.C. § 2322(a) (1976). The judgment of the Court of Customs and Patent Appeals is subject to review by the United States Supreme Court on *certiorari*. *Id.* As of September 1982, a Supreme Court decision had never evolved out of the Trade Act.

245 19 U.S.C. § 2395(b) (Supp. IV 1980), *replacing* 19 U.S.C. § 2322(b) (1976).

246 *Id.*

247 29 C.F.R. § 91.51 (1979) provides that, after the Secretary determines which general categories of workers are eligible for adjustment assistance, the unemployment insurance agencies of the states have jurisdiction to determine the entitlements of individual claimants.

248 19 U.S.C. § 2311(a) (Supp. V 1981), *amending* 19 U.S.C. § 2311(a) (1976) provides in part:

> Under such an agreement, the cooperating State agency (1) as agent of the United States, will receive applications for, and will provide, payments on the basis provided in this part, (2) where appropriate, will afford adversely affected workers testing, counseling, referral to training, and placement services, and (3) will otherwise cooperate with the Secretary and with other State and Federal agencies in providing payments and services under this part.

249 *See supra* notes 103-04, 110 and accompanying text.

own initiative. Upon obtaining approval of a training program, the worker is entitled to have the federal government pay for the cost of the program.[250] In addition, if the training facility is beyond commuting distance from his home, the worker may be entitled to allowances for resulting transportation and subsistence expenses.[251] The certified worker may also be eligible for a job search allowance. This assistance covers ninety percent of the worker's necessary job search expenses, up to a maximum of $600.[252] In order to receive it, he must file an application with his state employment security office,[253] and meet three requirements. First, the application must be timely filed.[254] Second, the worker must be totally separated from his prior employment, and must intend to use the allowance to secure a job within the United States.[255] Finally, the Secretary must determine that the worker cannot reasonably be expected to secure suitable employment in the commuting area in which he resides.[256]

Once certified, the import-affected worker may also receive a relocation allowance.[257] This assistance covers ninety percent of the worker's reasonable and necessary expenses incurred in transporting himself, his family and his household effects, plus a lump sum equivalent to three times the worker's average weekly wage, up to a maximum of $600.[258] Before this assistance will be provided, however, six requirements must be met. First, the worker must have obtained suitable employment, or a bona fide offer of suitable employment, affording him the reasonable expectation of enjoying long-term employ-

250 19 U.S.C. § 2296(a) (Supp. V 1981).

251 19 U.S.C. § 2296(b) (Supp. V 1981).

252 19 U.S.C. § 2297(a) (Supp. V 1981), *amending* 19 U.S.C. § 2297(a) (1976). Before the 1981 amendments became effective, the job search allowance covered 80% of the worker's necessary job search expenses, up to a maximum of $500.

253 19 U.S.C. § 2297(a) (Supp. V 1981). Although the Trade Act of 1974 provides that the worker may file his application with the Secretary, the worker actually files the application with his state employment security office which functions as the Secretary's agent. Wojcik Interview, *supra* note 115.

254 The worker must file the application with his state employment security office (1) within one year after the certification date, (2) within one year after the worker's last total separation, or (3) within six months after completing an approved training program. 19 U.S.C. § 2297(b)(3) (Supp. V 1981).

255 *Id.* at § 2297(b)(1).

256 *Id.* at § 2297(b)(2). The state employment security office makes the determination as the Secretary's agent. Wojcik Interview, *supra* note 115.

257 19 U.S.C. § 2298(a) (Supp. V 1981).

258 19 U.S.C. § 2298(d) (Supp. V 1981), *amending* 19 U.S.C. § 2298(d) (1976). Before the 1981 amendments became effective, the relocation allowance covered 80% of the worker's reasonable and necessary expenses plus a lump sum payment no greater than $500.

ment in the area in which he wishes to relocate.[259] Second, the area in which the worker wishes to be relocated must be within the United States.[260] Third, the state employment security office must determine that the worker cannot reasonably be expected to secure suitable employment in the commuting area in which he resides.[261] Fourth, the worker must be totally separated from employment at the time relocation commences.[262] Fifth, the worker's relocation must occur within six months after the date on which he filed an application for a relocation allowance, or within six months after completing an approved training program.[263] Finally, the application must be timely filed.[264]

*Steven T. O'Hara*

259 19 U.S.C. § 2298(b) (Supp. V 1981).

260 *Id.*

261 *Id.* This is determined by the state employment security office acting as the Secretary's agent. Wojcik Interview, *supra* note 115.

262 19 U.S.C. § 2311(b)(3) (Supp. V 1981).

263 *Id.* at § 2298(c).

264 The worker must file the application with his state employment security office within 14 months after the certification date, (2) within 14 months after the worker's last total separation, or (3) within six months after completing a training program to which the Secretary referred him. *Id.* at § 2298(a).