

Judicial Review of Tariff Commission Actions and Proceedings

Stanley D. Metzger

Alfred G. Musrey

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

Stanley D. Metzger and Alfred G. Musrey, *Judicial Review of Tariff Commission Actions and Proceedings*, 56 Cornell L. Rev. 285 (1971)
Available at: <http://scholarship.law.cornell.edu/clr/vol56/iss2/2>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

JUDICIAL REVIEW OF TARIFF COMMISSION ACTIONS AND PROCEEDINGS

Stanley D. Metzger† and Alfred G. Musrey††

There has been a great deal of confusion concerning the judicial review of Tariff Commission¹ actions and proceedings performed by the United States Customs Court² and the United States Court of Customs and Patent Appeals (CCPA).³ The procedures under which these courts have assumed jurisdiction, the scope of their judicial review, the manner in which they have construed the substantive provisions involved in the litigation before them, the recent change in the status of these courts from "legislative" to "constitutional" courts, and the virtual absence of review by the United States Supreme Court all have conspired to create complexities and uncertainties in an area of foreign trade regulation that is subject to virtually no constitutional limitations. It is the purpose of this article to examine the nature of judicial review in this area, to consider the effects that it has had on the administration of the regulatory statutes involved, and to suggest changes that will better effectuate sound policies.

† Professor of Law, Georgetown University Law Center; Chairman, U.S. Tariff Commission, 1967-69. A.B. 1936, LL.B. 1938, Cornell University.

†† Office of General Counsel, U.S. Tariff Commission. A.B. 1949, Pennsylvania State University; LL.B. 1952, Columbia University. The views expressed herein are personal to the authors and do not represent those of the U.S. Tariff Commission.

¹ The Tariff Commission was established by the Revenue Act of 1916, ch. 463, §§ 700-09, 39 Stat. 795.

² The Customs Court was established by an Act of May 28, 1926, ch. 411, 44 Stat. 669. The predecessor of the Customs Court was the Board of General Appraisers which was created by the Customs Administrative Act of 1890, ch. 407, §§ 12-14, 26 Stat. 137. The Board was under the administrative supervision of the Secretary of the Treasury, and from 1890 to 1926, it had jurisdiction over all protests from decisions of the collectors of customs and appeals for reappraisalment. The 1926 Act transferred to the Customs Court all the jurisdiction and powers of the Board. The Tariff Act of 1930, ch. 497, § 518, 46 Stat. 737, continued the Customs Court as constituted on June 17, 1930 with changes.

³ The CCPA was established by the Payne-Aldrich Tariff Act of 1909, ch. 6, § 28, 36 Stat. 105, as the United States Court of Customs Appeals, and was given exclusive jurisdiction over all appeals from final decisions of the Board of General Appraisers (the predecessor of the Customs Court). From 1890 to 1909, the United States circuit courts had jurisdiction over appeals from the Board under the Customs Administrative Act of 1890, ch. 407, § 15, 26 Stat. 138. By the terms of the 1909 Act, all pending cases in any circuit court were transferred to the Court of Customs Appeals for decision. On March 2, 1929, the name of the court was changed to the Court of Customs and Patent Appeals, and additional jurisdiction over decisions of the tribunals of the Patent Office was conferred on the court. Act of March 2, 1929, ch. 488, 45 Stat. 1475.

I

GENERAL PRINCIPLES AND THE STATUTES

Although the Supreme Court has addressed itself to Tariff Commission actions and proceedings on only a few occasions, it has decided a number of cases concerning the power of Congress to regulate foreign trade and impose import duties as well as to delegate such authority. In so doing, it has enunciated various principles which, in conjunction with those enunciated in cases involving the Commission, constitute the general legal framework within which Commission actions and proceedings are effectuated.

As a bedrock principle, it has been established that the power of Congress to regulate commerce with foreign nations is complete; no individual has a "vested right" to trade with foreign nations so as to limit the power of Congress to determine what articles of merchandise may be imported into the United States and the terms upon which importation is permitted.⁴ In short, a statute that restrains the introduction of particular goods into the United States because of congressional determinations of public policy does not violate the due process clause of the Constitution.⁵ As a corollary, it has been established that the power of Congress to lay and collect import duties can be utilized for both revenue and protective purposes⁶ and that no one has a legal right to the maintenance of an existing rate of duty.⁷ There also appears to be no question that Congress may delegate to administrative officials within the government, under very broadly-stated standards, its authority to regulate foreign trade and to impose and modify import duties;⁸ furthermore, if Congress makes it clear that in the exercise of delegated authority there is no need to accord a hearing, no case suggests that this constitutes a denial of constitutional due process.⁹

As is apparent from these principles, congressional authority in the field of foreign trade regulation is virtually unlimited. Any exist-

⁴ *Board of Trustees v. United States*, 289 U.S. 48, 56-57 (1933); *The Abby Dodge*, 223 U.S. 166, 176-77 (1912); *Buttfield v. Stranahan*, 192 U.S. 470, 492-93 (1904).

⁵ *Buttfield v. Stranahan*, 192 U.S. 470, 493 (1904).

⁶ *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414, 428 (1940); *Board of Trustees v. United States*, 289 U.S. 48, 58-59 (1933); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 411-13 (1928).

⁷ *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 318 (1933).

⁸ See *Buttfield v. Stranahan*, 192 U.S. 470 (1904); *Field v. Clark*, 143 U.S. 649 (1892). See generally *Frischer & Co. v. Elting*, 60 F.2d 711 (2d Cir.), cert. denied, 287 U.S. 649 (1932); 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* ch. 2 (1958, Supp. 1965).

⁹ *Buttfield v. Stranahan*, 192 U.S. 470, 497 (1904). See also *Cafeteria Workers Local 473 v. McElroy*, 367 U.S. 886, 895 (1961).

ing limitations on its delegated authority are essentially self-imposed rather than constitutionally required.

It is within this broad legal framework that the administration of regulatory statutes prescribing Commission functions has been subjected to judicial review by the Customs Court and the CCPA. These statutes call upon the Commission to conduct investigations so that it may: (1) render certain advice to the President in a variety of cases, and (2) notify the Secretary of the Treasury whether a domestic industry is being or is likely to be injured by imports sold at less than their fair value. Upon receipt of such advice, and within statutory limitations, the President may modify rates of duty or impose quantitative restrictions; upon notification of an injury determination, the Secretary of the Treasury is required to issue a dumping finding leading to the imposition of a dumping duty.

A. *Requirement of Notice and Hearing*

In the first category of cases, the type of investigation required of the Commission varies with the type of advice to be rendered. Thus, under section 337 of the Tariff Act of 1930,¹⁰ the Commission conducts such an investigation, with such notice and such hearing as it may deem sufficient for a full presentation of the facts. It then advises the President whether unfair methods of competition and unfair acts in the importation of articles into the United States have the effect or tendency to destroy, substantially injure, or prevent the establishment of an efficiently and economically operated domestic industry, or to restrain or monopolize trade and commerce in the United States. Under section 336 of the Tariff Act of 1930,¹¹ the Commission is required to hold hearings upon reasonable public notice before advising the President whether a change in the rate of import duty or in the basis of valuation is necessary to equalize the costs of production of a domestic article and the like or similar foreign article produced in the principal competing country. It is also required to hold hearings upon notice to interested parties under section 22 of the Agricultural Adjustment Act of 1933¹² before advising the President whether the imposition of an import fee or quantitative limitation is necessary to assure that imports will not impair the effectiveness of a program or operation undertaken by the Department of Agriculture with respect to an agricultural commodity. Similarly, under the escape-clause provisions of the Trade

¹⁰ 19 U.S.C. § 1337 (1964).

¹¹ *Id.* § 1336.

¹² 7 U.S.C. § 624 (1964).

Expansion Act of 1962,¹³ reasonable notice and a public hearing are prerequisites to the rendering of advice to the President on whether an increase in, or imposition of, a duty or other import restriction is necessary to prevent or remedy serious injury to a domestic industry from imports of a product like or directly competitive with that produced by the industry.

Under the Antidumping Act of 1921,¹⁴ which does not entail presidential action, the Commission's notification to the Secretary of the Treasury as to whether imports, found by the Secretary to have been sold in the United States or elsewhere at less than fair value, are adversely affecting a domestic industry need be preceded only by such investigation as the Commission deems necessary.

B. *Specific Judicial Review Procedures*

The provisions under which the administration of these statutes has been subjected to judicial review are numerous and for the most part quite generally stated. Those contained in section 337 of the Tariff Act of 1930 are the most specific, and, as will be seen, have caused the most difficulties. Section 337 provides that the testimony in every Commission investigation under that section shall be reduced to writing, and a transcript thereof with the findings and recommendation of the Commission shall be the official record of the case. If the findings are supported by evidence, they are to be conclusive, except that, prior to their submission to the President, an appeal may be taken from them upon questions of law to the CCPA by the importer or consignee of the articles involved. If it is shown to the satisfaction of the CCPA that further evidence should be taken, and that there were reasonable grounds for the failure to adduce such evidence in the proceedings before the Commission, then the CCPA may order such additional evidence to be taken. The Commission may then modify its findings as to the facts or make new findings based on the additional evidence. Such new findings, if supported by evidence, are to be conclusive as to the facts, except that a further appeal may be taken to the CCPA upon questions of law. The judgment of the CCPA is to be final with respect to the Commission's findings, but the ultimate determination regarding exclusion of the merchandise is to be made by the President. In short, the CCPA can "confirm" the Commission's findings, but they are in the nature of recommendations to the President even after confirmation.

¹³ 19 U.S.C. § 1901 (1964), formerly Trade Agreements Extension Act of 1951, ch. 141, § 7, 65 Stat. 74.

¹⁴ 19 U.S.C. §§ 160-71 (1964).

Judicial review of the administration of section 336 of the Tariff Act of 1930, of section 22 of the Agricultural Adjustment Act, of the escape-clause provisions, and of the Antidumping Act is conducted pursuant to sections 501,¹⁵ 514 to 515,¹⁶ and 516¹⁷ of the Tariff Act of 1930. Section 501 provides simply that the consignee of imported merchandise or his agent may file with the Customs Court an appeal from the decision of the appraiser. Subsections 516(a) and (c) provide that whenever an American manufacturer, producer, or wholesaler believes that the appraised value of any imported merchandise of a class or kind manufactured, produced, or sold at wholesale by him is too low, he may file an appeal for reappraisal in the same manner and with the same effect as an appeal by a consignee under section 501. Sections 514 and 515 provide that an importer, consignee, or his agent may file with the Customs Court an appeal from

all decisions of the collector, including the legality of all orders and findings entering into the same, as to the rate and amount of duties chargeable, and as to all exactions of whatever character (within the jurisdiction of the Secretary of the Treasury), and his decisions excluding any merchandise from entry or delivery, under any provision of the customs laws . . .¹⁸

Subsections 516(b) and (c) provide that whenever an American manufacturer, producer, or wholesaler believes that the proper rate of duty is not being assessed on imported merchandise of a class or kind manufactured, produced, or sold at wholesale by him, he may file an appeal with the Customs Court.

By statute, the Customs Court is vested with exclusive jurisdiction of these appeals,¹⁹ and the CCPA has jurisdiction to review final decisions of the Customs Court.²⁰ Appeals for reappraisal are decided initially by a single judge of the Customs Court,²¹ whose decision may be appealed first to a three-judge division of that court²² and then to the CCPA.²³

¹⁵ *Id.* § 1501.

¹⁶ *Id.* §§ 1514-15.

¹⁷ *Id.* § 1516.

¹⁸ *Id.* § 1514.

¹⁹ 28 U.S.C. §§ 1582-83 (1964). The appeals are required to be filed through the collector of customs.

²⁰ *Id.* § 1541.

²¹ *Id.* § 2631.

²² *Id.* § 2636. Appeals pursuant to §§ 514, 515, and 516(b)-(c) are decided initially by a three-judge division of the Customs Court. The judges of the Customs Court have been divided into three divisions, and the decisions of each division are decisions of the Customs Court. *Id.* §§ 254, 2637.

²³ Review by the CCPA on appeals for reappraisal is on questions of law only (*id.* § 2637) but it is on questions of law and fact on appeals filed pursuant to §§ 514,

As appears from the preceding, the appropriate provision pursuant to which the administration of the statutes has been subjected to review depends on whether the protestant is an importer or domestic producer, and whether the object of protest is the appraisal of merchandise or the rate of duty imposed on it. Appeals for review of administrative determinations under the Antidumping Act have been filed by importers pursuant to section 501 or sections 514 and 515, depending on whether the appeal has been from appraisal or from imposition of the dumping duty. Although no appeal has been filed by a domestic producer with respect to such determinations, it is possible that such an appeal could be filed under subsections 516(b) and (c) or 516(a) and (c).²⁴

The filing of an appeal for review of an administrative determination under section 336 of the Tariff Act of 1930 is a little more complicated. If the action taken by the President involved an increase in the rate of duty, then the importer may appeal under sections 514 and 515. If it involved a change in the basis of valuation for the imported article to the American selling price basis,²⁵ then he may appeal under section 501. If the action taken involved a decrease in the rate of duty, then the domestic producer may appeal under subsections 516(b) and (c). Appeals for review of administrative determinations under section 22 of the Agricultural Adjustment Act and the escape-clause provisions have been filed by importers pursuant to sections 514 and 515, and possibly could be filed—although none has been—by domestic producers pursuant to subsections 516(b) and (c).

Before continuing it should be noted that the provisions under

515, and 516(b)-(c). *Id.* § 2601. On October 1, 1970, the following changes became effective in these judicial review procedures: (1) protests (as to appraisal, classification, and rate and amount of duties chargeable) cannot be filed with the customs officer until the entry involved has been liquidated; (2) if the protest is denied, the party may contest the denial by bringing a civil action in the Customs Court; (3) such actions are to be decided by a single judge of the Customs Court, except that upon application of any party to the civil action, or upon his own initiative, the Chief Judge of the Customs Court shall designate any three judges of the court to hear and determine any civil action that he finds (a) raises an issue of the constitutionality of an act of Congress, a proclamation of the President, or an executive order, or (b) has broad or significant implications in the administration or interpretation of the customs laws; (4) actions before the Customs Court may be consolidated by order of the court or by request of the parties, with approval of the court, if there are common issues; and (5) appeals from final judgments or orders of the Customs Court (single judge or three judges, as the case may be) are to be taken to the CCPA. The Customs Courts Act of 1970, Pub. L. No. 91-271, §§ 103, 106, 108, 110, 117, 207 (June 2, 1970) (amending various sections of 19, 28 U.S.C.).

²⁴ See *North Am. Cement Corp. v. Anderson*, 284 F.2d 591 (D.C. Cir. 1960).

²⁵ That is, the selling price of the domestic article. See 19 U.S.C. §§ 1401a(e), 1402(g) (1964).

which the Customs Court and CCPA have sought to examine the proceedings and actions of the Tariff Commission, and the attendant presidential responses, are unsuitable vehicles for review.

There are various reasons why this is so. In the first place, proceedings before the Customs Court and the CCPA are essentially in rem proceedings; what is litigated is the rate of duty on, or valuation of, a specific importation. Consequently, each importation, even of the same article, can be litigated. It has long been held by these courts, in conformity with an early Supreme Court decision,²⁶ that the principle of *res judicata* is virtually inapplicable in customs jurisprudence.²⁷ Thus, a determination of fact or law with respect to one importation does not estop either the government, the same importer, or any other importer from litigating with regard to the same issue or same kind of goods in connection with another importation. Every importation, so to speak, is entitled to its own day in court. Fortunately for these courts, once a decision has been made with regard to an imported article, protests involving other importations of the same or similar articles are usually resolved by stipulation of the parties involved.²⁸

Although *res judicata* is virtually nonexistent in customs jurisprudence, the principle of *stare decisis* is applicable. Its application, however, is a matter that these courts have regarded as being entirely within their discretion.²⁹ Moreover, *stare decisis* is generally inapplicable where there is a change in, or addition to, the facts before the court, or where an additional legal issue is raised.³⁰ Consequently, there have been repeated litigations involving identical merchandise where the principle has not been applied.

The deficiencies inherent in these judicial procedures will become abundantly clear from the following example. On June 24, 1931, the

²⁶ *United States v. Stone & Downer Co.*, 274 U.S. 225 (1927).

²⁷ See *United States v. Boone*, 188 F.2d 808, 810-11 (C.C.P.A. 1951); *United States v. Jackson*, 1 Ct. Cust. App. 25, 27 (1910); *Charles H. Demarest, Inc. v. United States*, 174 F. Supp. 380, 385 (Cust. Ct. 1959); *S. Handal & Sons v. United States*, Reap. Dec. 8775, 38 Cust. Ct. 620, 621 (1957).

²⁸ There is, nonetheless, a large backlog of cases before these courts. Effective October 1, 1970, actions before the Customs Court may be consolidated by order of the court or by request of the parties, with approval of the court, if there are common issues. The Customs Courts Act of 1970, Pub. L. 91-271, § 110(d) (June 2, 1970), *amending* 28 U.S.C. § 1582 (1964).

²⁹ *A. Stein & Co. v. United States*, 28 C.C.P.A. (Customs) 280, 285-86 (1941), *citing* *Hertz v. Woodman*, 218 U.S. 205, 212 (1910); *Marianao Sugar Trading Corp. v. United States*, C.D. 1481, 29 Cust. Ct. 275, 278 (1952), *aff'd*, 41 C.C.P.A. (Customs) 236 (1954).

³⁰ *United States v. R.J. Saunders & Co.*, 42 C.C.P.A. (Customs) 128, 136 (1955); *Golding-Keene Co. v. United States*, 183 F. Supp. 947, 952 (Cust. Ct. 1960), *aff'd*, 48 C.C.P.A. (Customs) 66 (1961); *George S. Bush & Co. v. United States*, C.D. 949, 15 Cust. Ct. 83, 86-87 (1945).

President, pursuant to section 336, issued a proclamation increasing the rate of duty on dried egg albumen.³¹ A subsequent importation became the subject of an importer's protest, which was overruled on May 17, 1937, by the Customs Court,³² and the decision of that court was affirmed by the CCPA on March 27, 1939, in *David L. Moss Co. v. United States*.³³ Prior to the decisions in this case, there had been protests of other entries of dried egg albumen. Two of these protests were subsequently consolidated for trial. Since the merchandise and the issue—whether there was substantial evidence before the Tariff Commission to support its finding and the President's proclamation—were the same as in *Moss*, the record in that case was made a part of the record of the protest being litigated. The importers urged that since the Customs Court had made no findings of fact when the *Moss* case was before it for consideration, and since the findings of fact by members of the CCPA were inconclusive, the issue should be litigated again. On June 29, 1944, the Customs Court, after once again considering the issue, overruled the protests in *T.M. Duche & Sons v. United States*.³⁴ No appeal was taken by the importers to the CCPA.

In 1947, however, the Customs Court was again called upon by T.M. Duche & Sons to decide the same issue in connection with a protest made concerning a 1937 importation of dried egg albumen. Since the issue, merchandise, and parties were the same, the record in the case incorporated the record in the first *Duche* case, which in turn included the record in the *Moss* case.³⁵ On January 15, 1947, some fourteen years after the proclamation, the Customs Court adhered to its original position.³⁶ An appeal was then taken to the CCPA, and on November 2, 1948, that court affirmed the judgment of the lower court.³⁷

This was not the end of the story, however. In 1951 the Customs Court was again called upon by the same importer to decide the same issue with regard to the same product. This time the importer injected

³¹ Pres. Proc. No. 1956, 47 Stat. 2460 (1931).

³² *David L. Moss Co. v. United States*, T.D. 48985, 71 TREAS. DEC. 825 (1937), *aff'd*, 103 F.2d 395 (C.C.P.A. 1939).

³³ 103 F.2d 395 (C.C.P.A. 1939).

³⁴ C.D. 863, 13 Cust. Ct. 26 (1944).

³⁵ The importer stated to the court that it had been his intention to appeal the first *Duche* case, but that such an appeal had been inadvertently overlooked, and the present case was presented in order to proceed to a review in the event the Customs Court reaffirmed its prior conclusions.

³⁶ *T.M. Duche & Sons v. United States*, C.D. 1040, 18 Cust. Ct. 25 (1947), *aff'd*, 36 C.C.P.A. (Customs) 19 (1948), *cert. denied*, 336 U.S. 931 (1949).

³⁷ *T.M. Duche & Sons v. United States*, 36 C.C.P.A. (Customs) 19 (1948), *cert. denied*, 336 U.S. 931 (1949).

a new element: a contention that provisions of the Administrative Procedure Act of 1946 (APA)³⁸ required the Customs Court to review the Commission proceedings that preceded the 1931 proclamation of the President to determine if there was substantial evidence in the record to support his proclamation. If the court had decided that the APA had increased its scope of review, the main issue to be resolved would have been the same issue that had been raised in the second *Duche* case. Thus, the record in the case before the court incorporated the record in that case (which in turn had incorporated the record in the first *Duche* case, which in turn had incorporated the record in the *Moss* case). On February 14, 1951, the Customs Court overruled the protest of the importer.³⁹ Finally, on March 18, 1952, about twenty-one years after the President's proclamation, the CCPA affirmed.⁴⁰

II

JUDICIAL REVIEW IN ACTION

Under these variegated statutory schemes, there has been a substantial amount of litigation involving Commission actions and proceedings and the ultimate determinations of the President and the Secretary of the Treasury. While a large portion of this litigation has related to the administration of sections 315⁴¹ and 316⁴² of the Tariff Act of 1922—the predecessors to sections 336 and 337 of the Tariff Act of 1930—the earlier sections were for the most part quite similar to the existing provisions, and the cases involving the former tend to be equally relevant to the administration of the latter.

A. Section 336 Cases

The litigation that has most determined the functions of the Commission and the President in this area of foreign trade regulation, and that has most limited the scope of judicial review of those functions, has involved section 315 of the Tariff Act of 1922, and its successor, section 336 of the Tariff Act of 1930. It will be recalled that pursuant to this provision the Commission advises the President whether an in-

³⁸ 5 U.S.C. §§ 551-59, 701-06 (Supp. V, 1970).

³⁹ *T.M. Duche & Sons v. United States*, C.D. 1300, 26 Cust. Ct. 61 (1951), *aff'd*, 39 C.C.P.A. (Customs) 186, *cert. denied*, 344 U.S. 830 (1952).

⁴⁰ *T.M. Duche & Sons v. United States*, 39 C.C.P.A. (Customs) 186, *cert. denied*, 344 U.S. 830 (1952).

⁴¹ Ch. 356, § 315, 42 Stat. 941 (1922).

⁴² *Id.* § 316, 42 Stat. 943.

crease or decrease in import duty is necessary in order to equalize the production costs of a domestic article and a similar foreign article. Not only has there been a substantial amount of such litigation before the Customs Court and the CCPA, but the Supreme Court has had occasion to consider these provisions, and in doing so has established general principles for judicial review in the foreign trade area. As we shall see, however, the Customs Court and the CCPA have not been consistent in their application of these principles.

The most important of the early Supreme Court opinions was rendered by Justice Cardozo in *Norwegian Nitrogen Products Co. v. United States*.⁴³ In 1923, at a Commission hearing in connection with an investigation instituted under section 315 upon a petition filed by a domestic producer (the American Nitrogen Products Company), an importer (the Norwegian Nitrogen Products Company) requested that it be permitted to examine the cost data submitted in confidence by the American company to the Commission, and that it be allowed to cross-examine witnesses and Commission employees with respect to such data. The Commission denied these requests. The Norwegian company thereupon applied to the Supreme Court of the District of Columbia for a writ of mandamus directing the Commission to disclose the information sought. The petition was dismissed, the court ruling that the action of the Commission had been in conformity with the law.⁴⁴ Shortly thereafter, the Commission made its report to the President, who proclaimed an increase in the rate of duty on sodium nitrite.⁴⁵ Notwithstanding the action of the President, the Norwegian company took an appeal from the lower court's decision to the Court of Appeals of the District of Columbia, which held that the case had become moot.⁴⁶ The court nevertheless expressed an opinion not called for by its decision; it stated that in being denied access to the confidential information sought, the Norwegian company had been deprived of the right to be heard contemplated by section 315. On writ of error, the Supreme Court concluded, in *United States ex rel. Norwegian Nitrogen Products Co. v. United States Tariff Commission*,⁴⁷ that because the case had become moot, it was unnecessary to discuss the merits.

⁴³ 288 U.S. 294 (1933).

⁴⁴ Unreported, but discussed and affirmed on appeal in *United States ex rel. Norwegian Nitrogen Prods. Co. v. United States Tariff Comm'n*, 6 F.2d 491, 491-94 (D.C. Cir. 1925), *modified & aff'd*, 274 U.S. 106 (1927).

⁴⁵ Pres. Proc. of May 6, 1924, 43 Stat. 1949.

⁴⁶ *United States ex rel. Norwegian Nitrogen Prods. Co. v. United States Tariff Comm'n*, 6 F.2d 491 (D.C. Cir. 1925), *modified & aff'd*, 274 U.S. 106 (1927).

⁴⁷ 274 U.S. 106 (1927).

After the increased rate of duty proclaimed by the President had gone into effect, the Norwegian company imported more sodium nitrite and filed protests with regard to the assessment of the higher, proclaimed rate, alleging that it had been denied the hearing prescribed by the statute, and that the President's proclamation was therefore invalid. The protests were overruled by the Customs Court,⁴⁸ and the judgment of that court was affirmed by the CCPA.⁴⁹ The Supreme Court granted certiorari, and in February 1933 Justice Cardozo delivered his landmark opinion.⁵⁰ Citing *J.W. Hampton, Jr. & Co. v. United States*,⁵¹ where the Supreme Court in 1928 had held section 315 constitutional, he found that what was done by the Tariff Commission and the President in changing the tariff rates was in substance a delegation of the legislative process. Therefore, he concluded, the inference was strong that the kind of hearing assured by the statute was a hearing of the same order as that given by congressional committees when the legislative process was in the hands of Congress. Since advocates of a measure were not permitted to cross-examine the opponents (or the opponents the advocates) in congressional hearings, nor were congressional committees required to submit to an inquisition as to data collected by their members, it followed that such practices were not required before the Commission. Moreover, he continued, nothing in the statute suggested that every producer or importer was to be viewed as the adversary of every other, with the rights of examination and cross-examination extended to each of them.

In a further endeavor to ascertain the intent of Congress, Justice Cardozo compared the functions of the Commission and the President under section 315 with the regulatory functions of the Interstate Commerce Commission and the public service commissions of the states:

The Tariff Commission advises; these others ordain. . . . Whatever the appropriate label, the kind of order that emerges from a hearing before a body with power to ordain is one that impinges upon legal rights in a very different way from the report of a commission which merely investigates and advises. The traditional forms of hearing appropriate to the one body are unknown to the other. What issues from the Tariff Commission as a report and recommendation to the President, may be accepted, modified or rejected. If it happens to be accepted, it does not bear fruit in anything that

⁴⁸ *Norwegian Nitrogen Prods. Co. v. United States*, T.D. 44824, 59 TREAS. DEC. 921 (1931), *aff'd*, 20 C.C.P.A. (Customs) 27 (1932), *modified & aff'd*, 288 U.S. 294 (1933).

⁴⁹ *Norwegian Nitrogen Prods. Co. v. United States*, 20 C.C.P.A. (Customs) 27 (1932), *modified & aff'd*, 288 U.S. 294 (1933).

⁵⁰ *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294 (1933).

⁵¹ 276 U.S. 394 (1928).

trenches upon legal rights. No one has a legal right to the maintenance of an existing rate or duty. Neither the action of Congress in fixing a new tariff nor that of the President in exercising his delegated power is subject to impeachment if the prescribed forms of legislation have been regularly observed.⁵²

He concluded:

[W]ithin the meaning of this act the "hearing" assured to one affected by a change of duty does not include a privilege to ransack the records of the Commission, and to subject its confidential agents to an examination as to all that they have learned. There was no thought to revolutionize the practice of investigating bodies generally and of this one in particular. Hearings had once been optional. By the new statute they became mandatory. The form remained the same.⁵³

As is apparent from Justice Cardozo's opinion, there were essentially two factors that led to his determination: (1) the investigatory, advisory function of the Commission, and (2) the function of the governmental official, in this case the President, to whom the advice was rendered. It is interesting that in his opinion he combined these factors to support his holding even though the President's ultimate action did not "trench upon legal rights." Neither that fact alone nor the Commission's purely advisory role⁵⁴ was found to be a sufficient reason, viewed independently, for denial of a trial-type hearing.⁵⁵

The section 315 cases decided by the Customs Court and the CCPA prior to and immediately following the Supreme Court's decision in *Norwegian Nitrogen* were in accordance with that case. In *William A. Foster & Co. v. United States*,⁵⁶ the CCPA, in affirming the judgment of the Customs Court upholding presidential action, stated, first, that it had jurisdiction to determine whether the President had complied with the section 315 conditions and limitations in issuing his proclamation,⁵⁷ and, second, that it regarded the Commission's report to the President as immaterial and properly excluded from evidence by the Customs Court. In so holding, it was careful to point out that "[t]here may be cases where such reports may be competent to prove essential jurisdictional facts," and that it was not holding

⁵² 288 U.S. at 318.

⁵³ *Id.* at 319.

⁵⁴ See *Hannah v. Larche*, 363 U.S. 420, 440-52 (1960).

⁵⁵ Perhaps here were the seeds of uncertainty concerning the scope of review later displayed by the Customs Court and the CCPA in § 336 cases.

⁵⁶ 20 C.C.P.A. (Customs) 15 (1932).

⁵⁷ That is, whether the proclamation was preceded by a Commission investigation involving notice and a hearing, and whether the President's action was within the prescribed rate limitations in the statute.

“that any sort of an investigation by the Tariff Commission, however irrelevant, will justify a following proclamation by the President under this section.”⁵⁸ But the CCPA nonetheless concluded:

The United States Customs Court and this court are not given power, by statute, to review the proceedings of the United States Tariff Commission under this section. . . . Not having provided directly for such a review, it was certainly not the intent of the lawmakers that we should so review such hearings, collaterally and indirectly. . . . We are not permitted to write into the law something which is not there.⁵⁹

In another case, *United States v. Fox River Butter Co.*,⁶⁰ the CCPA again held that the Customs Court did not err in its rejection of the Commission’s report as irrelevant evidence. It stated that “the duty devolved upon the President to make the findings contemplated by the statute, and it is immaterial what opinions were entertained by the investigators, or by the members of the Tariff Commission, as a result of such an investigation.”⁶¹

These two cases involved the provisions of section 315 of the Tariff Act of 1922, which required as a condition precedent to the issuance of a presidential proclamation an investigation by the Commission, but did not limit the President in making his findings to the information acquired by the Commission or in proclaiming tariff changes to the changes recommended by the Commission in its report. On the other hand, section 336 of the Tariff Act of 1930, the successor to section 315, specified that

[t]he President shall by proclamation approve the rates . . . and changes . . . in any report of the commission under this section, if in his judgment such rates of duty and changes are shown by such investigation of the commission to be necessary to equalize such differences in costs of production.⁶²

⁵⁸ 20 C.C.P.A. (Customs) at 26. “An investigation of cotton goods . . . would not be a sufficient prerequisite for a change in duties in the woolen schedule.” *Id.* at 26-27.

⁵⁹ *Id.* at 27.

⁶⁰ 20 C.C.P.A. (Customs) 38, *cert. denied*, 287 U.S. 628 (1932).

⁶¹ *Id.* at 44.

⁶² 19 U.S.C. § 1336(c) (1964). As under § 315, no rate could be increased or decreased by more than 50%. *Id.* § 1336(a). But if the Commission found that the maximum increase or decrease would not equalize the difference in the costs of production, it would so state in its report to the President. The President could then change the basis of valuation for the imported article to the American selling price basis and, if necessary, decrease the rate of duty by not more than 50% to equalize the difference. *Id.* § 1336(b). He could not both change the basis of valuation and increase the rate. Furthermore, he was not authorized to change the form of duty for an article and was prohibited from transferring an article from the dutiable list of the Tariff Act to the free list, or vice versa. *Id.* § 1336(g).

Under this section, although the President was still to make the ultimate determinations, he was limited to proclaiming only those changes recommended by the Commission, and in making such determinations he was confined, at least by statute, to the information on which such recommendations were based. The basic nature of the functions of the Commission—advisory—and the President—discretionary—remained the same, however, subject only to those additional statutory limitations or conditions.

Both the Customs Court and the CCPA lost sight of this when deciding cases during the 1930's. In an early section 336 case, the CCPA seemed to be cognizant of the nature of these functions. In *United States v. Sears, Roebuck & Co.*,⁶³ it reversed the Customs Court, stating that "if it appears that the President has complied with the mandates of the law, the findings of fact upon which the proclamation is based are final and conclusive and may not be reviewed by us."⁶⁴ However, before the CCPA's decision in *Sears* was handed down, the Customs Court decided another case, *Dutchess Hat Works v. United States*,⁶⁵ in which it held that the President's "proclamation was based upon conclusions of the Tariff Commission founded upon facts which upon their face show that they were ascertained in a manner unauthorized by statute," and that therefore "such conclusions and the proclamation of the President were *ultra vires*, void, and of no effect."⁶⁶ Again, the CCPA reversed,⁶⁷ but in doing so it expressed itself much more carefully than it had in the *Sears* case:

We think it immaterial, so far as the question of the validity of said proclamation is concerned, what report the Commission may have made as to the *results* of its investigation or what *findings* it may have made, other than its finding that the rates specified by it were necessary to equalize the differences in costs of production of the merchandise under investigation. If the President, upon an examination of all the facts before the Commission, had any legal basis for a finding that such rates were necessary to equalize costs of production, his proclamation is valid.

. . . The record does not show that there were not facts before

⁶³ 20 C.C.P.A. (Customs) 295 (1932), *cert. denied*, 290 U.S. 633 (1933) (decided before the Court's decision in *Norwegian Nitrogen*).

⁶⁴ *Id.* at 301, *citing* *United States v. S. Leon & Co.*, 20 C.C.P.A. (Customs) 49, *cert. denied*, 287 U.S. 628 (1932), which had involved presidential action under § 315 of the Tariff Act of 1922.

⁶⁵ T.D. 45974, 62 TREAS. DEC. 440 (1932), *rev'd sub nom.* *Feltex Corp. v. Dutchess Hat Works*, 71 F.2d 322 (C.C.P.A. 1934).

⁶⁶ *Id.* at 448.

⁶⁷ *Feltex Corp. v. Dutchess Hat Works*, 71 F.2d 322 (C.C.P.A. 1934).

the Commission upon which he might properly make the proclamation here in question.⁶⁸

By seeking evidence in the record of the proceedings before the Commission, the CCPA had to some degree gone behind the President's determination, which earlier it had held was final and not subject to review so long as it was in compliance with the "mandates of the law." This tended to complicate matters. On the one hand, there was still a recognition by these courts that the function of the Commission was investigatory and advisory, but, on the other hand, less significance was given to the fact that the authority vested in the President by Congress was discretionary.⁶⁹

Having once gone behind the determination of the President, the CCPA had opened the door to substitute its judgment for his. In *Carl Zeiss, Inc. v. United States*,⁷⁰ decided two months after *Dutchess Hat*, the Customs Court was faced with the question whether it could determine if certain binoculars, which were the subject of Commission findings and a subsequent proclamation of the President, were covered by the Commission's notice of hearing. The notice covered "optical instruments of a class or type used by the [armed forces] for fire control." The Commission found that certain foreign-made prism binoculars were such optical instruments and that a change in the basis of valuation was necessary to equalize the different costs of production of foreign and domestic instruments. The President agreed with the Commission and proclaimed the change.⁷¹ The Commission's report to the President had contained, however, various statements referring to such binoculars as being *suitable* for use by the armed forces. The importer alleged that notwithstanding the language used, which followed the language in the notice, the Commission's findings in fact related to binoculars suitable for use. Therefore, the notice of hearing was inadequate and the findings of the Commission and the proclamation of the President were invalid. The Customs Court decided against the importer.⁷² On appeal, however, the CCPA held:

⁶⁸ *Id.* at 330-31 (emphasis in original).

⁶⁹ Moreover, these courts did not appear to appreciate fully that the hearing required of the Commission in the performance of its function did not require making confidential information a matter of record, and in fact the practice of the Commission had long been to withhold material that it considered to be confidential.

⁷⁰ Reap. Dec. 3337, 65 TREAS. DEC. 1734 (1934), *rev'd*, 76 F.2d 412 (C.C.P.A. 1935).

⁷¹ Pres. Proc. No. 2020, 47 Stat. 2545 (1932).

⁷² We do not believe . . . that it is within the power of the court to go behind the findings made by the Commission—at least, so far as to weigh the evidence submitted to us and thereby decide that such evidence outweighs any evidence

We think it clearly appears from the report of the Tariff Commission that its investigation was not confined to the matters contained in its public notice, that is, to the differences in the costs of production of foreign and similar domestic optical instruments of the class or type *used by* the Army, Navy, or their respective Air Forces, but was, in fact, extended in scope so as to include the differences in costs of production of foreign and domestic optical instruments suitable for use by such armed forces; that its findings and recommendations included in its report to the President were not limited to the scope of the Senate Resolution and the public notice of the hearing, but were based upon evidence relative to optical instruments *suitable for* such use; and that the findings and recommendations of the Commission were therefore invalid.

. . . .
 For the reasons stated, we must hold that the proclamation of the President was without authority of law, illegal, and void⁷³

In November 1936, over a year after it decided the *Zeiss* case, the CCPA markedly changed its approach to its review function. It was presented, in *Union Fork & Hoe Co. v. United States*,⁷⁴ with these questions: (1) whether a report of the Commission on its face showed sufficient compliance with the requirements of section 336; (2) whether the Tariff Commissioners could be examined by the litigant on communications they had made to the President, aside from the written report; and (3) whether the litigant could examine the extent of their investigation of the cost of production of competing articles manufactured in the principal competing country. The alleged objective of these interrogations was to show that the Tariff Commission did not investigate the cost of production of articles that were like or similar to the domestic product. In holding against the party litigant and affirming the judgment of the Customs Court, the CCPA stated:

The weight of this report was a matter for the consideration of the President. We have neither the inclination nor the right to review the same for the purpose of ascertaining whether the findings of the commission were correct. . . .

. . . .
 If it were given to this court to decide whether, in the case at bar, as a matter of fact, the commission came to the right conclusion on this point, the court might give its views as to whether or not such articles were like or similar. The facts shown by the in-

which the Commission had before it and which has not been and cannot be submitted to this court.

65 TREAS. DEC. at 1737.

⁷³ *Carl Zeiss, Inc. v. United States*, 76 F.2d 412, 417-18 (C.C.P.A. 1935) (emphasis in original).

⁷⁴ 86 F.2d 423 (C.C.P.A. 1936).

vestigation, however, were for the President to pass upon, and are not a matter for the consideration of this court.

. . . .
The communications which the individual members of the United States Tariff Commission may make, or fail to make, to the President, aside from the report and findings of the commission as specified by law, are not matters of public record, and, in our opinion, are not subject to investigation by this court.⁷⁵

The CCPA did not long maintain such a constricted view of its review function. In a little over two years after its decision in *Union Fork*, it had before it *David L. Moss Co. v. United States*,⁷⁶ in which the Customs Court had held "that it was without authority to review the findings of the Commission or to disturb the conclusion of the President based thereon." The CCPA disagreed with the lower court on the point. Acknowledging that "the proclamation of the President makes a prima facie showing of authority," the court noted that "if it is established before the court that there was no substantial evidence before the Commission upon which action complained of could have been based, such action must be held void because not within the authority granted by Congress." In the court's view this did not mean that it "may review the facts or substitute its judgment for that of the Commission." But it did mean that "where the question is properly raised, it must determine whether the Commission acted within the scope of the authority granted it by Congress and that, in determining this question, it must consider whether the Commission had before it any substantial evidence upon which to base its action."⁷⁷

⁷⁵ *Id.* at 428-29. The rationale of the CCPA in this case appears to be inconsistent with that of its decision in the *Zeiss* case, even though the court undertook to distinguish *Zeiss* by stating that it involved a failure by the Commission to give proper notice. *Id.* at 428.

⁷⁶ 103 F.2d 395 (C.C.P.A. 1939).

⁷⁷ *Id.* at 397-99. After examining the Commission's report and the testimony at the Commission's hearing, the court affirmed the judgment of the lower court. It was, however, evenly divided as to whether there was substantial evidence to support the Commission's findings and the action taken by the President. Two of the five judges found that there was substantial evidence; two found that there was not; and one judge was of the opinion that the court had no jurisdiction to review the evidence.

The court attempted to distinguish its holding in *Union Fork* by stating:

What was there decided was that the court could not examine the evidence before the Commission for the purpose of reviewing its findings and conclusions, not that it could not look to the evidence to ascertain whether the action complained of had substantial support therein so as to be within the authority granted the Commission.

Id. at 399. The very different language used by the court in the *Union Fork* and *Moss* cases makes it clear, however, that the court had indeed taken a more expansive approach to its review function.

About three months later the CCPA had an opportunity to exercise further this expanded scope of judicial review in *George S. Bush & Co. v. United States*.⁷⁸ Section 336 provided that, in ascertaining differences in costs of production, the Commission could when necessary accept as evidence of foreign production costs "the weighted average of invoice prices or values for a representative period."⁷⁹ The importer contended that, in making its findings, the Commission had misconstrued this statutory provision by converting invoice prices for one period into United States dollars at the average rate of exchange for another period, and that, therefore, the Commission's findings and the President's proclamation were invalid. The Customs Court overruled these contentions on the same basis that it had decided the *Moss* case.

On appeal, the CCPA reversed. Noting that "[a] legal investigation by the Tariff Commission is a condition precedent to the issuance of a lawful proclamation by the President," it observed that "[i]t clearly appears from the commission's report that its investigation of the cost of production of the foreign article and its findings with respect thereto were based upon an erroneous conception of the statutory provision." Therefore, the court held that "the investigation made by the Tariff Commission was illegal" and "the proclamation by the President, based upon such investigation, was without authority of law, illegal, and void."⁸⁰

The Supreme Court granted certiorari and in 1940 reversed the CCPA. In delivering the opinion of the Court, Justice Douglas stated flatly that "the scope of appellate jurisdiction conferred by § 501 of the Tariff Act of 1930 . . . does not permit judicial examination of the judgment of the President that the rates of duty recommended by the Commission are necessary to equalize the differences in the domestic

It also attempted to distinguish the holding of the Supreme Court in the *Norwegian Nitrogen* case by stating:

The decision in that case was that the provision for a hearing before the Commission did not give a right to the inspection of matter furnished it as confidential information. The case arose under the flexible provisions of the 1922 act; and much was said in the course of the opinion that has no application to proceedings under the 1930 act, which . . . limits the President in the exercise of his judgment to a consideration of the facts developed before the Commission in the course of its investigation.

Id.

⁷⁸ 104 F.2d 368 (C.C.P.A. 1939), *rev'd*, 310 U.S. 371 (1940).

⁷⁹ 19 U.S.C. § 1336(e)(2)(A) (1964).

⁸⁰ 104 F.2d at 373-74.

and foreign costs of production.”⁸¹ Noting that the powers entrusted to the President by the 1930 Tariff Act did not differ in kind from those granted under earlier tariff acts, he called attention to the Commission’s role “as an adviser to the Congress or to the President,” and held that its section 336 role was no different. The Commission does not, he observed, “increase or decrease the rates of duty”; it investigates, and submits the facts and its recommendations to the President. It is “the judgment of the President on those facts which is determinative of whether or not the recommended rates will be promulgated.” The action of the Commission and the President being “but one stage of the legislative process,” the judgment of the President that on the facts, adduced in pursuance of the procedure prescribed by Congress, a change of rate is necessary, “is no more subject to judicial review under this statutory scheme than if Congress itself had exercised that judgment.”⁸²

Prompted by the Supreme Court’s decision in *Bush*, the CCPA tied together the loose ends that remained from its earlier opinions by overruling *Moss* in *T.M. Duche & Sons v. United States*,⁸³ citing the *Bush* and *Norwegian Nitrogen* cases in support of its decision. The enactment in 1946 of the Administrative Procedure Act,⁸⁴ however, raised an additional question concerning judicial review of Tariff Commission activities. In the second *Duche* case,⁸⁵ the CCPA resolved this issue in accordance with the decisions of the Supreme Court.

The importer-litigant in the latter *Duche* case contended that section 10 of the APA required the Customs Court and CCPA to review the proceedings before the Commission to determine if there was substantial evidence in the record.⁸⁶ Holding that the APA did

⁸¹ *United States v. George S. Bush & Co.*, 310 U.S. 371, 379 (1940) (footnote omitted). Section 501 (Tariff Act of 1930, ch. 497, § 501, 46 Stat. 730) limited CCPA review of Customs Court decisions to “a question or questions of law.” The relevant subsection of § 501 is presently located in 28 U.S.C. § 2637 (1964).

⁸² 310 U.S. at 379-80. The Court stated further:

For the judiciary to probe the reasoning which underlies this Proclamation would amount to a clear invasion of the legislative and executive domains. Under the Constitution it is exclusively for Congress, or those to whom it delegates authority, to determine what tariffs shall be imposed. Here the President acted in full conformity with the statute. No question of law is raised when the exercise of his discretion is challenged.

Id. at 380.

⁸³ 36 C.C.P.A. (Customs) 19 (1948), *cert. denied*, 336 U.S. 931 (1949).

⁸⁴ 5 U.S.C. §§ 551-59, 701-06 (Supp. V, 1970).

⁸⁵ *T.M. Duche & Sons v. United States*, 39 C.C.P.A. (Customs) 186, *cert. denied*, 344 U.S. 830 (1952).

⁸⁶ Section 10 provides:

"not authorize a judicial review of the proceedings before the Tariff Commission or of the discretionary acts of the President," the CCPA affirmed the decision of the Customs Court against the importer.⁸⁷ Although the CCPA's decision was in conformity with the *Bush* and *Norwegian Nitrogen* cases, it was premised on the uncertain rationale of the latter case and consequently did not remove all of the confusion attending judicial review of section 336 actions. As in *Norwegian Nitrogen*, the court expressed itself in terms of the Commission's end product and its legal effect if accepted by the President rather than, as in the *Bush* case, in terms of the discretionary nature of the President's function. Thus, it found subsection 10(a) of the APA, regarding standing to review agency action, dispositive of the issue involved. But the importer had been given, pursuant to section 501 or sections 514 and 515 of the Tariff Act of 1930, the right to appeal from the appraisement of the imported merchandise or the duty imposed on it, and the APA was not intended to remove that right. Hence, the applicability of subsection 10(a) should not have been determinative of the scope of review.⁸⁸ The court could have removed this uncertainty

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) . . . Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

. . . .

(e) . . . So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute

Ch 324, § 10, 60 Stat. 243 (1946).

⁸⁷ 39 C.C.P.A. (Customs) at 191-92. The CCPA stated:

Appellant's contention that it is entitled to a judicial review of the procedure of the Tariff Commission under the Administrative Procedure Act is predicated upon its claim that it is "a person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action." We think appellant has suffered no legal wrong because, as stated by the Supreme Court in the *Norwegian Nitrogen Products* case . . . "No one has a legal right to the maintenance of an existing rate of duty." The action of the Tariff Commission being advisory only, its advice that the rate of duty should be increased cannot be considered to "adversely affect" appellant because it is only when the President acts upon that advice that appellant could be affected and, as . . . set out [in *Bush*], the action of the President "is no more subject to judicial review under this statutory scheme than if Congress itself had exercised that judgment."

Id. at 191.

⁸⁸ Moreover, if, as the CCPA seemed to indicate in its earlier cases, the proceedings under § 336 were rule making required by statute to be made on the record, then the

by addressing itself to the introductory clause of section 10 which provided for judicial review "except so far as agency action is committed to agency discretion." If it had done so, acting in accordance with the *Bush* case, there would have been no need for it to have considered subsection 10(a).

The confusion that existed during the 1930's and for a period of time thereafter emanated from a failure on the part of the CCPA to comprehend the nature of the functions vested by the Congress in the Commission and the President, and was abetted by the uncertain rationale of *Norwegian Nitrogen*. Within the confines of certain statutory mandates, the Commission's actions under section 336 are advisory to the President, and the President's actions have been committed by Congress to his sole discretion. Hence, in the absence of specific provisions to the contrary, judicial review should have been limited to an examination of compliance with these mandates—that is, whether the Commission had held hearings upon notice and whether the President's actions were within the statutory rate and value limitations and the scope of notice. Where, as in *Zeiss* and *Bush*, the CCPA chose to look beyond the notice and findings of the Commission and the action of the President, it was in effect passing upon the Commission's advice and substituting its judgment for that of the President. Yet, the only limitations or conditions specified in the delegation of these functions are the aforementioned statutory mandates. To have proclaimed tariff changes in disregard, or in violation, of these mandates would have constituted action in excess of the delegated authority. Once within the area of discretion, however, no question of law is raised by a challenge to the exercise of that discretion. This is in effect the holding of the *Bush* case, which, though prior in time, is in accord with the review provisions of the APA.

Since the 1952 *Duche* case there has been no litigation involving judicial review of presidential determinations under section 336. In the Trade Agreements Act of 1934, Congress provided that section 336 was not to apply to any article that was the subject of a trade agreement concession.⁸⁹ The evolution of the trade agreements program

substantial evidence rule should have been applicable, absent language to the contrary in the APA.

Needless to say, such proceedings are not rule making required by statute to be made on the record; the changes proclaimed by the President under § 336 are not required to be based upon the evidence adduced at the Commission's hearings. See ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 32-35 (1947).

⁸⁹ 19 U.S.C. § 1352(a) (1964).

has meant that there are fewer and fewer articles not covered by such concessions. Consequently, there have been only a few Commission investigations under the section, and no action has been taken by the President.

Although the confusion that attended judicial review of section 336 actions has ceased with the virtual absence of Commission activity under the section, the litigation is of more than historical significance because of the similarity in the administrative functions involved under section 336 and those under the other regulatory statutes in which the Tariff Commission plays a role. As will be seen, much the same confusion has been present in the judicial review of the administration of these other statutory provisions.

B. *Section 337 Cases*

While section 336 makes no provision for judicial review, section 337 does contain specific provisions for review by the CCPA of the findings of the Commission, but not of the President. However, while under section 336 a Commission investigation and report are a condition precedent to presidential action, and such action is limited to changes recommended by the Commission, under section 337 the President is not limited in any way by Commission findings or recommendations.⁹⁰ Moreover, his actions are conclusive. Thus, CCPA review of Commission findings under section 337 is essentially a review of Commission advice that the President may or may not heed. Whatever effect review by the CCPA has had on the administration of section 337 has not resulted from any judgment invalidating presidential action, but rather from its determinations affirming or reversing Commission findings and from the President's adoption of findings that have been affirmed, or from his rejection of findings that have been reversed. The confusion that has attended such "review" has related to the scope of the advisory authority of the Commission, and the authority of the CCPA to exercise a review function under the peculiar circumstances described.

The "advisory review" function of the CCPA was first questioned in 1928 in connection with certain Commission findings made under section 316 of the Tariff Act of 1922,⁹¹ the predecessor of section 337. The Commission found that certain phenolic resin articles, imported into and sold in the United States, infringed certain United States

⁹⁰ *Id.* § 1337. In other words, the President may act under § 337 independently of the Commission. It should be noted, however, that the President has never excluded merchandise under § 337 except upon recommendation by the Commission.

⁹¹ Ch. 356, § 316, 42 Stat. 943 (1922).

patents, and that such importation and sale constituted an "unfair" method of competition and an "unfair" act.⁹² Pursuant to the provisions of section 316, the importer appealed the Commission's findings to the Court of Customs Appeals (now the CCPA). The domestic producer moved for an order dismissing the appeal upon the ground that the court lacked jurisdiction. He contended that the Court of Customs Appeals was an inferior court created by the Congress under Article III of the United States Constitution; that, therefore, it could decide only "cases and controversies"; and that the matter before the court was not a case or controversy. The court, in *In re Frischer & Co.*,⁹³ agreed with the producer on his first two contentions but concluded that the matter was, in fact, a case or controversy in the Article III sense.⁹⁴

The appellee petitioned the Supreme Court⁹⁵ for a writ of certiorari and, at about the same time, for a writ prohibiting the Court of Customs Appeals from entertaining the appeal from the Commission's findings. The petition for certiorari was denied,⁹⁶ as was the petition for prohibition.⁹⁷ In denying the latter, however, the Court passed on the question of the status of the Court of Customs Appeals. It held that the court was a legislative and not a constitutional court; thus, there was no need to decide whether the proceeding under section 316 was a case or controversy within the meaning of Article III of the Constitution.⁹⁸

In so holding the Supreme Court preserved the confusion that was inherent in the statute. If no question of law is raised when the exercise of the President's discretion is challenged, then what question of law is raised when the Commission's findings are challenged—find-

⁹² Synthetic Phenolic Resin, Tariff Comm'n Inv. No. 316-4 (May 25, 1927).

⁹³ 16 Ct. Cust. App. 191 (1928).

⁹⁴ [I]f it be adjudged that the defendants or respondents in the pending case are violators of the law under consideration, that determination "will not be merely ancillary and advisory," but will be a "final and indisputable basis of action" for future proceedings. . . .

. . . [O]ur judgment in this case . . . declares or denies the existence of a right or a status (and does so conclusively and finally) which in turn affects a valuable interest or right, and otherwise meets the requirements of a "case" and "controversy"

Id. at 211.

⁹⁵ Section 316 provided that the judgment of the Court of Customs Appeals "shall be subject to review by the United States Supreme Court upon certiorari applied for within three months after such judgment." Tariff Act of 1922, ch. 356, § 316(c), 42 Stat. 944. This provision was not included in § 337 of the Tariff Act of 1930.

⁹⁶ *Bakelite Corp. v. Frisher & Co.*, 278 U.S. 641 (1928).

⁹⁷ *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929).

⁹⁸ *Id.* at 460-61.

ings that can be completely ignored by the President in exercising his discretion? Section 316, and subsequently section 337, provided for review by the CCPA on questions of law only. What then was the CCPA to review? All it could determine under sections 316 and 337 was what the Commission should or should not advise the President, not what the President could or could not do. As was to be stated in a later Supreme Court opinion,⁹⁹ the CCPA had been vested with an extrajudicial revisory authority.

Following the Supreme Court's decision on the writ of prohibition, the CCPA proceeded to consider the appeal by the importer from the Commission's findings regarding phenolic resin articles. In "affirming" these findings, the court passed on the constitutionality of the statute and declared that the Commission had no right to pass upon the validity of the patents involved, but that it could initially determine whether such patents had been infringed and could regard such infringement as an unfair method or act. It then held, after analogizing Tariff Commission findings to Federal Trade Commission orders, that there was substantial evidence in the record to support the Commission's affirmative findings,¹⁰⁰ and stated that "[w]hat constitutes unfair methods of competition or unfair acts is ultimately a question of law for the court and not for the Commission."¹⁰¹

The CCPA had clearly misconstrued its, and the Commission's, functions under section 316. The Commission's findings are legally determinative of nothing; they constitute only advice to the President. Therefore, the court's statement that "[t]he right to pass upon the validity of a patent which has been issued by the Patent Office is a right possessed only by the courts of the United States given jurisdiction thereof by law"¹⁰² was completely irrelevant to the question of what advice the Commission could or should give to the President. If the Commission is not permitted to advise the President as to its opinion concerning the validity or invalidity of the patent involved, how is it to advise the President whether the patent is being infringed? Equally confusing was the rationale of the court in applying the substantial evidence rule to the Commission's findings. The analogy it sought to draw between the Federal Trade Commission and the Tariff Commission did not exist. The Tariff Commission, unlike the FTC, does not issue orders—it renders advice. Finally, what constitutes un-

⁹⁹ *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962).

¹⁰⁰ *Frischer & Co. v. Bakelite Corp.*, 39 F.2d 247 (C.C.P.A.), *cert. denied*, 282 U.S. 852 (1930).

¹⁰¹ *Id.* at 259.

¹⁰² *Id.* at 258.

fair methods or acts under section 337 is not "ultimately a question of law for the court," but a question ultimately for the President.¹⁰³

Following the CCPA's decision, the Commission transmitted its findings to the President, and in October 1930, the President made permanent the temporary import prohibition that had been in effect since 1926 pending the completion of the Commission's investigation and the making of its report.¹⁰⁴ The importer then filed a bill in equity in the District Court for the Southern District of New York to restrain the collector of customs at the port of New York from excluding such merchandise. The importer argued (1) that section 316 was unconstitutional, and (2) that the Commission's findings and the President's order were unlawful because the Commission assumed authority to determine that the merchandise infringed patents and that the infringements were unfair acts mentioned in section 316. The district court dismissed the bill because of lack of jurisdiction, holding that the remedy in the CCPA was exclusive.¹⁰⁵ The court of appeals affirmed the dismissal but passed on the constitutionality of the section.¹⁰⁶ The court acknowledged that the terms in the section were general and vague, but held that the section was constitutional, citing, among others, the *Hampton* case. Furthermore, the court agreed with the lower court that section 316 contemplated no further remedy than provided for therein.¹⁰⁷ A writ of certiorari to the Supreme Court was subse-

¹⁰³ The futility of these review proceedings for deciding questions of law as distinguished from questions of advice was acknowledged by only one judge on the CCPA—Judge Garrett. In a long and cogent dissenting opinion, he stated:

Our decision has not the force and effect of law; a conclusion expressed in terms of affirmation or reversal, using the nomenclature customary in court procedure, means nothing, so far as binding individuals in any legal sense is concerned By its own force such judgment can exercise no control over the actions of the executive under the section.

. . . .

The decision of this court is in precisely the same category as the Commission's report, so far as any legal effect is concerned.

Id. at 263, 269.

¹⁰⁴ T.D. 44441, 58 TREAS. DEC. 722 (1930).

¹⁰⁵ Unreported, but discussed on appeal in *Frischer & Co. v. Elting*, 60 F.2d 711, 711-12 (2d Cir.), *cert. denied*, 287 U.S. 649 (1932).

¹⁰⁶ *Frischer & Co. v. Elting*, 60 F.2d 711 (2d Cir.), *cert. denied*, 287 U.S. 649 (1932).

¹⁰⁷ It is evident . . . that the President is given full power to determine what acts are unfair and injurious to industry. On the face of the statute, the Commission is only employed to "assist the President in making . . . decisions" and not to bind him. A review of their auxiliary findings by the Court of Customs and Patent Appeals is given as to "questions of law only," and provision is made for an appeal from the decision of that court to the Supreme Court upon certiorari. It seems most reasonable to suppose that the methods which the statute provides for determining whether an act is unfair and whether merchandise shall for that reason be excluded are the only methods which Congress intended to employ to enforce the statute. We realize that on the face of the statute the President is

quently denied.¹⁰⁸

In 1934, the CCPA simultaneously decided two cases, *In re Orion Co.*¹⁰⁹ and *In re Northern Pigment Co.*,¹¹⁰ involving Commission findings under section 337.¹¹¹ In both, the court passed on the constitutionality of the section, applied the substantial evidence rule to the Commission's findings, stated that the validity of the patents involved was not a proper consideration for the Tariff Commission or the CCPA, and sustained the Commission's finding that the imported articles infringed the domestic patents and that their importation and sale constituted an unfair method or act. In *Orion*, the court refined somewhat the statements made in the *Frischer* case:

[T]he Commission decided that the slide fasteners were being imported, made in conformity with the specifications and claims of the complainant's patents, and not in conformity with the specification and claims of any United States patent owned by the respondents.

Such a finding of fact does not constitute a trial of the validity of any of said patents or an ascertainment of infringement or noninfringement, such as is the case when such issues arise in equity in one of the District Courts The issues of validity or infringement are not involved, but, rather, the ascertainment of a fact which may be the basis of a finding of unfair methods of competition or unfair acts, which thereafter may be the basis of an order by the President, correcting the unfair methods or acts.¹¹²

Such niceties, however, only tended to add further confusion to an already confused situation. It was true that the Commission's findings did not constitute legal determinations of patent validity or infringement; as has been indicated, they were not legally determinative of anything. It was also true that the issue of patent validity was not presented by such findings because the court had held that the Commission had neither the right nor duty to consider that issue. It was

not bound by the recommendations of the Tariff Commission or by the findings of the Court of Customs Appeals or even by the decision of the Supreme Court should it grant a writ of certiorari, for all are in terms advisory. But it is hardly likely that Congress would have set up all this elaborate machinery and provided that the Court of Customs Appeals should review the Tariff Commission only as to matters of law if a suit was to be permitted to test matters again in a constitutional court. . . . In view of the broad powers of Congress to deal with foreign importations, we think the remedy afforded was ample.

Id. at 714 (emphasis in original).

¹⁰⁸ *Frischer & Co. v. Elting*, 287 U.S. 649 (1932).

¹⁰⁹ 71 F.2d 458 (C.C.P.A. 1934).

¹¹⁰ 71 F.2d 447 (C.C.P.A. 1934).

¹¹¹ *Oxides of Iron*, Tariff Comm'n Inv. No. 337-4 (August 16, 1933); *Slide Fasteners*, Tariff Comm'n Inv. No. 337-2 (March 20, 1933).

¹¹² 71 F.2d at 465.

not true, however, that the issue of patent infringement was not involved. The Commission's findings, however phrased, were in essence findings that domestic patents were being infringed.

In view of the nature of the Commission's findings, the court's position regarding the issue of patent validity was inconsistent with its position regarding patent infringement. If the Commission could make a finding as to patent infringement for the purposes of section 337, why was it to be precluded from making a finding as to patent validity? Whether such findings be denominated as findings of fact or as conclusions of law, they both would have had the same status under section 337. And in view of such status, it seemed completely incongruous for the court to permit the Commission to consider the one issue but not the other in advising the President as to the existence of unfair methods or acts.

It should not be forgotten, in this connection, that the presumption of validity that arises from the issuance of a patent has long been regarded as only prima facie evidence of the patent's validity; it does not relieve the courts of their duty in an infringement suit to inquire into such validity.¹¹³ Generally, only by becoming an infringer does one gain the opportunity to assail a patent in his own interests or that of the public,¹¹⁴ and the issue of patent validity is normally an integral part of infringement proceedings.¹¹⁵ Under these circumstances, why should what is merely a rebuttable presumption in infringement actions have been regarded as irrebuttable for the purposes of section 337? Once patent infringement, however characterized, had been equated with unfair methods or acts, it should have carried with it the issue of patent validity, and the weight given to the presumption of validity should have been for the President to decide.

If there was ever to be CCPA restraint on the President under section 337, it should have concerned patent infringement. Under the guise of preventing unfair methods and acts, the President, in effect,

¹¹³ See *John Deere Co. v. Graham*, 333 F.2d 529, 530-31 (8th Cir. 1964), *aff'd*, 383 U.S. 1 (1966); *Lorenz v. F.W. Woolworth Co.*, 305 F.2d 102, 105 (2d Cir. 1962); *Gomez v. Granat Bros.*, 177 F.2d 266, 268 (9th Cir. 1949), *cert. denied*, 338 U.S. 937 (1950); *Davis Harvester Co. v. Long Mfg. Co.*, 252 F. Supp. 989, 1008 (E.D.N.C. 1966); *Sherman v. Moore Fabrics, Inc.*, 179 F. Supp. 74, 80 (D.R.I. 1959). See also *Great Atl. & Pac. Tea Co. v. Supermarket Equip. Corp.*, 340 U.S. 147, 154-58 (1950) (Douglas, J., concurring).

¹¹⁴ *United States Gypsum Co. v. Consolidated Expanded Metal Cos.*, 130 F.2d 888, 890 (6th Cir. 1942), *cert. denied*, 317 U.S. 698 (1943).

¹¹⁵ It is true that a declaratory judgment may be had regarding validity, but only if there is an actual controversy; action merely to declare a patent void does not present such a controversy. *Thermal Equip. Corp. v. Leach*, 185 F. Supp. 330, 332 (E.D.N.Y. 1960); *Scovill Mfg. Co. v. Dulberg*, 138 F. Supp. 617, 618 (S.D.N.Y. 1955).

was prohibiting the importation of articles that allegedly infringed a domestic patent. Because the Commission defined injury to domestic industry in terms of patent infringement, and minimized section 337's injury requirement, its, and ultimately the President's, determination that a patent had been violated was the most significant determination for purposes of section 337. Of course, original jurisdiction to determine whether patent rights have been violated is vested in the district courts, not in the President. Congress had, however, clothed the President's actions with finality and the propriety of such actions was a consideration only for the Congress. The President had been given full power to determine what acts were unfair, and such power entailed the authority to decide what factors he was to consider and what weight he was to give to them in making his determination.

About nine months after *Orion*, the court wrote an opinion in *In re Amtorg Trading Corp.*,¹¹⁶ which illustrated a further inconsistency to which the court had become a party in the protection of patent rights under section 337. In *Frischer, Orion*, and *Northern Pigment*, the CCPA made it clear that the unfair methods or acts involved were the importation and sale of articles that violated patent rights. The patents being infringed in the first two cases were product patents, while the one involved in the latter case was a process patent. At the time, the court had drawn no distinction between these patents. But in 1935, Commission findings that a process patent was infringed and that such infringement constituted an unfair method or act¹¹⁷ were appealed to the CCPA by an importer who contended that there was a distinction. He maintained that the importation and sale of a product in the United States made abroad in accordance with a domestic patented process violated no patent rights of the patent holder and therefore did not constitute an unfair method or act. The CCPA agreed with the importer and overruled its decision in the *Northern Pigment* case insofar as it pertained to process claims. Judge Garrett, writing for the court, disposed of the issue as follows:

[A] process patent is not infringed by the sale of a product made by the process, the product itself not being patented, and a product patent is not infringed by one who uses the process by which it is made, the process itself not being patented. . . .

In the case at bar, the [product] is not patented. Hence there is no infringement of the patented process by a sale of [the product]. The Russian exporter had a perfect right to sell and the American importer had a perfect right to buy the [product] and to resell it

¹¹⁶ 75 F.2d 826 (C.C.P.A.), cert. denied, 296 U.S. 576 (1935).

¹¹⁷ Phosphates & Apatite, Tariff Comm'n Inv. No. 337-3 (January 15, 1934).

in the United States, in so far as any question of a process patent is concerned. . . .

Such must be the holding unless the court finds that it was the purpose of Congress in enacting section 337 of the Tariff Act of 1930 . . . to broaden the field of substantive patent rights, and create rights in process patents extending far beyond any point to which the courts have heretofore gone in construing the patent statutes.¹¹⁸

Although the opinion of the CCPA constituted only advice to the President, he followed the advice by not taking any action with regard to the imports involved and by modifying the order issued in connection with the *Northern Pigment* case to bring it into conformity with the court's opinion in *Amtorg*.¹¹⁹ While Congress overruled the CCPA's *Amtorg* holding in 1940,¹²⁰ by that time section 337 had become practically a dead letter. The Commission, following the enactment of the Trade Agreements Act in 1934, had endeavored to avoid the inequities that had become a part of these patent infringement proceedings—which were virtually the only proceedings being conducted under section 337—by withholding action until court adjudication of the validity of the patent, and by placing greater emphasis on the injury requirement in section 337, something that had been largely ignored by prior Commissions. After making one affirmative determination in 1935, the Commission did not make another until 1954.

In the meantime, however, the Customs Court became involved in section 337 actions. Under section 514 of the Tariff Act of 1930 an importer could protest a decision of a collector of customs which excluded any merchandise from entry or delivery, and under section 515 the Customs Court had jurisdiction to pass on such protests. In 1951, the court considered a protest concerning the exclusion of certain cigar lighters which a collector concluded infringed a patent that was the subject of a presidential exclusion order.¹²¹ Although issued after a Commission investigation found that some imported lighters infringed the domestic patent while some did not, the President's order

¹¹⁸ 75 F.2d at 832-34.

¹¹⁹ T.D. 48129, 69 TREAS. DEC. 184 (1936).

¹²⁰ [T]he importation hereafter for use, sale, or exchange of a product made, produced, processed, or mined under or by means of a process covered by the claims of any unexpired valid United States letters patent, whether issued heretofore or hereafter, shall have the same status for the purposes of section 337 of the Tariff Act of 1930 as the importation of any product or article covered by the claims of any unexpired valid United States letters patent.

Act of July 2, 1940, ch. 514, 54 Stat. 724, 19 U.S.C. § 1337a (1964).

¹²¹ The order (T.D. 47001, 65 TREAS. DEC. 659 (1934)) had been issued in 1934, but Congress had extended the life of the patent until June 1952, and the President had accordingly extended the exclusion order to that date.

was a blanket exclusion of all articles made in accordance with the patent.¹²² After stating that it had jurisdiction under section 515, the court proceeded to hold that the lighters infringed the domestic patent and, therefore, came within the scope of the presidential order and were properly excluded.¹²³

What becomes abundantly clear from the Custom Court's decision, from which no appeal was taken to the CCPA, is that the merchandise was excluded because the collector of customs and the Customs Court, rather than the Tariff Commission and the President, had decided that it infringed the domestic patent. As a result of the blanket nature of the exclusion order, articles that were not necessarily involved in the unfair methods or acts found to exist by the President were to be excluded, whoever the importer, if the collector decided that they infringed the domestic patent. But subsection 337(e) provided that the President "shall direct that the articles concerned in such unfair methods or acts, imported by any person violating the provisions of this Act, shall be excluded from entry into the United States"¹²⁴ In effect, the remedy prescribed by the President had exceeded the scope of determinations properly made under section 337.¹²⁵ Consequently, what was to have been the President's decision became the collector's decision, and because it was the collector's decision, the Customs Court reviewed it. Apparently the CCPA would have reviewed it as well if the decision of the Customs Court had been appealed.

Thus, section 337 had become a conduit through which protection was accorded a domestic patent regardless of whether the imported article had been the subject of an affirmative finding for the purposes of section 337.¹²⁶ By this bootstrap operation, the Customs Court had assumed jurisdiction of what, by virtue of the President's order, had become a patent infringement proceeding. Whereas, according to the

¹²² The presidential order directed the Secretary of the Treasury to exclude from entry into the United States "cigar lighters patented in United States Letters Patent Reissue No. 19023, except where the importation is made under license of the registered owner of said United States Letters Patent." *Id.* at 660.

¹²³ *Emery, Holcombe & Blair v. United States*, C.D. 1318, 26 Cust. Ct. 160 (1951).

¹²⁴ Tariff Act of 1930, ch. 497, § 337(e), 46 Stat. 704, 19 U.S.C. § 1337(e) (1964). The quoted language is similar to that contained in § 316 of the Tariff Act of 1922 and added on the Senate floor for the expressed purpose of limiting presidential action under that section. 62 CONG. REC. 11241-44 (1922).

¹²⁵ In reality, the President had changed the nature of the function vested in him by the Congress. What apparently had been intended to be an adjudicatory function involving a determination as to whether past conduct was unlawful had been converted into a rule-making function whereby merchandise was excluded irrespective of whether the merchandise or the importer had been the subject of such a determination.

¹²⁶ The President was utilizing this section to accord the same protection to designated domestic patents that was accorded domestic trademarks filed with the Secretary of the Treasury under § 526 of the Tariff Act of 1930, 19 U.S.C. § 1526 (1964).

CCPA in *Orion*, the issue of patent infringement was not involved in the proceedings before the Tariff Commission and was not to be considered in the review of its findings by the CCPA, that was the only issue in the proceedings before the Customs Court. What had evolved as a result of the President's action under section 337 was litigation involving the enforcement of a patent against an infringer, even though such enforcement rightfully constituted a case under the patent laws of the United States, with original jurisdiction vested in the district courts.¹²⁷ What should have been tried in the district courts under the patent laws, with the domestic patent holder as a party litigant, had become triable in the Customs Court under the customs laws with the United States as a party litigant.

In 1955, the CCPA was again called upon to review certain findings of the Tariff Commission made under section 337. In *In re Von Clemm*,¹²⁸ a majority of the Commission had found that imported synthetic star sapphires and rubies were made in accordance with the product and process claims of a domestic patent and that the importation had the effect or tendency to injure substantially the domestic industry.¹²⁹ As it did in *Frischer*, *Orion*, and *Northern Pigment*, the CCPA presumed the patent to be valid, applied the substantial evidence rule, and sustained the Commission's findings of patent infringement and injury.¹³⁰

This case clearly indicates the deficiencies of judicial review under section 337. As stated by the Commission in its report, all of the economic data regarding the operations of the Synthetic Crystals Division of the domestic company had been submitted to the Commission in confidence;¹³¹ therefore it was not included in the record before the court. Consequently, the court had no concrete data before it in considering whether the Commission's finding of "effect" or "tendency" of substantial injury was supported by substantial evidence. Similarly, the Commission did not have jurisdiction over the foreign producer, and therefore the only evidence before it and the court of the method used to produce the imported article was the testimony of the domestic inventor as to how he thought the article was made.¹³²

¹²⁷ See *Pratt v. Paris Gas Light & Coke Co.*, 168 U.S. 255 (1897); *Lear Siegler, Inc. v. Adkins*, 330 F.2d 595 (9th Cir. 1964).

¹²⁸ 229 F.2d 441 (C.C.P.A. 1955).

¹²⁹ *Synthetic Star Sapphires & Rubies*, Tariff Comm'n Inv. No. 337-13 (September 20, 1954).

¹³⁰ 229 F.2d at 445.

¹³¹ *Synthetic Star Sapphires & Rubies*, Tariff Comm'n Inv. No. 337-13, at 42 (September 20, 1954).

¹³² The importer involved in the proceedings before the Commission and the court

Judge Cole's dissenting opinion pointed out these deficiencies in the majority opinion and stated his reasons for concluding that Congress never intended such patent infringement proceedings to be covered by section 337:

In effect, a patent owner, upon a showing that a product literally described by his claims has been imported and sold in the United States, has obtained from the Tariff Commission a recommendation for an order that all articles which infringe his patent, or are made by a process which infringes his patent, be excluded from the United States.

As far as I can see from a reading of the majority opinion, there are no circumstances under which an owner of a United States patent could not get—without submitting to a validity contest—such a recommendation, whenever he can show that literally infringing articles are being imported and sold. There has been no inquiry into the validity of the patent, nor into the prior art to limit the claims. There has been no finding of *actual* injury to the patent owner; the mere fact that there have been substantial sales has been found sufficient to establish a *tendency* to injure sufficient to support an exclusion order. There has been no finding of fraud or deceit on the part of the importer. So far as appears from this case, all that is necessary to get an exclusion recommendation from the Tariff Commission is (1) that there be an owner of a United States Patent; and (2) that there be importations and sales of an article which infringes (either by itself or by the process by which it was made) the literal wording of the patent claims. . . .

Carrying the majority opinion to its logical conclusion, the only function of the Tariff Commission is to determine whether the complaining American manufacturer has a patent. In other words, it seems fair to conclude that section 337 has been construed to mean that any article which infringes, or is made by a process which infringes, the claims of a United States patent, may be barred from importation into the United States, upon the mere application of the patent owner. While Congress undoubtedly has the power to enact such a law, certainly, if such a meaning was intended, Congress would have said so in such clear language as the situation deserves. It seems to me that a result such as has been reached in this case was clearly outside the contemplation of Congress in enacting the statute.¹³³

apparently was not in a position to offer other than what the Commission regarded as "unsupported protests that a different process [was] employed abroad . . ." *Id.* at 15.

¹³³ 229 F.2d at 445-46 (emphasis in original). Judge Cole further pointed out: [I]t is to be seriously questioned whether, in the circumstances of this case where no actual or impending damage has been shown, the Tariff Commission should not have suspended its proceedings to await the outcome of the declaratory judgment suit filed by importer (. . . now pending in the Southern District of New York). Its action in proceeding with this rather extraordinary remedy when the actual damage to the patent owner could be adequately recompensed in the

The Commission was not to make another affirmative determination under section 337 until 1962.¹³⁴ Had an appeal been taken from these findings, it is very doubtful that the CCPA would have entertained it, for in 1958 Congress had declared the CCPA to be a constitutional court¹³⁵ and in 1962 the Supreme Court, in *Glidden Co. v. Zdanok*,¹³⁶ overruled its decision on the writ of prohibition in *Frischer*.¹³⁷

Subsequent to the 1958 congressional declaration that the CCPA was a constitutional court, a retired CCPA judge had been designated by the Chief Justice of the United States Supreme Court to preside over a criminal case before the United States District Court for the District of Columbia. The defendant in the case was convicted, and the conviction was affirmed by the Court of Appeals.¹³⁸ Certiorari was granted by the Supreme Court for the purpose of determining whether the judgment was vitiated by the participation of the CCPA judge. Citing the Court's decision on the writ of prohibition in *Frischer*, the petitioner contended that the CCPA had not been established as a constitutional court, that a declaration of Congress per se could not change that status, and that, therefore, the assigning of the CCPA judge to the district court denied petitioner the protection of judges with tenure and compensation guaranteed by Article III of the Constitution. The Supreme Court, closely divided, overruled its prior decision, holding that the CCPA had been established as a constitutional court and

declaratory judgment suit, seems extremely dubious, if not an abuse of discretion. The outcome of that case would conceivably result in complete justice to all parties. Indeed, since in that case the entire question of validity and infringement could be litigated and disposed of, the outcome of that case would be more likely to secure complete justice than these proceedings. If that case should be resolved favorably to complainant here, the decision should be of inestimable value to the Tariff Commission in the event the section 337 proceeding were still deemed desirable.

Id. at 447. See *Uniroyal, Inc. v. Daly-Herring Co.*, 294 F. Supp. 754, 760 (E.D.N.C. 1968).

Following the decision of the CCPA in the *Von Clemm* case, the Commission submitted its findings and recommendations to the President. However, before any action was taken by the President, the domestic and foreign producers reached an agreement, which the Commission believed rendered the issue moot. It thereupon withdrew its recommendation to the President and requested the President to return the record to it for final disposition. Upon receipt of the record, the Commission dismissed the investigation.

¹³⁴ Self-Closing Containers, Tariff Comm'n Inv. No. 337-18 (April 24, 1962).

¹³⁵ 28 U.S.C. § 211 (1964). The Customs Court was declared a constitutional court in 1956. *Id.* § 251.

¹³⁶ 370 U.S. 530 (1962).

¹³⁷ See notes 97-99 and accompanying text *supra*.

¹³⁸ *Lurk v. United States*, 296 F.2d 360 (D.C. Cir. 1961), *aff'd sub nom. Glidden Co. v. Zdanok*, 370 U.S. 530 (1962).

that the 1958 congressional declaration merely explained what had been intended by the earlier act establishing the court.¹³⁹ In so holding, the Court considered the Article III restriction of judicial power to "cases or controversies" and addressed itself to section 337:

The jurisdictional [statute] in issue . . . appear[s] to subject the decisions called for . . . to an extrajudicial revisory authority incompatible with the limitations upon judicial power this Court has drawn from Article III. . . . Whether [it] actually [does] so is not, however, entirely free from difficulty, and cannot in our view appropriately be decided in a vacuum, apart from the setting of particular cases in which we may gauge the operation of the [statute]. For disposition of the present [case], we think it is sufficient simply to note the doubt attending the validity of the jurisdiction, and to proceed on the assumption that it cannot be entertained by an Article III court.

It does not follow, however, from the invalidity, actual or potential, of . . . [this] jurisdiction, that . . . the Court of Customs and Patent Appeals must relinquish entitlement to recognition as an Article III court. . . .

. . . [W]e are advised that in all the years since 1922, when the predecessor to § 337 of the Tariff Act was first enacted, the Court of Customs and Patent Appeals has entertained only six such cases. Certainly the status of a District Court or Court of Appeals would not be altered by a mere congressional *attempt* to invest it with such insignificant nonjudicial business; it would be equally perverse to make the status of [this court] turn upon so minuscule a portion of [its] purported functions.

The Congress that enacted the assignment statute with its accompanying [declaration] was apprised of the possibility that a re-examination of the *Bakelite* [decision] . . . might lead to disallowance of some of [this court's] jurisdiction. . . . Nevertheless it chose to pass the statute. We think with it that, if necessary, the particular offensive jurisdiction, and not the [court], would fall.¹⁴⁰

As is apparent from the foregoing, the Supreme Court did not completely resolve the issue of whether the CCPA could entertain jurisdiction under section 337. It left the door ajar, albeit only slightly, for disposition of the issue when raised in connection with a section 337 proceeding, with the clear indication that the CCPA's "revisory authority" would fall when tested against Article III requirements. During the 1960's, however, neither the CCPA nor the Supreme Court had such an opportunity. When in November 1969 the Commission

¹³⁹ *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962). Only three Justices concurred in the overruling.

¹⁴⁰ *Id.* at 582-83 (emphasis added) (footnote omitted).

made another affirmative determination under section 337,¹⁴¹ no appeal was taken to the CCPA.

The confusion that has existed concerning judicial review under section 337 has resulted from a combination of factors: the peculiar function vested by Congress in the CCPA; an early Supreme Court decision labeling the court as a "legislative" court; a misconception on the part of the CCPA as to the nature of its own and of the Commission's functions under the statute; recurrent attempts to utilize the statute to protect patent "rights"; and a 1962 decision by the Supreme Court overruling its earlier decision and all but removing section 337 jurisdiction from the CCPA.

The CCPA should never have been assigned "revisory authority" jurisdiction under section 337. If Congress intended that there be a judicial check on the actions of the President, it should have so provided. Instead, it provided the CCPA with statutory authority cast in terms that sound like judicial review of on-the-record adjudicatory proceedings, when in fact the proceedings before the Tariff Commission under section 337 are investigatory and lead to advice based on information, a substantial portion of which is off the record. Under such circumstances, the CCPA has passed on "questions of law" by issuing pronouncements that have had no legal force and has applied the substantial evidence rule to, and sustained, Commission findings supported by virtually no evidence in the record, let alone weighed in accordance with the Supreme Court's rulings.¹⁴²

The court's pronouncements regarding the protection of patent "rights" have added to this overall confusion. While these pronouncements have no legal force, they have been followed by the Commission in advising the President, and the President, in turn, has often adopted the Commission's advice in prohibiting the importation of the article involved. The court in effect transformed patent rights, which carry only a rebuttable presumption of validity,¹⁴³ into virtually absolute rights by holding that neither it nor the Commission had the authority to inquire into their validity.

From the inception of the Trade Agreements Act of 1934 until November 1969, the Commission has attempted to avoid the inequities that have become a part of section 337 patent proceedings by deferring

¹⁴¹ Furazolidone, Tariff Comm'n Inv. No. 337-21 (November 13, 1969).

¹⁴² See *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951) (articulates the substantial evidence test).

¹⁴³ *John Deere Co. v. Graham*, 333 F.2d 529, 530 (8th Cir. 1964), *aff'd*, 383 U.S. 1 (1966).

to the district courts where a patent's validity is at the heart of the issue. However, its November 1969 determination in *Furazolidone*,¹⁴⁴ where it refused to await the results of pending court cases involving the validity of a patent, raises anew the problems of judicial review under this section. Although it would appear, in the light of the *Zdanok* case, that the CCPA lacks "extrajudicial revisory authority," the importer's failure to appeal the Commission's findings to the court left this question unanswered. Moreover, to further complicate the matter, in formulating its findings in the 1969 case, the Commission relied on previous CCPA decisions as justification for not inquiring into the validity of the patent and for advising the President that "patent infringement" constituted the unfair method or act. Thus, these cases and the confusion embodied therein appear to be very much a part of section 337 proceedings before the Commission, especially in the absence of a definitive ruling by the Supreme Court or the CCPA as to the latter's jurisdiction.

C. *Antidumping Cases*

Judicial review of the administration of the Antidumping Act of 1921,¹⁴⁵ like section 336 review, is undertaken pursuant to those provisions in the Tariff Act of 1930 that deal with appeals for reappraisal and protests of decisions by the collector of customs regarding the imposition of duties. Unlike section 336, however, the Antidumping Act contains a specific provision regarding such appeals and protests:

For the purposes . . . of this [Act], the determination of the appraiser or person acting as appraiser as to the foreign market value or the constructed value, as the case may be, the purchase price, and the exporter's sales price, and the action of the collector in assessing special dumping duty, shall have the same force and effect and be subject to the same right of appeal and protest, under the same conditions and subject to the same limitations; the United States Customs Court, and the Court of Customs and Patent Appeals shall have the same jurisdiction, powers, and duties in connection with such appeals and protests as in the case of appeals and protests relating to customs duties under existing law.¹⁴⁶

As is apparent from this provision, it is the determination of the appraiser as to the value and price of the merchandise, and the action of the collector in assessing the dumping duty, for which Congress has

¹⁴⁴ Tariff Comm'n Inv. No. 337-21 (November 13, 1969).

¹⁴⁵ 19 U.S.C. §§ 160-71 (1964).

¹⁴⁶ *Id.* § 169. Effective October 1, 1970, the words "appraiser or person acting as appraiser" and "collector" have been replaced by "appropriate customs officer" and "such customs officer," respectively. Also, "appeal" and "appeals" have been deleted. The Customs Courts Act of 1970, Pub. L. No. 91-271, § 314 (June 2, 1970). See note 147 *infra*.

provided judicial review.¹⁴⁷ There is no mention of the determination of either the Secretary of the Treasury concerning the existence of sales at less than fair value or of the Tariff Commission concerning sales causing or threatening injury to a domestic industry.

The procedure under the Antidumping Act leading to the imposition of a dumping duty involves first a determination by the Secretary of the Treasury that foreign merchandise is being, or is likely to be, sold in the United States or elsewhere at less than fair value; second, a determination by the Tariff Commission that a domestic industry is being, or is likely to be, injured by reason of the importation of such merchandise; third, the issuance of a finding by the Secretary consisting of his and the Commission's determinations and a description of the class or kind of merchandise to which the finding applies; fourth, a determination by the appraiser regarding each importation of such class or kind of merchandise, of the purchase price or the exporter's sales price, and the foreign market value or constructed value; and, finally, the assessment of a dumping duty by the collector equal to the amount by which the latter value exceeds the former price. Since sales at less than fair value have been defined by Treasury Department regulations in terms of a difference between such value and price,¹⁴⁸ the appraiser's determination is essentially the same as the Secretary's, and the judicial review of the former in effect constitutes a review of the latter.

The confusion that has attended judicial review of these dumping actions has related to the procedures utilized in such actions and to the injury determinations, now made by the Tariff Commission and prior to 1954 by the Secretary of the Treasury. Once again this confusion has resulted from the failure of the Customs Court and the CCPA, especially the former, to comprehend the nature of the functions vested by the Congress in these governmental agencies.

The doctrinal origins of judicial review in dumping cases began simply enough. In *Kleberg & Co. v. United States*,¹⁴⁹ the sole issue was the validity of the Secretary's finding under the Antidumping Act; the appraiser's value and price determinations were not in issue. The court sustained the Secretary as follows:

¹⁴⁷ In accordance with Reorganization Plan No. 1 of 1965, 3 C.F.R. 384 (1964-65 Comp.), the offices of collector of customs and appraiser of merchandise have been abolished. The functions formerly performed by these officials under the Antidumping Act are now performed by the district director of customs.

¹⁴⁸ 19 C.F.R. §§ 53.3-53.5 (1970) (redesignated as §§ 153.3-53.5, 35 Fed. Reg. 9251, 9271 (1970)).

¹⁴⁹ 71 F.2d 332 (C.C.P.A. 1933).

It appears . . . that the Secretary of the Treasury did make such investigation as he thought necessary; that he did find that an industry in the United States . . . is being, or is likely to be, injured . . . ; that such goods "have been sold," or are likely to be sold, in the United States at less than their fair value.

It further appears that he made such finding public to the extent he deemed necessary, together with a description of the merchandise to which it applied, in such detail as was necessary for the guidance of the appraising officers.

Thus every statutory step required by the law was taken by the Secretary and customs officials in imposing the anti-dumping duty here involved.

In view of the recent decisions of the United States Customs Court, this court, and of the Supreme Court of the United States in similar cases, it cannot now be doubted that the Congress was within its constitutional powers in enacting this statute The Congress has laid down "by legislative act an intelligible principle" to which the Secretary of the Treasury is directed to conform, and, therefore, such legislative action is not a forbidden delegation of legislative power. . . .

It is equally well established by the authorities that if the Secretary of the Treasury has proceeded in the method prescribed by the Congress, we may not judicially inquire into the correctness of his conclusions. The constitutionality of the law under which he proceeds having been once determined, then the judicial power extends only to a correction of his failure to proceed according to and within the law. . . .

This being the state of the law, we are not at liberty here to go into an investigation as to whether the facts shown on the trial below justified the issuance of the order complained of. Under the statute, the Secretary was not confined to any particular source of information or means of investigation. Furthermore, such information as he might obtain was not open to public inspection, unless he felt that the public interest so required.¹⁵⁰

The court, however, did not stop there. It addressed itself to the question whether the Secretary exceeded his authority when he construed the words "fair value" as he had in the Treasury regulations. Although it concluded that there was nothing "unreasonable" about the Secretary's construction, by so doing it left the door open, as it had under section 336, to review the judgment of the Secretary. It did not inquire whether Congress might have intended to preclude such review by providing in the Antidumping Act, "whenever the Secretary . . . , after such investigation as he deems necessary, finds" ¹⁵¹

¹⁵⁰ *Id.* at 334-35.

¹⁵¹ Antidumping Act of 1921, ch. 14, § 201, 42 Stat. 11. In 1954, the Act was amended to require the Commission, instead of the Secretary, to carry on the injury investigation. Act of Sept. 1, 1954, ch. 1213, § 301, 68 Stat. 1138, 19 U.S.C. § 160 (1964).

Although the *Kleberg* decision indicated that the CCPA might permit judicial examination of the judgment of the Secretary (and, after 1954, examination of the judgment of the Tariff Commission in injury determinations), it was not until the 1950's that these judgments were challenged.¹⁵² In 1958, in *Elof Hansson, Inc. v. United States* (an appeal for reappraisal),¹⁵³ the Secretary's dumping finding was contested.¹⁵⁴ The importer argued that the Secretary's function under the Antidumping Act was rule making covered by section 2 of the Administrative Procedure Act; that the Secretary had failed to publish notice of such proposed rule making, as provided for in section 4 of the APA; and that the Secretary had exceeded his authority under the Antidumping Act in making his injury determination. Judge Rao, in holding that the finding was valid, did not decide whether the Secretary's function constituted rule making. Rather, he pointed out that even if it were, the APA's procedural requirements for rule making did not bind the Secretary because of the Antidumping Act's specific grant of absolute discretion in making investigations to the extent and in the manner deemed necessary.¹⁵⁵ As for the Secretary's determination of injury, Judge Rao stated, citing the *Bush* and *Kleberg* cases:

In the instant case, what the court is asked to decide is whether from facts which may or may not have been before the Secretary in the form here presented, an erroneous principle of law was adopted, without any affirmative showing of what that principle was. . . . It is not the province of the court to substitute its discretion for that of the Secretary of the Treasury or to analyze the facts in the light of ephemeral construction. . . .

. . . Since the Secretary is the sole judge of the existence of the facts necessary to support his findings, and his finding has been

¹⁵² There was a fair amount of litigation under the Antidumping Act during the intervening years, but it involved a challenge to the appraiser's value and price determinations rather than to the Secretary's findings. As to such determinations by the appraiser, there was little question about the scope of judicial review, since Congress in effect had provided for a trial de novo. See *United States v. European Trading Co.*, 27 C.C.P.A. (Customs) 289 (1940); *Kreutz & Co. v. United States*, 25 C.C.P.A. (Customs) 180 (1937); *United States v. Kleberg & Co.*, 25 C.C.P.A. (Customs) 142 (1937); *United States v. C.J. Tower & Sons*, 24 C.C.P.A. (Customs) 456 (1937); *United States v. Manahan Chem. Co.*, 24 C.C.P.A. (Customs) 53 (1936). See also *C.J. Tower & Sons v. United States*, 71 F.2d 438 (C.C.P.A. 1934), where the court held that dumping duties were additional duties and not penalties. With regard to the exclusive jurisdiction of the Customs Court and CCPA, see *North Am. Cement Corp. v. Anderson*, 284 F.2d 591 (D.C. Cir. 1960); *Cottman Co. v. Dailey*, 94 F.2d 85 (4th Cir. 1938); *Kreutz v. Durning*, 69 F.2d 802 (2d Cir. 1934); *Horton v. Humphrey*, 146 F. Supp. 819 (D.D.C.), *aff'd*, 352 U.S. 921 (1956).

¹⁵³ Reap. Dec. 9212, 41 Cust. Ct. 519 (1958), *rev'd*, 178 F. Supp. 922 (Cust. Ct. 1959), *rev'd*, 296 F.2d 779 (C.C.P.A. 1960), *cert. denied*, 368 U.S. 899 (1961).

¹⁵⁴ The finding had been made prior to the 1954 transfer of injury determinations to the Tariff Commission.

¹⁵⁵ 41 Cust. Ct. at 526-27.

made in the language of the applicable statute, his act may not be judicially characterized as *ultra vires*.¹⁵⁶

An appeal was taken to the Third Division, Appellate Term, of the Customs Court, which reversed Judge Rao's decision.¹⁵⁷ The court held that the Secretary's action under the Antidumping Act constituted rule making;¹⁵⁸ that Congress intended the APA to apply to the Secretary's function under the Antidumping Act; that the Secretary did not comply with section 4 of the APA; and that, in accordance with section 10 of the APA, his finding was invalid. In view of this holding, the court regarded as unnecessary a consideration of the question raised by the Secretary's determination of injury.

A further appeal was taken to the CCPA, which in turn reversed the judgment of the Third Division.¹⁵⁹ The court held that the importer had actual notice of the pendency of the Secretary's investigation, had participated actively and without objection in the investigation, and had thereby waived his right to rely upon the asserted procedural irregularity. It therefore found it unnecessary to pass upon the applicability of the APA to an antidumping investigation or upon whether a finding of dumping constituted rule making as defined in the APA. As to the Secretary's injury determination, it cited the *Kleberg* holding that the court was not at liberty to investigate whether the facts shown justified the issuance of the order.¹⁶⁰

In a 1959 case, *Ellis K. Orlowitz Co. v. United States*,¹⁶¹ another challenge was made to a dumping finding by the Secretary. As one ground for appeal, the importer contended that the Secretary's finding was invalid because it was predicated on a Commission determination that did not satisfy the statutory requirements; *i.e.*, the Commission, for the purpose of making its determination that "an industry in the United States"¹⁶² was injured, had regarded the domestic industry as consisting only of the producers of cast iron soil pipe in California.

¹⁵⁶ *Id.* at 530-31.

¹⁵⁷ *Elof Hansson, Inc. v. United States*, 178 F. Supp. 922 (Cust. Ct. 1959).

¹⁵⁸ [T]he Secretary's finding implements the law laid down by Congress; it is part of the legislative process; it applies to all such merchandise which has not been appraised; it changes existing conditions by a new rule that hardboard from Sweden shall be appraised under the Antidumping Act; it is directed toward a general situation and not toward particular persons; it governs all importers of such merchandise, present and future, whether or not they had knowledge of the investigation.

Id. at 928.

¹⁵⁹ *United States v. Elof Hansson, Inc.*, 296 F.2d 779 (C.C.P.A. 1960).

¹⁶⁰ *Id.* at 782-83.

¹⁶¹ Reap. Dec. 9544, 43 Cust. Ct. 548 (1959), *aff'd*, 200 F. Supp. 302 (Cust. Ct. 1961), *aff'd*, 50 C.C.P.A. (Customs) 36 (1963).

¹⁶² Antidumping Act of 1921, ch. 14, § 201, 42 Stat. 11, *as amended*, 19 U.S.C. § 160(a) (1964).

Judge Lawrence of the Customs Court, in upholding the Commission's determination and the Secretary's finding, deemed the *Kleberg* and *Bush* cases dispositive of the controversy.¹⁶³ An appeal was taken again to the Third Division, which held that although the Commission's determinations were not subject to judicial review as to discretionary findings, they were subject to review on the question of compliance with the terms of the authority delegated by the Congress.¹⁶⁴ The court then affirmed the Customs Court, citing legislative support for the Commission's application of the term "industry." The case was further appealed to the CCPA, which agreed with the Third Division's analysis of the legislative history and with the conclusions drawn therefrom, but found it unnecessary to base its decision thereon.¹⁶⁵ It stated that it considered the Commission's determination of injury, or likelihood of injury, to be national in scope, despite the Commission's specific limitation to producers in California,¹⁶⁶ and concluded, in utter disregard of the principle announced in *SEC v. Chenery Corp.*¹⁶⁷

¹⁶³ In view of the established doctrine of the *Kleberg* and *Bush* cases giving finality to the acts of public officers who have been endowed by Congress with discretionary powers, the court has disregarded portions of the record other than those deemed necessary to determine whether the jurisdictional requirements of the Antidumping Act, as amended, have been complied with. In other words, the court has not, in the exercise of its judicial function, inquired into the mental operations or the correctness of the conclusions arrived at by the Commission.

.....
The statement of the Tariff Commission in its report to the Secretary of the Treasury that "The domestic industry to which the Commission's determination of injury relates was held to consist of the producers of cast iron soil pipe in the State of California" is not a matter for judicial inquiry. The reason for selecting the California producers was the sole concern of the Commission.

43 Cust. Ct. at 552-53.

¹⁶⁴ *Ellis K. Orlowitz Co. v. United States*, 200 F. Supp. 302 (Cust. Ct. 1961).

¹⁶⁵ *Ellis K. Orlowitz Co. v. United States*, 50 C.C.P.A. (Customs) 36 (1963).

¹⁶⁶ We think it clear that the Tariff Commission considered the nationwide effect its determination would have. The Commission had evidence before it (a) that the market area of the California producers includes "The seven Western states," and (b) that in several of these states competition existed from U.S. producers of cast iron pipe from states other than California. Such producers would obviously also be affected by the dumping of British cast iron soil pipe on the West Coast. Accordingly, we do not think that the Commission intended to limit itself to the State of California when it determined broadly, essentially in the words of the statute, that "a domestic industry in the United States is being, or is likely to be, injured." We consider *this* determination to be the basic determination of the Commission. We cannot agree with appellant that there is anything in the Commission's further statement referring to the California producers of cast iron soil pipe that would indicate that the Commission intended to limit geographically its actual determination that "a domestic industry in the United States is being, or is likely to be, injured."

Id. at 42 (emphasis in original).

¹⁶⁷ 318 U.S. 80 (1943) (the validity of an administrative determination must be judged on the grounds upon which the record discloses the action was taken).

Had the Tariff Commission omitted its gratuitous definition of "The domestic industry to which the Commission's determination of injury relates" and merely stated its determination in the words of the statute, we think it unlikely that this appeal would ever have been taken. It seems to us it is only because of the specific language used by the Commission in stating the *basis* for its determination, that the problems of the instant case have arisen.¹⁶⁸

In a more recent case, *City Lumber Co. v. United States*,¹⁶⁹ an importer contended that the Commission had exceeded its statutory authority in applying the statutory term "is being injured" to the continuance of an existing injury. In upholding the Commission's determination, Judge Wilson, notwithstanding his reference to the holding in the *Kleberg* case that the court was not at liberty to investigate whether the facts shown justified the issuance of a dumping order, held that the Commission properly applied the statute and that its determination was supported by substantial evidence. On appeal, his decision was affirmed by the First Division, Appellate Term, of the Customs Court.¹⁷⁰

Litigation under the Antidumping Act concerning the determinations of the Secretary of the Treasury and of the Tariff Commission has had little effect on the administration of the Act. No finding of the Secretary predicated on a Commission determination has been declared invalid, and both the Treasury Department and the Commission continue to regard their proceedings as not involving "rule making." The courts, however, especially the Customs Court, have been laboring under misconceptions as to the nature of the functions of the Secretary and the Commission. The Third Division of the Customs Court continues to regard these functions as rule making;¹⁷¹ the First Division of the Customs Court has undertaken to determine whether the Commission's determination was supported by "substantial evidence"; and the CCPA has gone behind the Commission's determination and substituted its judgment for that of the Commission.

While it might appear at first blush that the *Bush* case should have been dispositive of the latter two issues, there is a distinction between the nature of the function performed by the President under section 336 and the nature of the functions performed by the Secretary of the Treasury and the Commission under the Antidumping Act. Under section 336, deciding whether to effectuate the duties recommended by

¹⁶⁸ 50 C.C.P.A. (Customs) at 42 (emphasis in original).

¹⁶⁹ 290 F. Supp. 385 (Cust. Ct. 1968), *aff'd*, 311 F. Supp. 340 (Cust. Ct. 1970).

¹⁷⁰ *City Lumber Co. v. United States*, 311 F. Supp. 340 (Cust. Ct. 1970).

¹⁷¹ *Hoenig Plywood Corp. v. United States*, Reap. Dec. 10569, 51 Cust. Ct. 336 (1963).

the Commission has been committed to the President's discretion; under the Antidumping Act, while the determinations of the Secretary and the Commission entail the exercise of some discretion, if these determinations are affirmative, the imposition of a dumping duty becomes mandatory with respect to certain merchandise. Section 336 is, so to speak, a "permissive" statute, while the Antidumping Act is "mandatory." While the courts have ruled out judicial review with respect to the exercise of discretion under the former type,¹⁷² there has been an increasing tendency on their part to regard decisions under the latter type of statute as subject to review.¹⁷³

The Customs Court's and the CCPA's practice of engaging in judicial review with respect to the determinations of the Secretary and the Commission under the Antidumping Act is thus in accordance with the growing body of opinion that subjects action under "mandatory" statutes to review. But engaging in judicial review is one thing; the scope of such review is another. And it is with respect to the latter that the pronouncements of these courts have tended to become confusing.

In the *Hansson* case, the Third Division's characterization of the proceedings under the Antidumping Act as rule making and the consequent review by the court of the procedures followed by the Secretary in the making of his finding did violence both to the definitions of the terms "rule" and "rule making" in the APA, and to the provisions of the Antidumping Act. These proceedings are not designed to formulate a "statement of general or particular applicability and future effect";¹⁷⁴ they are designed to make essentially factual determinations that lead to the imposition of dumping duties prescribed by the statute.¹⁷⁵ If

¹⁷² In addition to *Bush*, see *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309 (1958); *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948); 4 K. DAVIS, *supra* note 8, at § 28.16.

¹⁷³ See *United States ex rel. McLennan v. Wilbur*, 283 U.S. 414 (1931); *Ferry v. Udall*, 336 F.2d 706 (9th Cir. 1964); 4 K. DAVIS, *supra* note 8, at § 28.16. See also *Sugarman v. Forbragd*, 405 F.2d 1189 (9th Cir. 1968), where the court of appeals held that, within the meaning of the APA, exclusion from importation was "committed" to the discretion of the Secretary of Health, Education and Welfare, but regarded the question of arbitrary action as an appropriate subject for judicial review. It would appear that if the court regarded the statute involved (21 U.S.C. § 381(a) (1964)) as a "permissive" statute, then it should not have regarded the Secretary's action as reviewable for arbitrariness or abuse of discretion. If, on the other hand, it regarded the statute as "mandatory," then it should have regarded the Secretary's action as involving discretion rather than as having been committed to his discretion. *But see Berger, Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55 (1965).

¹⁷⁴ 5 U.S.C. §§ 551(4)-(5) (Supp. V, 1970).

¹⁷⁵ Surprisingly enough, the court itself referred to the proceedings in these terms in its opinion, when it stated that "the Secretary, under the Antidumping Act, finds facts which bring into operation certain consequences provided for by the statute." 178 F. Supp.

the Customs Court's Third Division felt compelled to affix a label to these proceedings for APA purposes, it should have denominated them adjudicatory rather than rule making in character.¹⁷⁶ As the Third Division itself recognized, the finding brought into operation "certain consequences" provided for by the statute, and it represented the application of a statute to past events, which of course is essentially a judicial-type determination.

Had the court properly characterized these proceedings as adjudicatory, the procedures followed by the Secretary would have conformed not only with the provisions of the Antidumping Act but also with those of the APA. For the procedural requirements of sections 5 and 7 of the APA, regarding adjudicatory proceedings, are applicable only to adjudication required by statute "to be determined on the record after opportunity for an agency hearing."¹⁷⁷ And, as stated in the *Attorney General's Manual* on the APA, "[m]ere statutory authorization to hold hearings (e.g., 'such hearings as may be deemed necessary') does not constitute such a requirement."¹⁷⁸

In the *Orlowitz* case, the scope of review was extended to the Commission's application of the statute, but the courts failed to consider the Commission's reasons or all of the information upon which the Commission based its determination. The absence of a statutory requirement for a statement of reasons¹⁷⁹ and the CCPA holding in the 1933 *Kleberg* case that the court was not at liberty to investigate whether the facts justified the administrative determination no doubt supported Judge Lawrence in his holding that the Commission statement was not a matter for judicial inquiry.¹⁸⁰ On appeal, however, the Third Divi-

at 927. It nonetheless regarded such factual determinations—which Congress had provided were to be made after such investigation as the Secretary "deems necessary"—to be rule making, and held the Secretary's finding to be invalid, under the APA, because it was "without observance of procedures required by law." *Id.* at 929-30.

¹⁷⁶ See 5 U.S.C. §§ 551(6)-(7) (Supp. V, 1970).

¹⁷⁷ *Id.* § 554(a).

¹⁷⁸ ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 41 (1947).

¹⁷⁹ The requirement in the Antidumping Act that the Secretary and the Commission publish their determinations in the *Federal Register* with a statement of the reasons therefor was not added until 1958 (19 U.S.C. § 160 (1964)), and therefore was not in effect at the time that the determinations involved in *Orlowitz* were made. Consequently, the Commission's report to the Secretary, which also was made public, consisted of four small paragraphs. After reciting its determination in statutory language, the Commission stated, with no further comment: "The domestic industry to which the Commission's determination of injury relates was held to consist of the producers of cast iron soil pipe in the State of California . . ." Cast Iron Soil Pipe from the United Kingdom, Tariff Comm'n Inv. No. AA1921-5, at 1-2 (October 26, 1955).

¹⁸⁰ Without an examination of the facts before the Commission, he might well not have been in a position to assess the legal significance of the Commission's statement.

sion treated the Commission's statement as solely one of statutory interpretation, and without inquiry into the facts involved held that the Commission had acted in accordance with the authority delegated to it.¹⁸¹ But even though the Third Division limited itself to statutory interpretation in the abstract, the CCPA expanded the scope of judicial review by inquiring into the facts, and, finally, by substituting its judgment for that of the Commission. All that remained to be applied under this expanded scope of judicial review was the "substantial evidence" rule, and this was applied by Judge Wilson and the Appellate Term of the First Division of the Customs Court in the *City Lumber* case. After repeated quotations from the Commission's report, the testimony before the Commission, and briefs submitted to the Commission, Judge Wilson found that "[a]n examination of the voluminous record discloses substantial evidence in support of the facts set forth in the majority statement [of the Commission]."¹⁸²

While there is little question that Customs Court and CCPA review of the determinations of the Secretary and the Commission exceeds the limits of the APA and the Antidumping Act, this does not mean that there should be no judicial review. As indicated, the Antidumping Act is a mandatory-type statute; the imposition of dumping duties has not been left to the unbridled discretion of the Executive. Now that publication of a statement of reasons has been made a statutory requirement for both the Secretary and the Commission,¹⁸³ the Customs Court and the CCPA, possessing exclusive jurisdiction in

Even if he had attempted to inquire into the facts involved before the Commission to determine if the statute had been properly applied by it, he would have had to have based his judgment on only a portion of such information. Although a public hearing had been held in connection with the Commission's investigation and a transcript had been made available to the public, the Commission had not been limited to making its determination on the basis of such hearing. Moreover, under the statute the Commission was not even required to hold a public hearing; if no public hearing in fact had been held, the only way Judge Lawrence could possibly have determined whether the Commission had properly applied the statute would have been by conducting a trial de novo on both the facts and law, which unquestionably would have been beyond the scope of the court's jurisdiction.

¹⁸¹ While it was to become quite clear from later Commission action that it was applying a "geographical segmentation" principle in making its injury determinations, its quoted statement (note 179 *supra*), standing by itself, was not necessarily "interpretive" of the statute; it was cryptic enough to have permitted the court to conclude (which it did not), without inquiry into the facts, that it was unclear whether the Commission had acted within its delegated authority and to remand for clarification, in accordance with the *Chenery* doctrine.

¹⁸² *City Lumber Co. v. United States*, 290 F. Supp. 385, 390 (Cust. Ct. 1968), *aff'd*, 311 F. Supp. 340 (Cust. Ct. 1970).

¹⁸³ See note 179 *supra*.

customs matters, have a legitimate judicial function to perform in this area. The scope of judicial review of these administrative determinations should be limited, however, to a consideration of whether, in the light of the reasons adduced, they have a rational basis in law.¹⁸⁴ This is, in effect, the holding of the *Kleberg* case and it is also the scope of review provided for in the APA with respect to proceedings of this nature.¹⁸⁵ Since these proceedings are not adjudications "on the record," the substantial evidence rule is not appropriate in appraising their findings. A more limited scope of review would tend to avoid the substitution by these courts of their judgment for that of the Secretary and the Commission. If on the basis of the published reasons these courts were to conclude that there is no rational basis in law for the determinations made, or that such reasons are not adequate for them to ascertain whether there is such a basis, then they should set aside the value and price determinations of the appraiser and remand the case for further administrative proceedings. These proceedings would be for the purpose of making a new injury or sales at less than fair value determination, or for the purpose of making a more detailed or intelligible statement of reasons.¹⁸⁶

There is one drawback in applying even such a limited scope of review to the determinations constituting a dumping finding: the existing procedures for judicial review are inefficient. The *Orlowitz* case, for example, was decided by the CCPA almost eight years after the Commission had made its injury determination and the Secretary had issued his dumping finding. Obviously, what is required if such judicial review is to be efficient is a statutory amendment permitting, within a specified time period, a direct appeal from a finding of the Secretary to the CCPA. This would be analogous to the procedures under which appeals are taken to the courts of appeals from determinations made by other administrative agencies.¹⁸⁷

¹⁸⁴ See *Atlantic Ref. Co. v. FTC*, 381 U.S. 357 (1965); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944); 4 K. DAVIS, *supra* note 8, at §§ 30.01-14.

¹⁸⁵ In the language of the APA, the test would be whether, on the basis of the reasons given, the determinations of the Secretary and the Commission are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (Supp. V, 1970).

¹⁸⁶ See *FPC v. United Gas Pipe Line Co.*, 393 U.S. 71 (1968); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962); 2 K. DAVIS, *supra* note 8, at § 16.12.

¹⁸⁷ See, e.g., 15 U.S.C. § 21(c) (1964), under which the courts of appeals have jurisdiction to review orders of the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board, the Board of Governors of the Federal Reserve System, and the Federal Trade Commission.

D. *Escape Clause and Section 22 Cases*

As under sections 336 and 337 of the Tariff Act of 1930, so under the escape-clause provisions of the Trade Expansion Act of 1962 and the provisions of section 22 of the Agricultural Adjustment Act of 1933, the Tariff Commission functions in an advisory capacity, and the actions of the President are discretionary. Hence, the holding in the *Bush* case—that review by the Customs Court and CCPA does not permit judicial examination of the judgment of the President, or for that matter the advice of the Commission—would appear to be equally applicable to his actions and its advice under these provisions. Surprisingly enough, considering the difficulties experienced under judicial review of section 336 and 337 cases, there has been general recognition of this principle by these courts. Nevertheless, the courts have in effect substituted their judgment for that of the President in the two leading cases involving presidential actions under the escape clause and section 22 provisions.

1. *Escape Clause*

By the 1934 addition of section 350 to the Tariff Act of 1930,¹⁸⁸ the President was authorized from 1934 to the enactment of the Trade Expansion Act of 1962 to enter into trade agreements, to proclaim such modifications in import duties and other import restrictions as required or appropriate to carry out such agreements, and to terminate at any time, in whole or in part, any such proclamation. Practically the only limitations on this authority were the rate limitations specified in section 350.

Pursuant to this authority, the President in 1947 entered into the General Agreement on Tariffs and Trade (GATT),¹⁸⁹ which included a list of concessions and related provisions, and he then proclaimed such duty modifications as were specified or provided for in the agreement.¹⁹⁰ Among the modifications proclaimed were decreases in the rates of duty on bicycles. As specified in the proclamation, these duty modifications involved more than just decreases in the rates of duty; they involved decreases subject to the applicable terms, conditions, and qualifications set forth in the schedule of concessions and parts I, II, and III of the GATT.

Among the conditions or reservations contained in part II of the GATT were the so-called escape-clause provisions of article XIX, which

¹⁸⁸ Act of June 12, 1934, ch. 474, 48 Stat. 943.

¹⁸⁹ Oct. 13, 1947, 61 Stat. pts. 5-6, T.I.A.S. No. 1700, 55 U.N.T.S. 188 (1950).

¹⁹⁰ Pres. Proc. No. 2761A, 3 C.F.R. 139 (1943-48 Comp.).

permitted, under certain circumstances, a party to the agreement to suspend a concession in whole or in part or to withdraw or modify it. Prior to the enactment of section 7 of the Trade Agreements Extension Act of 1951,¹⁹¹ the domestic procedures leading to the invocation of this reservation were established by executive order.¹⁹²

By the enactment of section 7 of the Trade Agreements Extension Act of 1951, these domestic procedures became statutory. Section 7 provided, as had the executive orders, for a Tariff Commission investigation and report to the President. The Commission—upon presidential request, congressional resolution, its own motion, or application of an interested party—was to determine whether a product was, as a result of the duty reflecting a concession, being imported in such increased quantities as to cause or threaten serious injury to the domestic industry producing a like or directly competitive product. If the Commission found in the affirmative, it was to recommend to the President the withdrawal or modification of the concession, its suspension in whole or in part, or the establishment of import quotas, to the extent and for the time necessary to prevent or remedy such injury. Section 7 also provided:

Upon receipt of the Tariff Commission's report . . . , the President may make such adjustments in the rates of duty, impose such quotas, or make such other modifications as are found and reported by the Commission to be necessary If the President does not take such action within sixty days he shall immediately submit a report to the Committee on Ways and Means of the House and to the Committee on Finance of the Senate stating why he has not made such adjustments or modifications, or imposed such quotas.¹⁹³

In 1955, the Commission, pursuant to the escape-clause procedures contained in section 7, made an affirmative determination with respect to bicycles and recommended to the President certain increases in the rates of duty. After asking for additional information from the Commission, the President proclaimed the recommended increases, except in the case of certain lightweight bicycles.¹⁹⁴ For such bicycles,

¹⁹¹ Act of June 16, 1951, ch. 141, § 7, 65 Stat. 74.

¹⁹² Exec. Order No. 10082, 3 C.F.R. 281 (1949-53 Comp.); Exec. Order No. 10004, 3 C.F.R. 819 (1943-48 Comp.); Exec. Order No. 9832, 3 C.F.R. 624 (1943-48 Comp.). In one instance, following the utilization of these procedures, the President did invoke this reservation in withdrawing the concession that had been granted for certain women's fur felt hats and hat bodies, and in terminating the reduced rate that had been proclaimed for such articles. Pres. Proc. No. 2912, 3 C.F.R. 96 (1949-53 Comp.).

¹⁹³ Act of June 16, 1951, ch. 141, § 7(c), 65 Stat. 74.

¹⁹⁴ Pres. Proc. No. 3108, 3 C.F.R. 54 (1954-58 Comp.).

he proclaimed a smaller increase than that recommended by the Commission.

In proclaiming these increases, the President stated that he was acting not only under the authority of section 350 but also under the authority of section 7. But section 7 appeared to grant him no more authority than he already had under section 350. In addition, it contained certain language, which if taken out of context, could have been construed as limiting his proclaiming authority.

Pursuant to section 514 of the Tariff Act of 1930, an importer of lightweight bicycles challenged the legality of the proclamation in *Schmidt Pritchard & Co. v. United States*.¹⁹⁵ He argued, among other things, that the proclamation was invalid because the President had proclaimed a rate of duty that had not been found and recommended by the Commission, and that the statute required the President to either accept or reject the findings and recommendations of the Commission. The Customs Court sustained this contention, with Judge Lawrence writing the opinion. After citing a number of statutory provisions, including section 350, in which Congress had endowed the President with authority to exercise independent judgment in modifying the tariff schedules, Judge Lawrence pointed to the language in section 7 and concluded that it "directs the President to make the adjustments or modifications found and reported by the Tariff Commission, or to reject them."¹⁹⁶

But section 7 contained no such statutory mandate; it was by its terms purely permissive. The section's only requirement was that the President report to the House Ways and Means and Senate Finance Committees if he did not take the recommended action within sixty days.¹⁹⁷ There was no requirement that he take that action or no action; the statute merely said he "may" make such adjustments "as are found and reported by the Commission to be necessary." Since the language used in section 7 was permissive, it could hardly have constituted a limitation on the President's authority under section 350 to proclaim such modifications of existing duties as were required or appropriate to carry out foreign trade agreements. Furthermore, if the court regarded section 7 as containing proclaiming authority that

¹⁹⁵ 167 F. Supp. 272 (Cust. Ct. 1958), *aff'd in part*, 47 C.C.P.A. (Customs) 152, *cert. denied*, 364 U.S. 919 (1960).

¹⁹⁶ *Id.* at 282 (emphasis in original).

¹⁹⁷ Section 7 did contain a number of mandates respecting Commission investigations, one of which became the subject of litigation. See *Talbot v. Atlantic Steel Co.*, 275 F.2d 4 (D.C. Cir. 1960), where the court of appeals held that the Commission was required by § 7 to institute an investigation upon proper application of an interested party.

was independent of the President's authority under section 350 (and it is not clear from its opinion that it did), then the rate limitations contained in the latter section were apparently not applicable to his actions under the former. Considering the procedural nature of section 7, it was hardly likely that this was the intention of the Congress, especially in view of the absence of any language indicating unlimited delegation of power to the President. Conversely, if the court regarded section 7 as containing independent proclaiming authority subject to the rate limitations contained in section 350, by what process did this transference take place? What becomes clear is that by lifting the language in section 7 out of the trade agreements context of which it was a part, the court succeeded in construing as mandatory what was meant to be permissive.

An appeal was taken from the Customs Court's decision to the CCPA, but it supported the lower court's position. In reaching this result, it stated:

Counsel for appellant argued that a restrictive construction of the statute which allows the President only the alternative of proclaiming the modifications recommended or of disregarding the recommendations limits the powers of the [P]resident and that this cannot be done by a procedural statute. This argument ignores the fact that section 7 establishes a particular proceeding for a particular purpose and *does not affect any powers granted under other applicable statutes*.¹⁹⁸

The court thereby contradicted itself. For if section 7 did not affect the President's power under section 350 and if escape-clause modifications could continue to be proclaimed under the authority of section 350, then a presidential proclamation valid under section 350 should not have been declared invalid merely because it might not have been authorized by section 7. The proclaimed rates, being within the rate limitations contained in section 350, were validly proclaimed under that section.

Although the CCPA agreed with the Customs Court on the question of what rates the President could proclaim pursuant to the escape-clause procedures, its holding in the case was narrower than that of the Customs Court. While the Customs Court had held the entire proclamation to be invalid, the CCPA held invalid only that portion proclaiming a rate other than that recommended by the Commission;

¹⁹⁸ United States v. Schmidt Pritchard & Co., 47 C.C.P.A. (Customs) 152, 160 n.4 (1960) (emphasis added).

that is, the rate for lightweight bicycles.¹⁹⁹ In so doing, the court substituted its judgment for that of the President and of the Commission. Both the President and the Commission had found that, in order to remedy serious injury to the domestic industry, rate increases were necessary for all the bicycles covered by the Commission's investigation. By invalidating altogether the increase in the rate for lightweight bicycles, the court left standing a finding that was neither the President's nor the Commission's.

Within seven months of the CCPA's decision, the President restored, pursuant to section 350, the escape-clause rate that he had proclaimed for lightweight bicycles.²⁰⁰ This time he invoked article XXVIII of the GATT,²⁰¹ under which a contracting party could, by negotiation and agreement, modify or withdraw a concession that it had granted. He need not have waited that long to impose a higher rate; he had the authority under section 350 not only to proclaim such duty modifications as were required or appropriate to carry out foreign trade agreements, but also to terminate at any time, in whole or in part, any proclamation that had been issued.²⁰² In view of this broad delegation by the Congress of tariff-making authority to the President, the manner in which section 7 was construed and applied by the Customs Court and the CCPA was completely at odds with the trade agreements program of which it was a part.

This confusion in the operation of the trade agreements program has since been removed. In drafting the escape-clause provisions of the Trade Expansion Act of 1962, which replaced those of section 7, Congress specified in no uncertain terms that it was the President in whom the power was vested to determine what rate of duty should be applied:

After receiving an affirmative finding of the Tariff Commission . . . with respect to an industry, the President may proclaim such increase in, or imposition of, any duty or other import restriction

¹⁹⁹ *Id.* at 163. The proclamation's severability later became a specific issue in *Thornley v. United States*, G.D. 3133, 59 Cust. Ct. 261 (1967), and the Customs Court held that the proclamation was severable.

²⁰⁰ Pres. Proc. No. 3394, 3 C.F.R. 112 (1959-63 Comp.). The validity of this proclamation has also been challenged. *Aimcee Wholesale Corp. v. United States*, Protest No. 64/6295 (Cust. Ct. 1964).

²⁰¹ Oct. 13, 1947, 61 Stat. pt. 5, at A 71, T.I.A.S. No. 1700, at 67, 55 U.N.T.S. 188, 252 (1950).

²⁰² In this connection see *Falcon Sales Co. v. United States*, 199 F. Supp. 97 (Cust. Ct. 1961), where the Customs Court, invalidating another presidential proclamation upon the *Schmidt* rationale, also held that the President did not act under his "terminating" authority by "suspending" an earlier proclamation.

on the article causing or threatening to cause serious injury to such industry as he determines to be necessary to prevent or remedy serious injury to such industry.²⁰³

2. Section 22

Under section 22 of the Agricultural Adjustment Act,²⁰⁴ the procedure leading to the imposition of additional import restrictions involves: (1) the Secretary of Agriculture advising the President that he has reason to believe that articles are being or are practically certain to be imported under such conditions and in such quantities as to render or tend to render ineffective, or materially interfere with, a program or operation undertaken by the Department of Agriculture with respect to an agricultural commodity; (2) a determination by the President as to whether there is reason for such belief; (3) when the President so directs, an investigation by the Tariff Commission for the purpose of determining such facts; and (4) when on the basis of such Commission investigation and report of its findings and recommendations the President finds the existence of such facts, the issuance of a proclamation by him imposing such import fees or such quantitative restrictions as he finds and declares to have been shown by such investigation to be necessary. No fee, however, can be imposed in excess of fifty percent ad valorem, and no quantitative restriction can be imposed which would reduce the total quantity of imports of the article involved to proportionately less than fifty percent of the total quantity that entered during a representative period determined by the President.

Any such proclamation may, after investigation and report by the Commission, be suspended, terminated, or modified by the President whenever he finds and proclaims that changed circumstances so require; and any decision of the President as to the facts under section 22 is to be final. In any case where the Secretary of Agriculture determines and reports to the President that a condition exists which requires emergency treatment, the President may take immediate action under section 22 without awaiting the Commission's recommendations. Such action is to continue in effect pending the report and recommendations of the Commission and action thereon by the President. Fees imposed under section 22 are to be treated for administrative purposes as duties imposed by the Tariff Act of 1930, but are not to be considered as duties for the purpose of granting preferential concessions under any international obligation of the United States. In addition,

²⁰³ 19 U.S.C. § 1981(a)(1) (1964) (emphasis added).

²⁰⁴ 7 U.S.C. § 624 (1964).

no trade agreement or other international agreement is to be applied in a manner inconsistent with the requirements of the section.

Pursuant to these provisions, the President, in 1953, imposed on the importation of peanuts an absolute quota of 1,709,000 pounds for the twelve-month period beginning July 1, 1953, and for each such period thereafter.²⁰⁵ In March 1955, following an investigation by the Commission and after the quota for the period beginning July 1, 1954, had been filled, the President, because of a drought-induced reduction in the domestic peanut crop, modified his earlier proclamation to permit the importation of an additional quantity of not more than 51,000,000 pounds of peanuts during the remainder of that quota year.²⁰⁶ Such additional imports, however, were made subject to a fee of up to two cents per pound, but not to exceed fifty percent ad valorem, as recommended by the Commission.

An importer of peanuts that entered within the enlarged quota challenged the President's authority to impose the fee in *Best Foods, Inc. v. United States*.²⁰⁷ He argued that while the President had the power either to fix a quota or to exact a fee, he did not have the power to do both, and that, therefore, the President's 1955 proclamation was void insofar as it imposed a fee. The Customs Court agreed and held the fee to be invalid. After first acknowledging that it did not have jurisdiction "to review either the President's findings of fact, or his discretion, or the proceedings of the Tariff Commission," the court decided that the President's action did not constitute a "modification" for purposes of section 22:

So far as the peanut quota is concerned, the action proclaimed clearly fits the dictionary and judicially contrived meanings of modification. The previous limitation on imported peanuts was altered somewhat. It was eased. That is a *modification*.

A fee was also imposed. This is a new burden. Was this a *modification* of the previous peanut quota proclamation, within the intent of Congress in delegating to the President power to *modify* his previous proclamation? Nothing in the record persuades us that it is.²⁰⁸

²⁰⁵ Pres. Proc. No. 3019, 3 C.F.R. 189 (1949-53 Comp.).

²⁰⁶ Pres. Proc. No. 3084, 3 C.F.R. 33 (1954-58 Comp.).

²⁰⁷ 158 F. Supp. 583 (Cust. Ct. 1957), *aff'd*, 47 C.C.P.A. (Customs) 163 (1960).

²⁰⁸ *Id.* at 590 (emphasis in original). A rehearing was granted by the court (Abs. 62865, 42 Cust. Ct. 310 (1958)), and it entered the same judgment that it had previously entered, with Judge Richardson, who had not participated in the earlier proceedings, dissenting. He regarded the court's application of the term "modify" as unduly restrictive. He further stated:

It is evident . . . that the fee provision is an integral part of the scheme permitting entry of additional peanuts. The President found that the entry of

On appeal, the CCPA affirmed.²⁰⁹ Its rationale, however, was different from the lower court's. It stated that it was not necessary to decide whether the President's action constituted a "modification," since under section 22 he did not have authority to proclaim both a fee and a quota with respect to one commodity. It pointed to the use of the disjunctive "or" in the statute and to statements in both the House and Senate committee reports made in connection with the 1940 legislation that amended section 22 to give the President the authority to impose fees,²¹⁰ and concluded that when Congress used the term "or" in this statute it meant "or" literally, not "and."

The opinion of the Customs Court was based on an excessively narrow interpretation of the word "modification," and that of the CCPA on an excessively strict interpretation of the language used by the Congress in granting additional authority to the President so that he would have a greater degree of flexibility under the statute. Instead of regarding the use of the word "or" as constituting a limitation on the President's discretion, the CCPA should have regarded it as reflecting congressional intent to obviate confusion as to the range of presidential discretion.²¹¹ For if "and" instead of "or" had been used by the Congress, then it might have appeared that it had intended to limit the President's discretion to imposing both a quota and a fee.²¹² Within

additional peanuts subject to such fee would not render ineffective or interfere with the peanut program of the Department of Agriculture. The President's judgment in this regard may not be judicially reviewed. *United States v. George S. Bush & Co., Inc.* . . . The court cannot assume that the President would have found that entry of additional peanuts, without payment of a fee, would have had no injurious effect on the peanut program. It follows that if the fee provision is stricken from the proclamation, the intent of the President to permit the entry of the additional quantity of peanuts only subject to a fee, is rendered ineffective.

. . . The fee provision may not be deleted from the proclamation as a severable part thereof, and if, as plaintiff contends, the fee provision is invalid, the quantitative provision must fall with it, and plaintiff's case would be destroyed.

Id., at 320-21.

²⁰⁹ *United States v. Best Foods, Inc.*, 47 C.C.P.A. (Customs) 163 (1960).

²¹⁰ Act of Jan. 25, 1940, ch. 13, 54 Stat. 17. Both the House and Senate reports contained the following statement:

[T]he bill amends section 22 so as to permit the President, upon the recommendation of the United States Tariff Commission, to impose either an importation fee or an importation quota, whichever under the circumstances is determined to be better adapted for the protection of any particular farm program.

H.R. REP. No. 1166, 76th Cong., 1st Sess. 2 (1939); S. REP. No. 1043, 76th Cong., 1st Sess. 2 (1939).

²¹¹ See *Carter v. McClaughry*, 183 U.S. 365, 392-93 (1902).

²¹² Section 22, as amended in 1940, provided that the President "shall by proclamation impose such fees on, or such limitations on the total quantities of, any article or articles which may be entered, or withdrawn from warehouse, for consumption as he finds and declares shown by such investigation to be necessary . . ." Act of Aug. 24, 1935, ch. 641, § 22(b), 49 Stat. 774, as amended, Act of Jan. 25, 1940, ch. 13, 54 Stat. 17.

the statutory context, the word "or" conveyed an intention to grant a greater range of discretion; in the absence of language to the contrary, it should not have been construed to preclude the combined utilization of a quota and a fee. The language in the House and Senate reports on the 1940 amendment did not warrant a conclusion that Congress intended otherwise. Moreover, in this field of trade regulation, when Congress has intended to limit the President to a choice of mutually-exclusive remedies, it has specifically so provided in the statute. For example, section 336 of the Tariff Act of 1930 provides that no rate of duty may be increased by the President if he changes the basis of valuation.²¹³

Regardless of the substantive merits of the courts' interpretations of the words "or" and "modification," the manner in which they disposed of the case ignored the discretion vested by Congress in the President. By declaring the fee invalid, with nothing more, both courts in effect substituted their judgment concerning the appropriate remedy under section 22 for that of the President. The President had found that both an increase in the quota and the imposition of a fee were necessary to carry out the purposes of the statute. By invalidating the fee, but not the quota increase, they left standing a partial remedy that was not the President's. Having once determined that the President had exceeded his authority, the courts should have declared both to be invalid. The case could then have been remanded by the CCPA to the Customs Court with instructions to hold it until the issuance of a valid proclamation by the President.²¹⁴ To be sure, such a disposition would have entailed retroactive rule making by the President, but there is judicial precedent for such retroactivity,²¹⁵ and it would have constituted a lesser evil than retroactive rule making by the courts.

CONCLUSION AND SUGGESTIONS

The history of judicial review by the Customs Court and the Court of Customs and Patent Appeals unfortunately demonstrates that they have not functioned effectively or sensibly in the area of foreign trade regulation. They have substituted their judgment for the judgment of the President in matters that have been committed to the President's discretion. They have applied the "substantial evidence"

²¹³ 19 U.S.C. §§ 1336(a)-(b) (1964).

²¹⁴ See *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607 (1944).

²¹⁵ *Id.* at 619-23; 1 K. DAVIS, *supra* note 8, at § 5.08.

rule to proceedings that are not, and were never intended to be, "on-the-record" proceedings. They have issued—in connection with the exercise of an extrajudicial revisory function (section 337 cases)—pronouncements that have had no legal force. They have erroneously denominated as "rule making," proceedings that have involved essentially factual determinations of past conduct, the classic definition of the "adjudicatory" proceeding. They have erroneously construed permissive provisions as constituting mandates. They have disregarded judicial precedent. And they have done virtually all of this collaterally, pursuant to procedures that are inappropriate for the type of judicial review in which they have engaged.

There is no doubt that a number of the statutes whose administration these courts are called upon to review are ineptly drawn and improperly conceived.²¹⁶ Nonetheless, it is our view that even in the absence of statutory revision these courts can extricate themselves from the morass of confusion that has attended their proceedings if they adhere to the following suggestions:

1. The courts should understand fully the nature of the functions that have been vested in the President, the Tariff Commission, and the Secretary of the Treasury. The actions of the President in this area have been committed to his discretion; the actions of the Commission, except under the Antidumping Act, are wholly advisory; and the actions of the Secretary of the Treasury are the end product of adjudication, not rule making, by him and the Commission. Moreover, the proceedings under these statutes are in no sense on-the-record proceedings.

2. The courts should tailor the scope of their judicial review to the nature of these actions and proceedings. Accordingly, the exercise of presidential discretion and the sufficiency of Commission advice should be excluded from the scope of their review of actions under section 336 of the Tariff Act of 1930, under section 22 of the AAA, and under the escape-clause provisions of the Trade Expansion Act of 1962. Likewise, the "substantial evidence" rule is inappropriate as a standard for review of the determinations of the Secretary and the Tariff Commission under the Antidumping Act. It is also inappropriate with respect to judicial review of the advice of the Commission and the determinations of the President under section 336, section 22, and the escape clause. With respect to these latter statutes, judicial review

²¹⁶ While there is little question that major changes are called for in the substantive provisions that have been considered and in the prevailing statutory procedures for judicial review, it cannot be the purpose of this article to discuss what these changes should be; that analysis warrants separate treatment.

should be limited to a consideration of whether there has been compliance with the statutory mandates involved. So far as the Antidumping Act is concerned, the scope of review should be whether there is a rational basis in law for the determinations of the Secretary and the Tariff Commission.

As for section 337, there is little question that the exercise by the CCPA of the extrajudicial revisory function provided for therein is incompatible with its status as a constitutional court. The CCPA and Customs Court should decline to exercise this function even if the President's discretion is challenged pursuant to the general review provisions of the Tariff Act of 1930. By failing to follow this course, they will be inviting reversal by the Supreme Court.

3. If and when the Customs Court and the CCPA determine that there is non-compliance with the statutory mandates involved in section 336, section 22, and escape-clause cases, or that there is no rational basis in law for the determinations under the Antidumping Act, they should remand the matter for, or hold it pending, a proper disposition by the administrative officials involved, and not substitute their judgment for that of the officials charged with administration of the laws. Import restrictions and dumping determinations have been consigned by the Congress to the President, the Secretary, and the Commission.

4. The courts should make greater use of the principles of *res judicata* and *stare decisis*. The Supreme Court's rationale for the non-application of the principle of *res judicata* in customs jurisprudence was addressed to the question of the classification of merchandise, the question most often presented in litigation before the Customs Court and CCPA. This rationale has no applicability to the validity of a presidential proclamation or a dumping finding of the Secretary of the Treasury. The greater use of these principles in conjunction with the recent changes in the statutory procedures for judicial review could result in a more efficient disposition of many cases.

It cannot be expected, in view of the past performance of these courts, that a major transformation in the judicial process in this area of foreign trade regulation will occur even if these suggestions are accepted and applied. After all, the relevant body of case law has evolved over a period of almost fifty years, and the more recent opinions of these courts are no less confusing than their earlier ones. Nonetheless, pending a major overhaul of the substantive and procedural provisions of the statutes, these changes in approach to the judicial review of actions under the trade statutes would be beneficial to the public interest.