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CHANGES UNDER THE CUSTOMS PROCEDURAL REFORM AND SIMPLIFICATION ACT

JAMES S. O'KELLY*

The extensive changes made in section 592 of the Customs Procedural Reform and Simplification Act of 1978¹ are certainly a timely and appropriate subject for a conference of tariff and trade lawyers. I think it is fair to say that most would agree that by 1978 a complete overhaul of section 592 was urgently needed and long overdue. As a nation of laws, and one which for years has encouraged open and fair trade among nations, we could no longer suffer a statute that mandated the assessment of massive penalties for both serious and minor violations of the Customs laws, or a system of enforcement unfettered by legal standards or guidelines and lacking in effective judicial review.² This Article will analyze the changes wrought by section 592 by examining the previous state of the law and suggesting the potential impact the amendments will have.

SECTION 592(e)—JUDICIAL REVIEW

Of all the important changes brought about by the 1978 Act, as a lawyer I think the most significant change in the law is the provision for meaningful judicial review of penalty assessments. In order to appreciate fully the significance of section 592(e), one need only recall the state of the law prior to the 1978 Act. Under old section 592, the degree of culpability of the alleged violator was not a factor in determining the amount of the penalty. In the eyes of the law, a negligent violation of the Customs entry laws was

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¹ Pub. L. No. 95-410, 92 Stat. 888 (codified in scattered sections of 15 & 19 U.S.C. (1982)). See generally 10 L. & POL'Y INT'L BUS. 1305, 1315-19 (1978) (discussion of the major changes made in § 592).

² See S. REP. NO. 95-778, 95th Cong., 2d Sess. 2, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 2211, 2213-14 [hereinafter cited as SENATE REPORT]; Dickey, *Customs, Fines, Forfeitures, Penalties and the Mitigation Procedures—Sections 592 and 618 of the Tariff Act of 1930*, 30 BUS. LAW. 299, 312 (1975).

treated no differently than a fraudulent one. There was but one level of penalty,³ and that was forfeiture of the merchandise or a penalty equal to its value.⁴ Similarly, the amount of revenue lost by the government as a result of a violation was not a factor in fixing the amount of the penalty. Forfeiture of merchandise, or a penalty equal to its value, was required "whether or not the United States shall or may be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise"⁵ Given that each entry of merchandise involving an allegedly false or fraudulent statement or document constituted a separate violation of the statute,⁶ combined with the repetitive nature of entries by companies regularly engaged in importing, it was not uncommon for penalty cases to involve numerous entries and penalty assessments in some cases reaching millions of dollars, for violations involving relatively small amounts of lost duties.⁷

Of course, under section 618 of the Tariff Act of 1930, the importer had the right to petition for mitigation of the amount of the penalty.⁸ Under this provision, the Secretary of the Treasury was authorized to mitigate or remit the penalty "upon such terms and conditions as he deems reasonable and just"⁹ What was reasonable and just under the circumstances was left solely to the discretion of the Secretary.¹⁰

³ See 19 U.S.C. § 1592 (1982); SENATE REPORT, *supra* note 2, at 2, reprinted in 1978 U.S. CODE CONG. & AD. NEWS at 2213; H.R. CONF. REP. NO. 95-1517, 2d Sess. 9, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 2249, 2252 [hereinafter cited as HOUSE CONFERENCE REPORT].

⁴ See Tariff Act of 1930, ch. 497, tit. 4, § 592, 46 Stat. 590, 750 (codified at 19 U.S.C. § 1592 (1982)) ("such merchandise, or the value thereof . . . shall be subject to forfeiture, which forfeiture shall only apply to the whole of the merchandise or the value thereof").

⁵ *Id.*

⁶ Cf. SENATE REPORT, *supra* note 2, at 1, reprinted in 1978 U.S. CODE CONG. & AD. NEWS at 2213 (each importation is a separate transaction requiring the filing of appropriate documents).

⁷ See, e.g., Dickey, *Survivals From More Primitive Times: Customs Forfeitures in the Modern Commercial Setting Under Sections 592 and 618 of the Tariff Act of 1930*, 7 L. & POL'Y INT'L BUS. 691, 694 n.13 (1975); Gerhart, *Judicial Review of Customs Service Actions*, 9 L. & POL'Y INT'L BUS. 1101, 1132 n.118 (1977). For a table of forfeitures presenting representative random cases, see Dickey, *supra*, at 703-05.

⁸ See Tariff Act of 1930, ch. 497, tit. 4, § 618, 46 Stat. 590, 757-58 (codified as amended at 19 U.S.C. § 1618 (1982)).

⁹ *Id.*

¹⁰ *Id.* (Secretary of the Treasury may remit or mitigate penalty of forfeiture if he finds no willful violation or the existence of other mitigating circumstances, upon such terms as he deems reasonable and just). In 1974, the Treasury Department published guidelines for use in determining whether to mitigate penalties. See 39 FED. REG. 39,061 (1974); Dickey,

If the importer was dissatisfied with the decision of the Customs Service on mitigation, he could refuse to pay the mitigated amount. The government then would be forced to file suit in a district court to collect the penalty.¹¹ However, the action in a district court would not be for the mitigated penalty, but, rather, for the statutory penalty of forfeiture value.¹² In addition, the court had no authority to review the amount of the penalty;¹³ if the court found that a violation had occurred, it was required to issue judgment for the full forfeiture value.¹⁴ This all or nothing approach to litigation greatly discouraged importers from rejecting the Customs decision on mitigation. For, faced with the possibility of having to pay the full forfeiture value in the event of an adverse decision in court, most importers agreed to pay the mitigated penalty, even though they may have believed the mitigated amount was excessive, or that no penalty should have been assessed at all.¹⁵

This all or nothing approach to judicial review of penalty assessments was roundly condemned by numerous witnesses at hearings held in the summer of 1976 by the Subcommittee on Trade of the Committee on Ways and Means of the House of Representatives.¹⁶ Indeed, a spokesman for the American Bar Association suggested that the procedures under the old section 592 might well be construed as placing an unconstitutional burden on the right to judicial review.¹⁷

Section 592(e), on its face, changes all of the foregoing. In pro-

supra note 2, at 308-09. These guidelines mandated consideration of, inter alia, large variations between the forfeiture values and the losses of revenue, the violator's cooperation in the investigation, the remedial action taken by the offender, prior records, and experience in importing. 39 FED. REG. 39,061 (1974); Dickey, *supra* note 2, at 308-09.

¹¹ See Dickey, *supra* note 2, at 311; Gerhart, *supra* note 7, at 1135.

¹² See, e.g., SENATE REPORT, *supra* note 2, at 2, reprinted in 1978 U.S. CODE CONG. & AD. NEWS at 2214; Dickey, *supra* note 2, at 311-12.

¹³ See, e.g., SENATE REPORT, *supra* note 2, at 2, reprinted in 1978 U.S. CODE CONG. & AD. NEWS at 2214; Dickey, *supra* note 7, at 701-02.

¹⁴ See *supra* notes 12-13 and accompanying text.

¹⁵ See Dickey, *supra* note 7, at 705 (mitigated amounts paid "more as an 'out of court' settlement than because importers believe[d] or concede[d] that they [were] justly payable"); 10 L. & POL'Y INT'L BUS. 1305, 1314 (1978) (businessmen generally not willing to take risk of total forfeiture attendant to pursuing judicial review).

¹⁶ See *Hearings on H.R. 9220 Before the Subcomm. on Trade of the House Comm. on Ways and Means, 94th Cong., 2d Sess. 400-01 (1976)* (statement of Marjorie M. Shostak [hereinafter cited as *Hearings on Trade*]; see also Gerhart, *supra* note 7, at 1134. The inescapable risk of total forfeiture as a consequence of seeking judicial review caused one commentator to refer to the procedures under § 592 as "administrative blackmail." Gerhart, *supra* note 7, at 1134.

¹⁷ See *Hearings on Trade, supra* note 16, at 191 (statement of Robert C. Herzstein).

viding for trial *de novo* of all issues, including the amount of the penalty,¹⁸ Congress mandated that there shall be effective and meaningful judicial review of penalty assessments.¹⁹ The court is no longer restricted to a simple determination of whether there has been a violation of the statute. It may now look into all aspects of the case, including: whether a violation has been committed, the degree of culpability of the violator, and the appropriateness of the amount of the penalty to be assessed.²⁰

Given this understanding of the wrong that Congress sought to correct, the question arises whether the government should be limited in the amount of penalties it may demand in an action in court. I suggest two such limitations. First, the government should not be permitted to plead a higher degree of culpability than that alleged at the administrative level. For example, if the penalty notice issued to the importer alleged a negligent violation of section 592, the government should be limited to a claim for penalties based upon negligence and should not be permitted to sue under theories of gross negligence or fraud. To suggest otherwise, I submit, would be tantamount to placing another deterrent on the right to judicial review—a result clearly not intended by Congress.²¹ Second, I think a case can be made for limiting the amount of the government's claim in court to the mitigated penalty. Under section 592(b)(2), at the conclusion of the mitigation proceedings, Customs is required to furnish the importer with a written statement that sets forth the final determination on mitigation, and the findings of fact and conclusions of law on which such determination is based.²²

¹⁸ 19 U.S.C. § 1592(e)(1) (1982); see HOUSE CONFERENCE REPORT, *supra* note 3, at 12, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 2249, 2255.

¹⁹ See, e.g., SENATE REPORT, *supra* note 2, at 3, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 2211, 2213-14.

²⁰ Cf. SENATE REPORT, *supra* note 2, at 2-3, reprinted in 1978 U.S. CODE CONG. & AD. NEWS at 2213-14; Dickey, *Customs: Fines and Forfeitures Under Section 592 of the Tariff Act of 1930—Revisited*, 35 BUS. LAW. 149, 152-54 (1979).

²¹ See SENATE REPORT, *supra* note 2, at 1-3, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 2211, 2212-14.

²² See 19 U.S.C. § 1592(b) (1982). According to the procedures set forth in § 1592, the appropriate Customs officers shall issue to the person concerned a written notice of his intention to issue a claim for a monetary penalty if he has reasonable cause to believe that there has been a violation. *Id.* § 1592(b)(1)(A). After that person is afforded a reasonable opportunity to make representations as to why a penalty claim should not be issued in the amount stated, the appropriate Customs officer shall determine whether a violation occurred in fact. *Id.* § 1592(b)(2). If it is determined that there was a violation and a penalty claim is issued, the person shall have a reasonable opportunity to make representations seeking re-

It seems clear that Congress intended the mitigation proceedings to be something more than a mere steppingstone or prerequisite to filing suit in court for collection of the penalty. Rather, what I suggest was intended was to provide a procedure at the administrative level under which the person charged with a violation could obtain a meaningful review of whether the violation alleged in the notice in fact occurred, and, if so, of the appropriateness of the penalty under the circumstances.²³ If, after consideration of the importer's petition, the government determines that, on the basis of the facts and law, a penalty in an amount less than the maximum penalty should be assessed against the importer, simple fairness dictates that the government's claim in court should be limited to the amount of the mitigated penalty. Such a limitation would be consistent with the intent of Congress that the government not automatically seek the maximum penalty in every case.²⁴

SECTION 592(D)—RESTORATION OF LAWFUL DUTIES

Like most of current section 592, subsection (d) is new. On its face, it directs Customs to require the restoration of duties lost as a result of a violation of section 592, regardless of whether a penalty is assessed.²⁵ The concept of requiring the importer to pay the

mission or mitigation of the penalty assessed. *Id.* The Secretary of the Treasury has the discretionary authority to remit or mitigate the penalty of forfeiture. *Id.* § 1618; *see supra* note 10 and accompanying text. At the conclusion of a proceeding under § 1618, the appropriate Customs officer shall provide to the petitioning party a written statement that sets forth the final determination and the underlying findings of fact and conclusions of law. *Id.* § 1592(b)(2).

²³ *See* 19 U.S.C. § 1618 (1982); *supra* notes 10, 22 and accompanying text; *see also* HOUSE CONFERENCE REPORT, *supra* note 3, at 2253-54, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS at 10-12.

²⁴ *See, e.g.,* SENATE REPORT, *supra* note 2, at 21, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS at 2232. The Report of the Senate Finance Committee makes clear that Congress intended that the government should not seek the maximum penalty in every case.

The committee expects the Customs Service to examine the circumstances surrounding each offense before determining the amount of penalty assessed in a penalty claim. The maximum penalties in the revised section 592 are ceilings. Customs should not automatically issue a penalty claim for the maximum amount in each case. Further, the committee emphasizes that the appropriateness of the amount of the penalty is a proper subject for judicial review under new section 592(e).

Id.

²⁵ 19 U.S.C. § 1592(d) (1982). Section 592(d) provides that "if the United States has been deprived of lawful duties as a result of a violation . . . the appropriate customs officer shall require that such lawful duties be restored, whether or not a monetary penalty is assessed." *Id.*

loss of revenue in a section 592 proceeding is not new. Indeed, it had long been the practice of the Customs Service under old section 592 to require the payment of lost duties as a condition of mitigation of the penalty.²⁶ I question whether Congress, in codifying this administrative practice in section 592(d), also intended to create a new cause of action for duties that could be enforced in court.

I suggest that Congress did not intend such a result for the following reasons. First, under prior law, there was no provision for collection of duties lost by the government as a result of a violation of section 592. Unless, by chance, the entries involved in a penalty proceeding had not been liquidated, there was no mechanism for the government to force an importer to pay the lost revenue.²⁷ The rule of section 514, that once an entry had been liquidated and no protest had been filed by the importer, liquidation and the amount of duties assessed on the entry became "final and conclusive upon all persons, including the United States and any officer thereof," was strictly enforced.²⁸ There were only two exceptions to this rule: first, section 520(c),²⁹ which authorized Customs to reliquidate an entry within one year to correct clerical errors adverse to the importer, and, second, section 521,³⁰ which authorized Customs to reliquidate an entry within two years if there was probable cause to believe that fraud had been committed in the case. The strong

²⁶ See *infra* note 28 and accompanying text.

²⁷ See SENATE REPORT, *supra* note 2, at 3, reprinted in 1978 U.S. CODE CONG. & AD. NEWS at 2230; H.R. REPORT No. 621, 95th Cong., 1st Sess. 16 (1977). The Senate Report stipulated that "the nature of the offense [was] intended to remain the same as [it was] under present law." SENATE REPORT, *supra* note 2, at 3, reprinted in 1978 U.S. CODE CONG. & AD. NEWS at 2230. According to the report to the Ways and Means Committee, § 592(a) set out the only causes of action that could be brought against an importer under the new section; such actions were enumerated as fraud, gross negligence, and negligence. See H.R. REPORT No. 621, 95th Cong., 1st Sess. 12 (1977). The purpose of section 592(d), however, was to codify an existing administrative practice. See *id.* at 16; *infra* note 28 and accompanying text. Sections 592(a) and 592(d), taken together, thus suggest that the purpose of 592(d) was to ensure the payment of lost revenue at the administrative level, rather than to create a violation for which the government could bring a separate cause of action.

²⁸ See H.R. REP. No. 621, 95th Cong., 1st Sess. 16 (1977). The purpose of § 592(d), as stated in the report of the Ways and Means Committee, was to "codify the existing administrative practice of mitigating claims for forfeiture value on condition that any loss of revenue is deposited with the United States . . . even where Customs may not wish to assess a penalty (for example, with petty or technical violations), but nevertheless, wishes to recover lost revenues." *Id.*

²⁹ Tariff Act of 1930, ch. 497, tit. 4, § 520(c), 46 Stat. 590 (codified at 19 U.S.C. § 1520(c) (1976)).

³⁰ *Id.* § 521.

public policy of requiring that there be finality to liquidations of Customs entries was strictly enforced by the Court.³¹

Second, the legislative history of subsection (d) suggests that Congress did not intend to create a new cause of action. The hearings before the Subcommittee on Trade elicited testimony and written submissions from over 100 individuals and associations. A number of witnesses submitted draft bills to the committee for this purpose; however, none of these draft bills included a provision like section 592(d) calling for the restoration of lost duties.³² The report of the hearings exceeds 500 printed pages, and yet there does not appear to have been any testimony on the need for a new cause of action for lost duties. The only reference in the legislative history to subsection (d) is the following brief statement in the report of the Committee on Ways and Means:

Under section 592(d)(4), the intent is to codify the existing administrative practice of mitigating claims for forfeiture value on condition that any loss of revenue is deposited with the United States. This covers cases where Customs may not wish to assess a penalty (*e.g.*, with petty or technical violations), but nevertheless, wishes to recover lost revenue.³³

I submit that this is hardly a ringing endorsement for the creation of a new cause of action for lost revenue.

Congress' peculiar choice of words in section 592(d) is a third reason to believe no new cause of action was intended. The statute directs that the "appropriate Customs officer" shall require that the lawful duties be restored.³⁴ Such language seems more in the nature of an instruction to Customs in the performance of its administrative functions than the establishment of a claim for such duties that could be enforced in court.

There is also a problem of possible retroactive taxation that must be considered. If Congress has, in fact, created a new cause of action for duties under subsection (d), the language of the statute appears to place no limit on the government's ability to reach out and seek to collect duties on entries that had been made, liquidated, and become final long before the enactment of section

³¹ See Gerhart, *supra* note 7, at 1115-18. The Customs Court will grant the import specialist a presumption that the value of the liquidated merchandise is correct. *Id.* at 1115.

³² See *Hearings on Trade, supra* note 16.

³³ H.R. REP. No. 621, 95th Cong., 1st Sess. 16 (1977).

³⁴ 19 U.S.C. § 1592(d) (1982).

592(d).³⁵ Clearly, the government sees no limitation on its ability to collect additional duties on entries that became final before the enactment of the 1978 amendments. In *United States v. Ap-pendagez, Inc.*,³⁶ the government sought to collect duties in excess of \$600,000 on entries filed during the period from February, 1974 to September, 1978.³⁷ Given the public policy in support of the finality of liquidation,³⁸ one would expect that such a fundamental change in that policy would engender at least some debate or discussion on the public record.

Lastly, the government undoubtedly will assert that the recent decision of the Court of International Trade in *United States v. Carl Ross*³⁹ stands for the proposition that the government has a judicially enforceable claim for duties under section 592(d). I disagree. The issue before the Court in *Ross* was whether the provisions of section 592(b), relating to the issuance of pre-penalty and penalty notices at the administrative level, were applicable to claims for duties under subsection (d). The Court held that the notice requirements of subsection (b) applied only to penalty claims under subsection (c), and not to duty claims under subsection (d). The Court did not rule, nor did the importer defendant raise the issue, on whether Congress created a new cause of action for duties under section 592(d). Let us not attempt to close doors

³⁵ See 19 U.S.C. § 1592(d) (1982). Section 592(d) provides that, notwithstanding § 514 of the Act, which in part finalizes the appropriate Customs officer's orders and findings concerning the rate and amount of duties chargeable, see 19 U.S.C. § 1514 (1982), lost duties may be recovered after liquidation, see *id.* § 1592(d). The failure of Congress specifically to limit the time during which lost revenues may be collected under this statute has provided the impetus for the government's claims for additional duties on entries finalized prior to the enactment of the Customs Procedural Reform and Simplification Act.

³⁶ 560 F. Supp. 50 (Ct. Int'l Trade 1983).

³⁷ See *id.* at 55 (plaintiff United States conceded that statute of limitations had expired on claim for penalties on entries made 5 years earlier, but claimed "causes of action for the increased customs duties were not time barred").

³⁸ See, e.g., R. STURM, CUSTOMS LAW AND ADMINISTRATION 63 (1980) (liquidation is "the final reckoning of the importer's liability on a specific entry, including regular and special duties"). But see 19 C.F.R. § 162.79(b) (1984) (regulation requires deposit of any actual loss of duties notwithstanding a final liquidation of the entry under scrutiny).

It should be noted, however, that the 1978 amendments did render a significant transformation in the form of action, from *in rem* to *in personam* proceedings. See *United States v. Quintin*, No. 84-33, slip op. at 5 (Ct. Int'l Trade April 3, 1984); HOUSE CONFERENCE REPORT, *supra* note 3, at 10, reprinted in 1978 U.S. CODE CONG. & AD. NEWS at 2252. Since the action is no longer predicated on seizure of the merchandise, but may be brought against the importer directly, it may be argued that the finality of a liquidation is no longer a critical factor for *in personam* proceedings.

³⁹ No. 83-124, slip op. (Nov. 28, 1983).

before they have been opened!

In view of the above, I suggest that Congress did not intend to create a new cause of action for duties under subsection (d). Rather, as the Ways and Means Committee Report suggests, subsection (d) was merely intended as authority for Customs to continue to require the payment of lost duties as a condition of mitigation.⁴⁰ Once the mitigation process has run its course, and the case goes before the Court, as under old section 592, the government's action is limited to a claim for a monetary penalty.⁴¹ The question of lost duties is important only to the extent that it has a direct bearing on the amount of the penalty.⁴²

If the government's interpretation of the statute is correct, however, and Congress did create a new cause of action for lawful duties under § 592(d), there seems to be a serious question about whether there is any statute of limitations controlling the government's ability to institute an action for so-called "lawful duties."⁴³ In at least two pending cases—*United States v. Appendagez*⁴⁴ and *United States v. RCA*⁴⁵—the government has taken the position that there is no statute of limitations governing section 592(d), and that an action for lawful duties may be brought at any time. To

⁴⁰ See *supra* notes 27-28 and accompanying text.

⁴¹ See 19 U.S.C. § 1592(e) (1982). Section 592(e) provides for judicial review of the penalty, whether remitted or not under § 618, without fear of forfeiture if the action were resolved against the defendant. See Dickey, *supra* note 20, at 156-57. Such judicial review, however, is limited to the monetary penalties imposed under § 592(c) or § 618, and is not applicable to the lost revenue. See 19 U.S.C. § 1592(e) (1982).

⁴² See 19 U.S.C. § 1592(c) (1982) (maximum penalties that can be assessed for customs violation). Regardless of the violator's state of mind, the civil penalty may not exceed the domestic value of the merchandise. *Id.* However, the penalty may be less, depending on the amount of duties that are owing. For example, the penalty for a grossly negligent violation is limited to the lesser of the domesticated value of the merchandise or four times the lawful duties of which the government has been deprived. *Id.* § 1592(c)(2).

⁴³ See C.S.D. 81-223, 15 Cust. B. & Dec. 33-34 (1981). Although the time period for challenging liquidation may expire under 19 U.S.C. § 1504 (1982), Customs retains the authority, pursuant to section 592(d), to require payment of lost duties. 2 R. STURM, CUSTOMS LAW AND ADMINISTRATION 10, 30 (3d ed. 1984). Whether this payment is subject to the same statute of limitations as actions under § 592(a) is not clear from the legislative history. Customs Procedural Reform Act of 1977, *Hearings on H.R. 8149 and H.R. 8222 Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 95th Cong., 1st Sess. 57 (1977) [hereinafter cited as *House Hearings*]. As a result, the Customs Service construed the statute as permitting the Government to collect all duties not previously collected, arising out of a § 592 violation, "even though liquidations of the entries had become final under another provision of law (whether or not a monetary penalty is assessed) limited only by the 5-year statute of limitations." *Id.*

⁴⁴ 560 F. Supp. 50 (Ct. Int'l Trade 1983).

⁴⁵ No. 80-933-C, slip op. (S.D. Ind. Dec. 16, 1983).

support this position, the government cites two nineteenth century district court cases for collection of duties assessed in liquidations of Customs entries. The *Appendagez* case is currently pending in the Court of International Trade, while the *RCA* case was instituted prior to the Customs Courts Act of 1980, and is currently in the United States District Court, Southern District of Indiana. Both courts have rejected the government's position, although apparently for different reasons.

In the *RCA* case, the District Court held that section 621 of the Tariff Act applied to both penalty and duty claims under section 592,⁴⁶ and that such claims must be instituted within the applicable 5 year period of limitations.⁴⁷ In contrast, the Court of International Trade in *Appendagez* appears to have applied a much stricter limitation to section 592(d) actions.⁴⁸ The *Appendagez* Court held that, in the case of fraud, a claim for lawful duties must be asserted within 2 years of the date of liquidation of the entry, citing section 521 of the Tariff Act,⁴⁹ and, citing section 514 of the Act, within 90 days of liquidation in an action not founded upon fraud.⁵⁰

Although I do not intend to argue for either of these positions, I suggest that there should be some limitation on the government's ability to sue for duties under section 592(d). I further suggest that the government's reliance upon so-called collection cases that came before the district courts in years past is misplaced. While it may be true that cases such as *United States v. Leng*⁵¹ and *United States v. Comarota*⁵² stand for the proposition that the government can institute a suit at any time for the collection of duties assessed in liquidation, an action for duties under section 592(d), by definition, does not involve duties assessed in liquidation. Rather, a claim for duties under subsection (d) concerns duties not

⁴⁶ *Id.* at 11-12.

⁴⁷ *Id.* at 6.

⁴⁸ See *infra* note 49 and accompanying text.

⁴⁹ See 560 F. Supp. at 55. The Court allowed the action for fraud to be brought based, not on § 621, but on § 521, which allows a Customs officer to reliquidate duties because of fraud as long as the action is commenced within 2 years of the date of liquidation or of last reliquidation. See *id.*; 19 U.S.C. § 1521 (1982).

⁵⁰ 560 F. Supp. at 55. The Court noted that if an action were not based on fraud, then the applicable statute of limitations would be § 514(c)(2)(A), which requires the Customs officer to commence the action within 90 days after notice of liquidation or reliquidation. See *id.*; 19 U.S.C. § 1514(c)(2)(A) (1982).

⁵¹ 18 F. 15 (S.D.N.Y. 1883).

⁵² 2 F. 145 (S.D.N.Y. 1880).

assessed in liquidation, allegedly because of a violation of the statute, which is being asserted at a point in time when the liquidation and the amount of duties assessed on the entry have become final.⁵³

The public policy behind statutes of limitations reflects the basic notion of fairness that litigants and courts should not be involved in cases in which the search for the truth may be seriously impaired by the passage of time.⁵⁴ Since Congress has seen fit in section 621 to limit the ability of the government to institute an action for penalties under section 592,⁵⁵ it seems reasonable similarly to limit actions for duties allegedly lost as a result of such violations. An importer would be no less impaired by the passage of time in defense of a claim for duties under section 592(d) than he would in defense of a claim for penalties under section 592(c).⁵⁶

Finally, the government's position on the statute of limitations appears to conflict with the Customs Policies and Procedures Manual.⁵⁷ In a supplement issued on September 17, 1982, the Commissioner of Customs issued the following instructions with respect to section 592(d):

A demand shall not be made for recovery of lawful duties if the violation in respect of which the duties were incurred was due to gross negligence or negligence and if the demand would be issued 5 years or more after the violation; or, if the violation was due to fraud, the demand would be made 5 years or more after

⁵³ See 15 Cust. B. & Dec. 30, 30-31 (1981); see also H.R. REP. No. 8149, 95th Cong., 1st Sess. 57 (1977) (§ 592 violation limited only by 5-year statute of limitation even though liquidation of entries had become final under any other provision of law).

⁵⁴ See, e.g., *United States v. Kubrick*, 444 U.S. 111, 117 (1979); *Burnett v. New York Cent. R.R.*, 380 U.S. 424, 428 (1964); *United States v. R.I.T.A. Organics, Inc.*, 487 F. Supp. 75, 78 (1980).

⁵⁵ See 19 U.S.C. § 1621 (1982). Section 621 provides:

No suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs laws shall be instituted unless such suit or action is commenced within five years after the time when the alleged offense was discovered: *Provided*, That in the case of an alleged violation of section 1592 of this title arising out of gross negligence or negligence, such suit or action shall not be instituted more than five years after the date the alleged violation was committed . . .

Id.

⁵⁶ See *United States v. R.C.A.*, No. 80-933-C, slip op. at 11 (S.D. Ind. Dec. 16, 1983) (Court noted that time periods otherwise available to customs were more restrictive than 5-year statute of limitations found in § 1621). This view makes sense in light of the fact that the recovery of duties is independent of any assessment of a monetary penalty, see 19 U.S.C. § 1592(d) (1982), and that the statute makes no distinction between actions for duties and penalties, see *id.* § 1621.

⁵⁷ Customs Policies and Procedures Manual, Supp. No. 4400-09, issued Sept. 17, 1982.

the date on which the violation was discovered by Customs. Absence of the violator from the jurisdiction of the United States for any period would increase the period in which a demand for withheld duties can be made, by the length of the period of absence.⁵⁸

I suggest that it is clear that the Commissioner's choice of words was influenced by the provisions of section 621.

VOLUNTARY DISCLOSURES

On January 13, 1984, the Customs Service issued amendments to the regulations governing the administrative handling of penalty cases under section 592. While much can be said about the amended regulations, I will briefly comment upon only two points, both of which have to do with importers' voluntary disclosures of violations of section 592.

Since 1982, and continuing under amended section 162.74 of the regulations, undisclosed violations discovered by Customs in the course of an investigation of a prior disclosure by an importer of another violation will not be entitled to treatment under the prior disclosure provisions.⁵⁹ This is a significant departure from past practice, and, more importantly, from the practice that was in effect at the time Congress endorsed in section 592(c)(4) the Customs' program of encouraging importers to come forward and voluntarily disclose violations. In the past, such undisclosed violations discovered in the course of an investigation of a voluntary disclosure were entitled to treatment in the same manner as if voluntarily disclosed, except in cases in which the undisclosed violations were intentional when committed.⁶⁰ This departure from past practice is not only self-defeating, but, I submit, also raises the possibility of an attempt to limit the scope of the statute by regulation.

In addition, while a prior disclosure of a violation limits an importer's liability for civil penalties, there is no such limitation with respect to criminal penalties.⁶¹ Within the last two years,

⁵⁸ *Id.*

⁵⁹ See 19 U.S.C. § 1592(c)(4) (1982). Under the current law, the importer is entitled to favorable treatment for penalty assessment only in instances in which disclosure is made before, or without knowledge of, the commencement of a formal investigation. *Id.* § 1592(c)(4). In addition, the burden of proof in establishing lack of knowledge of the commencement of an investigation is on the person asserting such lack of knowledge. *Id.*

⁶⁰ See 19 C.F.R. § 171.1(a)(2) (removed); Dickey, *supra* note 2, at 303.

⁶¹ See 18 U.S.C. §§ 542, 545 (1982). Although prior disclosure does not limit the applicable criminal sanctions, if a criminal action is brought the civil proceedings will be tempo-

there have been a number of cases in which voluntary disclosures have led to presentations to grand juries resulting in the issuance of indictments.⁶² This situation obviously makes it far more difficult for lawyers to advise clients to disclose past violations of the law voluntarily.

rarily suspended. 19 C.F.R. § 171.2(a) (1978).

⁶² See, e.g., *United States v. Ackerman*, 704 F.2d 1344 (5th Cir. 1983); *United States v. Fifty-Three (53) Eclectus Parrots*, 685 F.2d 1131 (9th Cir. 1982); *United States v. Teraoka*, 669 F.2d 577 (9th Cir. 1982).