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9-11's Impact on the Practice of Customs Laws

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INTRODUCTION

This paper presents a look at the impact 9-11-2001 had on the practice of the Customs laws, as seen from the perspective I had as the Attorney in Charge of the International Trade Field Office, Civil Division, United States Department of Justice (ITFO). Although I retired from that position on January 2, 2002, I have remained an active member of the Advisory Committee of the United States Court of International Trade. Among other activities, I have been involved in several public service projects related to the Court, the Customs and International Trade Bar Association.

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The author was also an agency representative to the New York Federal Executive Board. The NYFEB was responsible for establishing and implementing the policies and steps taken by the agencies headquartered in lower Manhattan to restore and maintain normal operations in the aftermath of the September 11, 2001, attack on the World Trade Center and Civic Center complexes and surrounding areas and to develop plans and procedures for implementing changes warranted in the post 9-11 period.

The views expressed herein are those of the author and are not necessarily those of the United States or the Department of Justice. This paper was presented as an adjunct to his participation on a panel discussion, held on November 13, 2002, in New York City, at the occasion of the 12th Judicial Conference of the USCIT.

1 When available, this paper includes hyperlinks to enable those reviewing it on CD-Rom to directly access many of the references I cite here by using a browser linked to the Internet.
I begin my presentation with a personal look at the first few days that followed September 11, 2001, when lower Manhattan was attacked when two planes, acting as missiles, collided into the World Trade Center (WTC). That attack resulted in tremendous loss of human life, injuries, both physical and mental, to people in the immediate and surrounding areas, and immeasurable physical, economic and emotional disruption of businesses, schools, residential buildings and government offices in the area, city, region and the whole nation. Then, I will turn my telescope on the legal issues that practitioners faced at the time and consider the longer range impact the period may have on disputes that have yet to ripen. Two other attacks that day, in Washington, D.C., and Pennsylvania, caused significant loss of life, injuries and economic harm to the nation.

I have not intended this paper to be an exposition of steps that lawyers, both in the private and public sector, may take to compensate for deficiencies in their disaster recovery plans. Those issues, particularly as they may relate to the private sector, I believe another speaker on this panel intends to discuss. Other groups have already covered some of those same issues in several public forums and publications. Additionally, any new preparedness steps the Department of Justice and the Executive Branch may be taking, should be discussed, if at all, by proper representatives.

I also expect that another panel speaker will examine some operational and regulatory steps the Customs Service took, on local, regional and national levels, to adjust to the destruction of the New York City Customs House (6 World Trade Center). That speaker may also touch upon other changes the Customs Service has made in light of Homeland Security.

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3 Many articles report the efforts being undertaken by the Federal government to safeguard our nation's infrastructure. See, e.g., Joshua Dean, Systems Failure, GOVERNMENT EXECUTIVE MAGAZINE, Feb. 2, 2002, at http://207.27.3.29/features/0202/0202s2.htm (last visited June 29, 2003).

4 See And then Tuesday Happened..., U.S. CUSTOMS TODAY, Sept. 2001 (showing pictures of the smoldering ruins of 6 WTC and reporting the efforts by the Customs Service to regroup and reestablish operations in the New York City area), at http://www.customs.gov/xp/CustumsToday/2001/September/ (last visited June 29, 2003); Kathleen Miller, "I hope you find a lot of people", U.S. CUSTOMS TODAY, Mar. 2002
Commissioner Bonner repeated his commitment to insuring that the Customs Service meets its new Homeland Security responsibilities while retaining a focus on its traditional roles to manage and facilitate international trade. I will examine some steps the Customs Service took that have immediate discernable legal consequences on the Customs laws in litigation before the United States Court of International Trade (USCIT).

I conclude with some forecasts for the future. I also attach an epilogue. I dedicate it to the memories of the many innocent people, who lost their lives on 9-11, the heroic rescuers, and the dedicated public servants in the United States Department of Justice, the United States Customs Service and our Federal courts. Those career individuals tirelessly work to insure that the rule of law governs, justice prevails and the freedoms our laws were enacted to protect endure.

DAY ONE, SEPTEMBER 11, 2001

On September 11, 2001, at approximately 8:35 A.M., I began my workday at ITFO, whose offices are in New York City at the Jacob Javitts Federal Building (26 Federal Plaza). A few minutes before 9:00 A.M., I telephoned the Office of the Clerk of the USCIT and was informed that Mr. Gordon could not take my call. His assistant told me he called to say he was unable to get to the USCIT due to a plane accident at the World Trade Center (hereinafter “WTC”). I spoke with a colleague who advised me that news reports said a large plane had hit one of the two towers of the WTC. Considering the news, I departed my office and walked a few blocks south, so I could have an unobstructed view.


I cannot erase the impact of what I observed from my memory. After lingering, no doubt for too long, I walked slowly back to the courthouse and was informed that security had ordered us to evacuate the Javitts Federal Office Building and USCIT courthouse complex.

I went to my office, sent a brief email: "Mayday! Mayday! Evacuate Now!" walked through the suite and told the one staff member who I found there to leave, and left. I sent my message throughout the two offices of the Department of Justice that I was responsible for overseeing in the building, and a copy went to several key personnel in Washington, D.C. I added in my message that I expected to return to my home and provided my home telephone number and home email address.

I was not able to reach my home until late that evening. Upon my arrival at home, I sent an email to the Director of the Commercial Litigation Branch and several key officials in Washington, D.C. I believed that they would help with efforts I would undertake to locate and account for all our New York City personnel, and reestablish our operations, when practical.

DAY TWO

Although I always kept the telephone numbers of my office personnel at home, apparently one or two numbers were not current, and I only had a few home email addressees. With one or two exceptions, I was able to contact everyone by telephone by mid morning, on September 12, 2001. As a result, I received email addresses and new phone numbers. This enabled me to contact everyone by the end of the day, or at least confirm that everyone from my office was safe.

We of course never realized how valuable the Internet would be for making and maintaining efficient contact with all staff. This enabled me to assess the resources that all professional and support staff had at their disposal in their own homes. Using my personal email and Internet connections, Washington personnel could forward to me essential information and provide copies of important documents. I determined that if we could not resume operations at Federal Plaza that we could perform some essential work from our individual homes. Therefore, I developed a plan to
establish three regional home centers where colleagues could work together, when appropriate.

By the following day, I was also in telephone and email contact with the President of the Customs and International Trade Bar Association, the Clerk of the Court, and my counterparts in the Customs Service. Besides offering whatever assistance I could provide to private firms affected by 9-11, we discussed the severe impact 9-11 had upon several private firms, the Customs Service and my own office’s operations. I initiated discussions with the President of the Bar and the Clerk. Those discussions included the appropriateness of a blanket stay motion and other alternatives.

**DAY FOUR AND THE NEXT TWO WEEKS**

By September 14, 2001, when available government resources and personnel, along with the private sector efforts, could apparently not restore normal operations in lower Manhattan for some indefinite time, I had reached a consensus within the Department of Justice and obtained the unanimous support of the Board of the Directors of the Bar Association to orally move the USCIT, through the Clerk of the Court, for a stay of all proceedings in the Court.

We proposed that proceedings be stayed until two weeks after the Department of Justice reopened its New York City ITFO office, based upon the date the New York Federal Executive Board would establish for resuming operations at the Javitts Building. Based upon the exchange of messages the President of the Bar Association and myself had with the Clerk of the Court, neither the President of the Bar Association nor myself had any reason to think that the Court would not favorably act upon the motion.

The Clerk of the Court informed me the following week that although the Javitts Building was not going to reopen to staff and public for several more days, the USCIT was going to open its doors Wednesday, September 19, 2001. The Court made this decision although telephone service to the courthouse and Javitts Building and other communication devices: Internet, email and facsimile, were not yet operational. The Postal Service and the GSA contractor responsible for delivery of the mail had not
restored mail service. The Clerk also advised me that the Court had denied the application for a stay.  

The Court reopened Wednesday, September 19, 2001. The Javitts Federal Building was first reopened to employees, including ITFO personnel Monday, September 24, 2001. The Javitts Federal Building was not accessible to the public for several more days. The surrounding areas were under military patrol. Restricted zones severely limited public transportation, and commercial and controlling authorities did not permit vehicles in the area.

Health professionals advised that time would be needed by employees to heal and cope with the aftermath of the disaster. Also, the lack of telephone service and the T-1 link between the Department of Justice’s ITFO and Washington, D.C., meant many essential tools needed to operate safely and effectively were not yet restored. We did not have any email communication, electronic legal research or access to the electronic Department of Justice records and files not kept on local databases. Thus, while offsite electronic backup was present, the need for a redundant T-1 data link and regular voice communications was plainly evident. Additionally, although access to the building was

6 I had met with the Chief Judge of the Court and the Clerk of the Court at a special meeting of Federal Executive Board, held in a secure, secret location. There, we were briefed on the conditions in lower Manhattan and some steps the General Services Administration and Federal Emergency Management Agency were going to take to restore services to the lower Manhattan area. Issues of a temporary morgue in front of the courthouse and the possibility of getting one or two cell phones for each agency were among the topics discussed at the meeting. Further details regarding the GSA efforts in lower Manhattan are described in an article, written by Timothy B. Clark, Shane Harris & Tanya N. Ballard, GSA Chief Praises Employees for Reaction to Attacks, GOVERNMENT EXECUTIVE MAGAZINE, Sept. 20, 2001, at http://207.27.3.29/dailyfed/0901/092001gsa.htm (last visited June 29, 2003).

7 I was not privy to the judges’ deliberations. I can only speculate that some judges were anxious to display that our government and the Court were prepared to return to normal. It is also possible that, because the Court serves other parts of the country, which the terrorists did not impact the way they affected New York City, some judges believed that it was necessary to immediately service that constituency, although that constituency, through its bar associations representatives, had supported the motion made by the Department of Justice. The judges would later learn that conditions were much worse, perhaps, than they understood, and cooperated fully with the individual requests for extensions and continuances; the Court either proposed or accepted other accommodations.

8 While not necessarily a problem in the wake of the WTC disaster recovery efforts, responsible commentators have recognized that more needs to be done to develop a universal format that will permit contemporary computer devices to read computer software and access hardware that is now considered obsolete. See Anne Eisenberg, A Universal Tool to Rescue Old Files From Obsolescence, N.Y. TIMES, Aug. 29, 2002, at G7.

9 Even organizations that had redundant lines and services of different carriers, soon
available, in part due to the steps taken by the GSA to isolate the building's atmosphere immediately after the terrorists attacked the area, many issues relating to internal and external safety of the environment and the security of building's perimeter were ongoing disruptions of normal activity.

The United States District Court, Southern District of New York, whose offices are across the street from the USCIT issued an order on September 21, 2001, invoking Rule 6 of the Federal Rules of Civil Procedure (FRCP),10 which is comparable to USCIT R. 6,11 and declared that the district court was inaccessible from September 11, 2001 to September 26, 2001. This omnibus order made the due date for any filings due between those dates, including appeals, due on September 26, 2001.12 Additionally, the order provided that the district court deemed them filed on September 26, 2002. This shifted the time in which action may have been required, based upon the date of filing. Although not applicable to the Federal courts, the Governor of the State of New York suspended the statute of limitations on civil and criminal judicial proceedings and deadlines for filing appeals.13 Thus, the Court required practitioners in the USCIT to begin filing motions for extensions of time or motions to be relieved of any defaults as of September 19, 2001, several days before the ITFO reopened. I discuss the impact of this event later.

APPROXIMATELY ONE MONTH AFTER THE ATTACK

Communications specialists had restored Internet and email service about a week ago, two cell phones and 30% of the regular

learned that most of those lines went through the central switching station located at the WTC complex and therefore many backup communication facilities expected to be available were also destroyed.

10 FED R. CIV. P. 6 (a) (allowing for delays in filing papers due to inaccessibility of the clerk in district court).
11 CT. INT'L TRADE R. 6 (a) (excusing delays in filing requirements while the clerk is unavailable).
telephone lines were operational, with remaining phones to be restored over the next three months, sporadically. The Postal Service and the CASU Mail Center had restored mail service, although they would later interrupt it due to the anthrax threat. Controlling authorities and security personnel were allowing overnight courier service to resume. The conditions in the building changed daily: foul odors, bomb scares, rumors and stress became part of daily life. The threat of anthrax-tainted mail would soon disrupt the fragile appearance of a return to normal operations.

DECEMBER 2001

For the most part, all ITFO operations had returned to full capacity. A new number eventually replaced one phone line that the commercial provider never restored. The Federal Protective Service had increased building and perimeter security with temporary and permanent changes. In the eyes of some, the practice of law, as it relates to the Customs Law, had returned to its pre 9-11 state.

THE CUSTOMS LAW LEGAL ISSUES 9-11 PRESENTED

The immediate impact 9-11 had on the administration of the Customs laws was the interruption of access to government buildings, in particular 6 WTC, and other Federal buildings closed or otherwise inaccessible on, during and after the attack. In addition, the offices of many private and government attorneys, and the USCIT were either closed or inaccessible. Finally, the infrastructures that people rely upon to create, transmit, deliver, receive, process and store information or perfect compliance with legal requirements were either interrupted, destroyed or unavailable.

I am not aware of any Federal statute that has the legal effect of tolling or extending the time for performing legal acts that had to be done in the period in issue. I am also not aware of any general regulation or ruling issued by the Customs Service that would have extended the time for the performance of any specific deadline required under the Customs laws.14

14 The Internal Revenue Service was given authority to postpone tax filing deadlines
The Customs Service did issue, however, Trade Guidelines, which included several measures that addressed the impact of 9-11 on Customs entry, duty payments, protests and other filing matters. The highlights of those guidelines were as follows:

DUTY PAYMENT POLICY

The Customs Service declared a “Snow Day” policy that covered the period from September 11, 2001, through October 2, 2001. ACH Filers who wanted coverage under this extended Snow Day policy were directed to their assigned Client Representative. Non-ACH payments were to be presented locally and Snow Day determinations would be made at each port.

FILING OF ENTRY DOCUMENTS AT NEW YORK

SILs, PEAs, formal and informal entries, entry summaries and protests that were originally filed in the Port of New York (1001) should now be submitted in Customs Ports of Newark (4601) and/or JFK (4701). Any reconciliation entries for port 1001 would be accepted at 4601 only. All entries originally designated as 1001 should remain 1001. All ABI transmissions were advised follow this same principle.

FILING PROCEDURES FOR PROTESTS, REQUESTS FOR ADMINISTRATIVE REVIEW, SILS AND PEAS

Due to the loss of entry summary documents at 6 World Trade Center, new filings of protests, requests for administrative review and Supplemental Information Letters were advised to be accompanied by a copy of the summary document(s) (“reconstructed entry”). Additionally, new Post Entry Amendments that related to revenue issues for the above entry summaries needed to be accompanied by a copy of the summary document(s). Appeals would be processed according to the port of unlading, i.e., the port code identified on the entry summary.

For those protests and requests for administrative review that were filed on or prior to September 11, 2001, Customs advised importers to wait for the its notification on how to reconstruct these claims and their associated entry summaries.

For Supplemental Information Letters filed on or prior to September 11, 2001, a copy of the claim would have to be resubmitted and labeled "Duplicate." To avoid any processing delays, importers were advised to also submit a copy of the entry summary. Alternatively, if there was little time remaining within the one-year liquidation period, Customs recommended that importers wait until the liquidation occurs. A protest could then be filed with the appropriate Area, as explained above.

VESSEL REPAIR ENTRY SUMMARIES

All Vessel Repair entry summaries that were previously filed at 6 World Trade Center, should be filed at the U.S. Customs Service, 1210 Corbin Street, Elizabeth, New Jersey 07201, Attn: Marine Unit. Filers should use port code 4601 on these entries.

BULLETIN NOTICES OF LIQUIDATION (BNOL)

On September 14, 2001, the BNOL for the entire Port of New York began being posted at Building 77, JFK International Airport. On September 21, 28, and October 5, the BNOL began being posted at both JFK International Airport and Elizabeth, New Jersey. Effective October 12, 2001, the BNOL began being posted at only one of the two Customs sites, based on the port code under which the listed shipments were entered.

BONDS (CF301)

Effective immediately, Bonds, Riders, and terminations were allowed to be filed at either US Customs at 1210 Corbin Street, Elizabeth, New Jersey 07201, attention Bond Desk or at US Customs at JFK Airport, Building 77, Jamaica, NY 11430, attention Branch D.
DRAWBACK ENTRIES

Drawback entries normally filed for Port 1001 must be filed with the Entry Division at Newark location.

RECONCILIATION ENTRIES

Hard copies of reconciliation spreadsheet information, diskettes, and supporting entry documentation designated for port 1001 or 4601 should be mailed to the Entry Section / Reconciliation Desk at the Newark location.

Filers who utilize the above temporary method of filing for NAFTA reconciliation entries were instructed to ensure that Customs received all three components within 12 months of the import date for the claim to be accepted timely.

ENFORCEMENT OF TIME LIMITS

The suspension of enforcement of time limits will be lifted effective October 5, 2001. Any merchandise arriving on or after October 5, 2001, will again be subject to the 15-day lay-order period and the 20-day reporting limit established by Customs Regulations. Customs officers were advised to enforce the time limits on this merchandise. Merchandise that arrived prior to October 5, 2001, would still be granted the 15-day suspension of time limit enforcement.

STATEMENT PROCESSING

Effective November 12, 2001, all NY, JFK, or Newark Statements (both ACH and check payments), with the exception of statements involving reconciliation, had to indicate the processing port where the statement is actually to be filed. Port 1001 would be used as the processing port for statements involving reconciliation summaries only. Because some filers might not be able to comply with this, pending reprogramming of their computer software, and for an unstated period of time Customs advised that it would not reject statements because they have the wrong port processing code.
CUSTOMS ADDRESSES IN THE NEW YORK AREA

New York Strategic Trade Center: U.S. Customs Service, Strategic Trade Center, 1 Penn Plaza, 11th Floor, New York, NY 10119

JFK Airport: Building 77, JFK Airport, Jamaica, NY 11430, 718-553-1750

NY/Newark Area: 1210 Corbin Street, Elizabeth, NJ 07201, 201-443-0110

New York Customs Management Center: U.S. Customs Service, 1 Penn Plaza, 11th Floor, New York, NY 10119 15

Judicial decisions have recognized that, when the filing of a protest is impossible because a Customs facility is closed, the protest may be considered timely filed when the Customs house reopens.16

Thus, the Customs Service provided reasonable alternatives. By declaring that Customs deemed the Customs houses in affected areas closed, as is the case when a "snow day" is in effect, the Customs Service met the needs of the importing community. Apparently, while it is possible that unspecified matters are still lurking in the wings, there apparently have not been issues presented amounting to any denied protest or legal action filed in the USCIT in which a protesting party has made a claim that an untimely act should be considered timely due to 9-11.

A decision of the USCIT suggests that in the event someone were unable to file an action in a timely manner in the USCIT directly because of the events of 9-11, a litigant could make an

15 The information set forth here was collected from various advisories published at the time by the Customs Service on its Internet site. The information was rebroadcast by entities such as law firms, customs brokers and trade organizations. See, e.g., U.S. Customs, 1 TRADE ALERT 3 (Nov. 19, 2001), http://www.hklaw.com/newsletters.asp?ID=224&Article=1273 (last visited June 29, 2003). Before relying upon any of the information, interested persons should confirm any specific matter with the United States Customs Service.

16 See, e.g., Frankenberg v. United States, 77 F. 606 (C.C.D.N.Y. 1896) (reversing a decision that a motion was made too late where the clerk was unavailable); Frost & Adams v. Saltonstall, 129 F. 481 (C.C.D. Mass. 1987) (accepting "good excuses" for filing late motions).
argument that the court should apply an equitable toll based upon an act of war. 17

Additionally, USCIT R. 6 provides as follows:

(a) Computation. In computing any period of time prescribed or allowed by these rules, by order of the court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or a legal holiday, OR WHEN THE ACT TO BE DONE IS THE FILING OF A PAPER IN COURT, A DAY ON WHICH WEATHER OR OTHER CONDITIONS HAVE MADE THE OFFICE OF THE CLERK INACCESSIBLE, IN WHICH EVENT THE PERIOD RUNS UNTIL THE END OF THE NEXT DAY WHICH IS NOT ONE OF THE AFOREMENTIONED DAYS. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. 18 (Emphasis added)

Therefore any filings prescribed by the courts' rules continued from September 11, 2001 until September 19, 2001, when the court reopened. The USCIT was inaccessible for a total of seven days, including September 11, 2001. Apparently, that rule would not extend the time for filing any actions. A party could normally meet the deadlines of filing an action by depositing the papers initiating the action in an envelope, with proper postage affixed and properly addressed to the court, with the United States Postal Service, if mailed by certified or registered mail, return receipt requested. 19

As suggested in an earlier portion of this paper, the approach taken by the USCIT to the 9-11 emergency may be understandable. However, it appears that neighboring federal and state courts approached the matter more realistically and therefore afforded all parties more time to reorganize and restart their operations. The approach taken by the USCIT was to shift to the parties, on a case-by-case basis, the need to show good

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17 See Osbourne v. United States, 164 F.2d 767 (2d Cir.1947) (tolling statute while plaintiff was a prisoner of war); Wally Packaging, Inc. v. United States, 7 CIT 19 (Ct. Int'l Trade 1984) (tolling applicable statutes of limitations where war deprived plaintiff of access to the courts).

18 CT. INT'L TRADE R. 6 (a) (allowing for delays in filing papers due to inaccessibility of the clerk of the USCIT) (footnote omitted).

19 See CT. INT'L TRADE R. 5(e) (providing for filing by certified or registered mail).
cause for relief. The approach taken by neighboring courts was to shift to any person or party that had an emergency that requires immediate attention during the longer period those courts were "deemed closed," the responsibility to seek judicial relief. That seems to be the more efficient and preferable approach. In any event, as discussed, above, based upon my experiences and reports, the individual judges dealt with any actions or applications for relief with sensitivity and accommodated the justifiable needs of the parties.

THE PRACTICE OF CUSTOMS LAWS, SEPTEMBER 11, 2002, AND BEYOND

It is now over a year since the attack that occurred on September 11, 2001. Although there have been some changes required by the destruction of 6 WTC and the relocation and redeployment of Customs personnel, the changes in the commercial operations of the Customs Service have in my opinion had very little material change in the practice of Customs Laws. Some initial changes, such as the temporary suspension of the New York ruling program have recently been eliminated. As of December 3, 2001, eligible persons may submit Ruling requests to Director, National Commodity Specialist Division, United States Customs, Attn: CIE/Ruling Request, One Penn. Plaza, 10th Floor, New York, NY 10119.

Deputy Commissioner Douglas Browning, in a speech given on October 15, 2002, to the Customs and International Trade Bar Association, reported that there is no longer any backlog of rulings pending at Headquarters, United States Customs Service. Under a new program adopted by the Office of Rulings and Regulations (ORR), ORR will now act upon all ruling requests within 90 days of receipt.

Can terrorism or other disasters interrupt the practice of Customs laws in the future? Yes. Have we learned lessons? Yes. Will new issues arise in the future? Yes.

21 See Bonner, supra note 20 (announcing that rulings will be issued within 90 days).
For example, as the USCIT migrates to electronic filing and service, which the Court expects to become operational in the next few months, we can expect that counsel and other interested persons having business before the Court will rely ever more on the Internet and email to perfect filings and receive notice of service of judicial documents, by complying with USCIT Administrative Order 02-01 (AO).

As discussed above, the Internet played a vital role in maintaining communication for many individuals and firms during 9-11 when other more traditional means of communication were not available. It appears to me that even if the court develops sufficient backup and alternative systems, that many law firms and their Internet providers probably could not provide alternative electronic pathways needed to transmit Internet communications in case of a major disruption of physical facilities.

Additionally, the Internet is subject to its own terrorists and other malicious cyber attacks. Interruptions of service, viruses and worms are a daily occurrence on the Internet. CERT/CC®, a site maintained by Carnegie Mellon University, is a major reporting center for Internet security problems. In the first three quarters of 2002, there were a total of 70,463 incidents reported and approximately, a 50% increase over the entire number of incidents reported for the previous year.

While the AO gives mechanisms for dealing with interruptions of service at the Court’s site, it is unsettled how the USCIT will

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24 This coordination center provides information ranging “from protecting your system against potential problems to reacting to current problems to predicting future problems. Our work involves handling computer security incidents and vulnerabilities, publishing security alerts, researching long-term changes in networked systems, and developing information and training to help you improve security at your site.” CERT/CC® Coordination Center Welcome Page, at http://www.cert.org/ (last visited June 29, 2003).


26 See CERT/CC® Statistics 1988-2002: Number of Incidents Reported, supra note 25 (resulting in a 55.9% increase comparing full-year statistics for 2001 and 2002).
rule on motions citing interruptions that occur at the point of transmission or at other places in the electronic pipeline. Daily outages\(^{27}\) may create confusion and require expensive and time consuming motions to permit alternative filing and service or to relieve parties from potential defaults. Consequently, practitioners and the USCIT must continue to assess and develop ways to maintain the infrastructures needed to maintain operations if future disaster or events disrupt the Internet.

The Customs Service is committed to issuing more timely rulings. In light of the continuing debate that many in the legal community are having over the standard of review applicable to judicial review of some actions in the USCIT resulting from the Supreme Court’s decision in *United States v. Mead Corp.*,\(^{28}\) it is uncertain whether rulings issued more expeditiously will contain “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”\(^{29}\) Well-reasoned rulings will provide greater certainty for all persons interested in the import transaction and should reduce the costs and expenses of needless litigation. Whether the Customs Service will allocate sufficient resources to commercial operations, in light of its Homeland Security mission, as pledged by Commissioner Bonner, to enable the Customs Service to maintain personnel and other tools needed for a qualitatively effective ruling program is unclear.

Many people in the trade community are unsure whether the impending reorganization of many government agencies under the Homeland Security Act of 2002\(^{30}\) will impact them. The Act transfers 22 agencies including the Customs Service, the Coast Guard, the Department of Agriculture’s Animal and Plant Health Inspection Service, and the law enforcement function of the Immigration and Naturalization Service to the new Department

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\(^{27}\) See, e.g., James Maguire, *Internet Attacked on Massive Scale*, NEWSFACTOR NETWORK, October 23, 2002 (noting it was widely reported that on October 21, 2002, there was “[a] powerful attack on the 13 root servers that manage worldwide Internet traffic temporarily crippled seven of the servers and caused two others to fail intermittently”), at http://www.newsfactor.com/perl/story/19756.html (last visited June 29, 2003).

\(^{28}\) 533 U.S. 218 (2001) (refusing to extend *Chevron* deference to administrative judgments).

\(^{29}\) *Mead*, 533 U.S. at 235 (quoting *Skidmore v. Swift*, 323 U.S. 134, 140 (1944)).

of Homeland Security.\textsuperscript{31} Under Section 403, the Act provides that Customs Service will be placed under the Under Secretary for Border and Transportation Security.\textsuperscript{32} In that position, Customs will maintain the functions done by imports specialists, entry specialists, drawback specialists, fines and penalties specialists, international trade specialists, customs auditors, and ORR attorneys.

The Act also has several other key components: 1) creates the “Customs Commercial and Homeland Security Automation Account” within the Treasury Department’s general fund, funded with $350 million in collections from the merchandise processing fee;\textsuperscript{33} 2) requires Customs to continue to submit Congressionally-required reports;\textsuperscript{34} 3) prohibits the Secretary of Homeland Security from consolidating, altering, discontinuing, or diminishing the functions vested with Customs\textsuperscript{35}; and, 4) confirms that Customs has adequate staffing to maintain the levels of customs revenue services it provided before the effective date of this legislation.\textsuperscript{36}

Under Subtitle C, section 452 of the Act, The Secretary of the Treasury will retain the Customs revenue function.\textsuperscript{37}

The Act also amends 19 U.S.C. 1505(a)\textsuperscript{38} to establish new time limits for the payment of duties and fees when an Import Activity Summary Statement is filed. The House of Representatives passed the Homeland Security Act on July 26, 2002 (the text of the engrossed or passed bill may be found at:

\begin{itemize}
  \item \textsuperscript{31} See e.g., Homeland Security Act of 2002 §§ 403, 402, 421, 888 (2002) (transferring powers as follows: § 402: INS Enforcement, § 403: Customs Service, § 421: Dep’t of Agriculture Animal and Plant Health Inspection, § 888: Coast Guard).
  \item \textsuperscript{32} See Homeland Security Act of 2002 § 403 (codified at 6 U.S.C. 203 (2003)) (shifting Customs Service duties to the Under Secretary for Border and Transportation Security).
  \item \textsuperscript{34} See Homeland Security Act of 2002 § 418 (a) (codified at 6 U.S.C. § 218 (2003)) (placing reporting requirements on the Customs Department).
  \item \textsuperscript{36} See Homeland Security Act of 2002 § 417 (a) (codified at 6 U.S.C. § 217 (2003)) (requiring Secretary of Homeland Security to maintain funding for functions previously performed by Customs Department).
  \item \textsuperscript{37} See Homeland Security Act of 2002 § 412 (a)(1) (codified at 6 U.S.C § 212 (2003)) (retaining Customs Department functions in Secretary of Treasury those functions that previously reposed with Treasury).
  \item \textsuperscript{38} 19 U.S.C. § 1505 (a) (2003) (establishing deposit requirements for payment for customs and duties).
\end{itemize}
The Act has moved onto the Senate, where it is the subject of debate and several amendments.39

It is too early to predict with certainty whether the Act will pass and what impact the Act will have upon the practice of Customs law. Plainly, all new legislation usually brings some uncertainty and result in a short-term increase in litigation as private parties and government representatives test the scope and meaning of its provisions. My sense is that despite any changes in the venue of the Customs Service, the core of its functions will remain the same. Even if there were no changes made from the current legal regime, the law enforcement's and Homeland Security function's responsibilities of the Customs Service will inevitably require that Customs will deploy some resources differently. Until the threats of terrorist and other unlawful activities diminish, the performance of even routine commercial functions will continue to require that Customs give some emphasis to its security functions. Therefore, we can expect that the personnel Customs deploys for commercial functions will continuously need to consider and implement new ways to secure our nation's borders and preserve our strategic positions.

Whether the Secretary of the Treasury, with respect to the Customs revenue raising function, will continue to be a player, along with the other agencies that currently make and shape international trade policies: the Office of the United States Trade Representative, the International Trade Administration of the Commerce Department, and the United States International Trade Commission, at the same level as pre-9-11, will depend upon the ability of the Secretary of the Treasury and the Secretary of Homeland Security to share and properly delegate resources required for overlapping functions and essential functions. Such sharing, through cross-designating and other resource deployment techniques have, however, been a well-

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accepted part of the current functions of the Customs Service, with respect to such agencies as the Immigration and Naturalization Service, Food and Drug Administration and Department of Agriculture. Therefore, we should not project that the commercial operations of the Customs Service from a revenue perspective will not continue to be an important and meaningful component of Homeland Security, under the guidance and direction of the Secretary of the Treasury and the overlapping control of the Secretary of Homeland Security.

It is also possible that new functions or changed functions may lead to changes in the jurisdiction of the USCIT. That expanded role may include review of new or modified regulatory functions adopted by the Customs Service that involve that agency's Homeland Security functions and its traditional commercial operations.\(^4\)

**CONCLUSION**

In sum, the post 9-11 practice of Customs law continues to evolve. The Customs Service began as an agency in 1789. It began its mission by rescuing our young nation from the brink of bankruptcy. It has performed its assignments through domestic and international turmoil and adapted to those changing assignments. The practice of Customs law will continue to adapt to the changing legal framework and landscape. We will meet the challenges of new technology, modified resources and the continuing threats of terrorists and others who seek to destroy the fabric of our society.

**EPILOGUE**


\(^4\) Since the presentation of this paper, the anticipated Department of Homeland Security (DHS) was established. Under section 402 of the Homeland Security Act of 2002, Public Law No. 107-296, the functions of the Customs Service were transferred to DHS. The responsibilities pertaining to rulings of the type discussed here were transferred on March 1, 2003, to the newly created Bureau of Customs and Border Protection. See Reorganization Plan Modification for the Dep't of Homeland Security, H.R. Doc. 108-32, at 4 (2003).
In 1981, artist Richard Serra installed his sculpture, the Tilted Arc, at Federal Plaza, in the plaza in front of the United States Court of International Trade (USCIT), in New York City. In 1985, several others, including the late former Chief Judge Dominick DiCarlo who was then a junior judge on the USCIT, along with myself testified at a public hearing. Our testimony concerned the possible removal of the Tilted Arc. Selections from the transcript of the public hearing were published in many forums. I believe Harper's Magazine was the first to republish the remarks that Judge DiCarlo and I presented.41

For almost a decade, until the government removed it in 1989, the work caused controversy. The story of its removal has remained a lightening rod in the art community. Several books chronicle the events surrounding the Tilted Arc, as seen through the eyes of scholars, art critics and defenders of the competing interests.42 They discuss its creation and installation; the public storms it created, the debate, the lawsuits, and the aftermath of its removal. Reprinted below are the remarks Judge DiCarlo and I presented. Judge DiCarlo wondered whether the government installed the Arc to protect the courthouse from terrorists,43 and I reflected upon the impact it had on our traditions, dreams and sense of well-being.

The decade that sustained the controversy over the Tilted Arc in retrospect was an era of relative domestic tranquility in the United States. However, the references and comparisons made then forewarned the evil and disruption that we would face at

41 See The Storm in the Plaza, HARPER'S MAGAZINE, July 1985, at 27-33 (reprinting transcripts of public hearing over relocation of the Tilted Arc, including the statements of Judge DiCarlo and Mr. Liebman).


43 Judge DiCarlo said:

Having just returned from visiting our embassies in Rome, Islamabad, Rangoon, and Bangkok, I concluded that this rusted iron object was an anti-terrorist barricade, part of a crash program to protect United States government building against terrorist activities. But why such a huge barricade? Was this an overreaction? Why in cities where terrorist activity is much greater are comparatively attractive highway dividers and concrete pillars sufficient to do the job?

The Storm in the Plaza, supra note 40, at 28.
the start of the new millennium. My original remarks were the following:

I am the attorney in charge of the International Trade Field office, Civil Division, U.S. Department of Justice, with offices located at 26 Federal Plaza.

I have worked at 26 Federal Plaza since 1969. While the plaza never fulfilled all my expectations, until 1980 I regarded it as a relaxing space where I could walk, sit, and contemplate in an unhurried manner. Every now and then rays of sunshine bathed the plaza, creating new vistas and moods for its vibrant, unchallenged space.

I remember those moments. I remember the cool spray of the fountain misting the hot air. I remember the band concerts. I remember the musical sounds of neighborhood children playing on the plaza while their mothers rocked baby carriages. I remember walking freely in the plaza, contemplating the examination of a witness, undisturbed by the presence of other people engaged in conversation or young lovers holding hands. I also remember my dreams of additional seating areas, more cultural events, temporary outdoor exhibits of painting and sculpture, and ethnic dance festivals.

All of those things are just memories now.

Regardless of the thoughtfulness and artistic accomplishment of its creator, Tilted Arc fails to add significant value to the plaza. The arc has condemned us to lead emptier lives. The children, the bands, and I no longer visit the plaza. Instead, the arc divides space against itself. Whatever artistic value the arc may have does not justify the disruption of the plaza and our lives.

The arc, a creation of mortal hand, should yield. Relocate it in another land. Reprieve us from our desolate condemnation.\(^{44}\)

Finally let me conclude with the following reprise inspired by the events of September 11, 2001:

\(^{44}\) Id. at 30.
I cannot forget the Tilted Arc, a symbol of when artistic expression, public debate and judicial processes, instead of fanatics, bombs and missiles and bombs, changed the course of history.

I cannot forget our leisure strolls through the tranquil plaza that stood in the shadows of the two towering symbols of our modern culture.

I cannot forget our quest to reach for world unity, exchange of ideas, cultures and traditions through the building blocks of world trade.

I cannot forget the outlines of people as they flowed in and out of the buildings at the start and end of the work day, the summer concerts, the tourists standing in the plaza, with eyes and cameras fixed upon the sky.

I cannot forget the uneasy calm that followed the first bombing, the warning sign that the plaza was no longer a place to linger, what evil did the stranger carry in the plain brown box?

I cannot forget the sadness that followed the realization that Oklahoma City and New York were no longer distant, but had been united in tragedy.

I cannot forget the slow walk back to evacuate numbers 1 and 26 Federal Plaza, the memories of what I sensed, fixed in my inner self: the sights and smells of smoke and fire; paper and debris floating, like birds; and human bodies catapulting to ground.

I cannot forget the endless walk north, with too many tearful looks back; followed by the weeks and months of questioning, adapting, restoring, changing and building new visions of future plazas.

We cannot forget that we must preserve our freedom to: question, challenge, and bring about lawful change.
We cannot forget that future generations: artists, poets, lawyers, film makers, judges, plumbers, farmers, secretaries and all people of the world, should have the liberty to peacefully create, protest, admire or remove the tilted arcs that cast shadows on their special plazas.\textsuperscript{45}
