8-1-1987

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The Presumption of Judicial Review in International Trade Disputes

by The Honorable Edward D. Re*

"Judicial Oversight—Relations Between the Court and the Agencies" is the theme of the Third Annual Judicial Conference of the United States Court of International Trade. As this year's theme indicates, the Conference will examine the interrelationship between the court and those agencies primarily responsible for regulating import transactions under the nation's international trade laws. The speakers will focus on the effect of the court's decisions on the policies and procedures of the Customs Service, the International Trade Administration of the Department of Commerce, and the International Trade Commission. Moreover, they will provide us with their own unique perspective as to the many important issues that the court and agencies face daily.

In this context I shall discuss briefly the role of the Court of International Trade as it applies the presumption of judicial review in this important field of law.

The court and its predecessor tribunals have a long relationship with the various international trade agencies, dating back almost two hundred years, to the earliest days of our nation. The present court is the result of a continuous empiric legislative process. This process culminated with the Customs Courts Act of 1980,1 which not only expanded the jurisdiction and powers of the Court of International Trade, but also reaffirmed and perfected its status as an Article III court. That legislation made clear that the Court of International Trade is a constituent part of the mainstream of the federal judicial system, with all the powers in law and equity possessed by, or conferred by statute upon, a federal district court.2

The result of this evolutionary process is the present United States Court of International Trade. Unlike other federal courts, this court does not usually resolve disputes between private parties. It is a national court that constantly and daily reviews a wide variety of administrative actions by those agencies charged with the administration of our nation's international trade laws.

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In the area of customs and trade disputes, the federal judicial system, through the institution and the procedures of the Court of International Trade, was intended by Congress to provide protection to those parties who maintained that they were aggrieved by ultra vires or wrongful government actions. Domestic manufacturers, importers, and others who believe that they have been treated illegally or unjustly by officials of our trade agencies can seek judicial review of the government's activities by bringing a lawsuit in the Court of International Trade.\(^3\) It is well to remember the legislative mandate of the 1980 Act—namely, to provide persons adversely affected or aggrieved by agency actions arising out of import transactions with the same judicial review and judicial remedies available to persons aggrieved by other agency actions.\(^4\) This statutory enactment brought the field of international trade law closer to the ideal of equal justice under law.

The legislative history of the 1980 Act explicitly provides that

the expertise and national jurisdiction of the Court of International Trade ... [and its appellate court] be exclusively utilized in the resolution of conflicts and disputes arising out of the tariff and international trade laws, thereby eliminating the present jurisdictional conflicts between these courts and the federal district and appellate courts.\(^5\)

This clear and unambiguous statement of purpose defines and shapes the court's relationship with those agencies which administer and enforce the customs and international trade laws of the United States. Equally important, it forms the basis for the presumption of judicial review in international trade disputes.

Much of the court's work involves the application of traditional principles of administrative law. In its broadest terms, administrative law is the law that governs the machinery of government.\(^6\) It determines the manner in which agencies may exercise the powers delegated to them.\(^7\) It further provides courts with the remedial devices which make judicial review of administrative actions meaningful.

For many years, litigants before this court could be certain that the court would apply well-established principles of administrative law that pertain to judicial review. Specifically, the court would review the discretionary action of an administrative official, unless there was a clear showing that Congress in-

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\(^6\) See 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1.1, at 2 (2d ed. 1978).
\(^7\) Id.
tended to preclude judicial review. Of course, even if review was available, in cases of express delegation of discretion and authority, the standard of review would be limited to whether the administrative decision was arbitrary or contrary to law, and therefore an abuse of discretion. Hence, it seemed clear that judicial review should be presumed, and that the preclusion from judicial review is the rare exception.

The principle of the presumption of judicial review was clearly set forth in the case of Abbott Laboratories v. Gardner. There, the Supreme Court stated that the Administrative Procedure Act "embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute,' . . . so long as no statute precludes such relief or the action is not one committed by law to agency discretion . . . ." In this seminal case, the Court emphasized that "only upon a showing of 'clear and convincing' evidence of a contrary legislative intent should the courts restrict access to judicial review."

In 1971, the Supreme Court had occasion to explain the extent of this presumption of reviewability in the equally important case of Citizens to Preserve Overton Park v. Volpe. In Overton Park, the Supreme Court declared that the "committed to agency discretion" exception is "very narrow," and that the exception is applicable only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'"

The policies and reasoning which underlie these seminal cases of administrative law have long provided guidance and precedent to this court and its predecessor, the Customs Court. An example is the Suwannee Steamship case, in which the Customs Court applied the principles enunciated in the Supreme Court cases of Abbott Laboratories and Overton Park.

Indeed, in the Suwannee case, the court recognized the dispute as to the availability of judicial review of discretionary agency action. In view of these and other precedents, it stated with certainty that "the suggestion that . . . agencies have untrammeled authority to act in areas committed to agency discretion reflect[s] a position that has been increasingly restricted, if not nullified, in recent years as the courts have taken a fresh look at the judicial review provisions of the APA." The court, therefore, held that discretionary action was
reviewable, and denied the government's motion to dismiss. In the second Suwannee case, the court reviewed the merits of the challenge to agency action. It held that the administrative action was not an abuse of discretion, and therefore upheld the action.

It is submitted that the advantage of the Suwannee approach is that, in permitting judicial review of the administrative action, the challenged action was subjected to an impartial and searching scrutiny. This scrutiny is beneficial in itself because it raises high the banner of government accountability, and induces careful and reasoned administrative decisionmaking. Moreover, a searching judicial analysis reflects a concern for fairness, together with the necessity to adhere to the perceived intent and purpose of the law in question. Surely, this should be regarded as one aspect of our ideal of a government of laws. It would seem clear that judicial review can be, and usually is, an effective curb upon arbitrary administrative action. The evenhanded administration of justice requires an impartial examination of the actions of governmental agencies and officials.

The court must now consider the newly developing norms and precedents in the important field of judicial review of administrative action. Reference was made to the Suwannee cases, decided by the Customs Court, because Suwannee raised the important question of the availability of judicial review in cases in which a party felt aggrieved by an administrative agency or official. In making available judicial review to challenge an alleged abuse of discretion, the Suwannee cases brought international trade law into the mainstream of administrative law. It made available judicial review by applying the strong presumption of judicial reviewability.

Often, it has been assumed that administrative action included administrative inaction. It was taken for granted that, in the language of § 706 of the Administrative Procedure Act, the reviewing court could “compel agency action unlawfully withheld or unreasonably delayed.”

However, under the recent case Heckler v. Chaney a court might distinguish between a party aggrieved by administrative action and a party aggrieved by administrative inaction. Hence, the court should not be surprised to receive a brief asserting that under Heckler v. Chaney the presumption of reviewability that prevailed under prior cases ought to be reconsidered.

In the Chaney case, eight prisoners who had been convicted of capital offenses and sentenced to death by lethal injection petitioned the Food and Drug Administration (FDA), asking that the FDA investigate the safety and effectiveness

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16 354 F. Supp. at 1368.
of the drugs. The FDA declined to take action on the petition. Subsequently, the prisoners filed suit, seeking to compel the FDA to investigate and regulate the use of the drugs. The district court held that the decision of the FDA to refrain from regulation was not subject to judicial review.

On appeal, the Court of Appeals for the District of Columbia Circuit vacated and remanded the decision. The court held that the FDA’s refusal to exercise its statutory authority was reviewable, and that the refusal was impermissible as being arbitrary, capricious, and without the authority of law.

Judge Scalia, now Justice Scalia, dissented and identified a general presumption of unreviewability. He dissented because of what he termed “a clear intrusion upon powers that belong to Congress, the Executive Branch, and the states.”

The Supreme Court granted certiorari, and reversed. In an opinion delivered by Justice Rehnquist, the Court focused on the interplay between § 701(a) and § 706 of the Administrative Procedure Act. As we know, the reconciliation of these two sections has long prompted judicial and scholarly debate. The Supreme Court posed the question: “How is it … that an action committed to agency discretion can be unreviewable and yet courts still can review agency actions for abuse of discretion?”

The Supreme Court sought to answer these questions by distinguishing the case of Overton Park. The Court noted that Overton Park involved an affirmative act of approval under a statute that set clear guidelines for determining when approval should be given. The Supreme Court in the Chaney case stated that “the Court of Appeals broke with tradition, case law, and sound reasoning” when it applied the “‘no law to apply’ standard of Overton Park” to an agency’s decision not to undertake certain enforcement actions.

The Court identified three main reasons why decisions to refuse enforcement are unsuitable for judicial review. First, the agency decision not to enforce “involves a complicated balancing of a number of factors which are peculiarly within its expertise.” Second, if an agency has acted, the action provides a focus for judicial review, and the court can “determine whether the agency exceeded its statutory powers.” Third, the Court analogized the refusal to enforce with prosecutorial discretion.

The Court then looked at the relevant provision of the Federal Food, Drug, and Cosmetic Act (FDCA) and concluded that “the presumption that agency
decisions not to institute proceedings are unreviewable under § 701(a)(2) of the APA is not overcome by the enforcement provisions of the FDCA.”

The Supreme Court asserted that the District of Columbia Circuit “broke with tradition” when it applied a presumption of reviewability.

It is clear that the case is significant and will affect the relationship between courts and federal agencies. Even limited to its specific facts, it manifests a different approach to judicial review of administrative inaction. Clearly, *Chaney* presents an approach that both lawyers and judges must seriously consider.

It is important to note that Customs enforces regulatory statutes and rules that pertain to imported merchandise on behalf of forty-eight other federal agencies. In light of *Chaney*, countless questions may be raised. For example, will challenges to a refusal by Customs to act on a request to exclude gray market goods be actionable in this court? In the past, importers who were the subject of a fraud investigation have brought suit for declaratory judgment regarding their culpability under § 592 of the Tariff Act of 1930. While this court has not specifically addressed the issue raised by these reverse § 592 actions, the question under the *Chaney* decision may be whether the court may ever reach the merits. Or, in antidumping and countervailing duties actions, may *Chaney* be applicable in connection with the refusal of the ITA or the ITC to make confidential business information available under § 777(c)(2) of the Tariff Act of 1930?

It is interesting to note that, in one case, the court was constrained to note the existence of the *Chaney* case, even though the parties did not mention the case in their briefs. In that case, referred to as the “slave labor” case, the plaintiffs had petitioned the United States Customs Service to bar importation of goods produced by forced labor. The Customs Service denied the petition. As the parties did not raise the issue, the court was not required to address “whether the denial of the petition is committed to agency discretion . . . and therefore precluded from judicial review [under *Heckler v. Chaney*].”

As you have seen, the court has, in the main, embraced the traditional doctrines of reviewability of agency actions. During its nascent years, the Court of International Trade sought to define the limits and boundaries of its newly authorized jurisdiction and powers. The court commenced by applying time-

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27 Id. at 837.
29 614 F. Supp. at 1241.
honored concepts of administrative law, such as ripeness,31 timeliness,32 primary
jurisdiction,33 exhaustion,34 and finality.35 Additionally, the court has engrafted
the broad principles of equity onto the field of international trade law.36 In
neither instance has the court sought to establish its own distinct norms of
administrative law or equity jurisprudence. To the contrary, the court has
adhered to the congressional directive that it look to and apply already existing
judicial principles as developed by the other Article
III
courts.

Recent case law evidences a cross-fertilization of legal principles with the
district courts and the courts of appeals beginning to benefit and borrow from
the decisions of the Court of International Trade. For example, this has arisen
in the context of the question of the timeliness of a judicial challenge by a party
aggrieved by a final agency order. In Western Union Telegraph Co. v. Federal
Commerce Commission,38 the FCC adopted a final order which was released to the
public and was later published in the Federal Register. An action was filed with
the Court of Appeals for the District of Columbia Circuit after release of the
order, but prior to its entry, i.e., publication. The issue before the court was
whether the action was commenced prematurely. The petitioner claimed that
the statute in question, 28 U.S.C. § 2344, created a sixty-day “window” for the
filing of a petition for review, rather than a filing deadline.39

The Court of Appeals for the District of Columbia Circuit dismissed the
petition as premature, rejecting the petitioner’s novel interpretation of the
inter alia, the British Steel decision of this court, stated that the “courts have often
dismissed premature petitions under provisions analogous to § 2344, never
suggesting that they were free to do otherwise.”40

This cross-fertilization also is found in the area of discovery and the question
of the invocation of the doctrine of executive privilege. One court, for example,
relying upon the Republic Steel case,41 rejected a claim of executive privilege,

31 Special Commodity Group on Non-Rubber Footwear from Brazil v. Baldridge, 575 F. Supp. 1288
(Ct. Int’l Trade 1983).
33 Lowa, Ltd. v. United States, 561 F. Supp. 441 (Ct. Int’l Trade 1983), aff’d, 724 F.2d 121 (Fed.
Cir. 1984).
38 Western Union Telegraph Co. v. FCC, 773 F.2d 375 (D.C. Cir. 1985).
39 Id. at 377.
40 Id. at 378.
holding that whether the documents sought "would involve confidential inter-
ministerial deliberations" was not a sufficient basis on which to make a deter-
mination as to whether the documents withheld were akin to state secrets.42
Courts also have relied on Court of International Trade decisions in the areas
of administrative rules for stare decisis,43 and tests for when an agency official
must comply with the notice-and-comment and publication requirements pre-
scribed by the Administrative Procedure Act.44

In this brief presentation, I have sought to indicate the emergence of a new
development in the law and the possibility of its application to customs and
international trade law. The Chaney case is only illustrative. Undoubtedly, there
are many others. In addition, I have attempted to highlight the recent trend in
the district courts and the courts of appeals utilizing decisions of this court as
precedents. With the emergence of the Court of International Trade as an
important constituent member of the federal judiciary, this process of cross-
fertilization will continue to play a prominent role in the development of federal
jurisprudence.

42 Id. at 175.
43 Cf. Butterton v. Texas General Land Office, 789 F.2d 316 (5th Cir. 1986)(citing Toyota Motor
(Fed. Cir. 1985)) (agency practice, once established, is not frozen in perpetuity).
44 Cf. Mada-Luna v. Fitzpatrick, No. 84-1988, slip op. (9th Cir. Mar. 30, 1987) (citing Mast Industries,
Inc. v. Regan, 596 F. Supp. 1567 (Ct. Int'l Trade 1984))(operating instructions must operate only
prospectively and must not establish a binding norm to fall under procedural exception).