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Michael Cornell Dypski

INTRODUCTION

Under the U.S. Constitution, Congress shall have the power "to regulate Commerce with foreign Nations."

Furthermore, Congress holds exclusive power in establishing and maintaining tariffs. As such, Congress is constitutionally empowered to establish tariffs and conduct the international economic relations of the United States. The nascent country found involvement in international commerce paramount in her emergence on the global scene. Evidence of this concern is that the Tariff Act of 1789, signed by President George Washington on July 4th of that year, became the second bill enacted by the American federal legislature.

On July 31, 1789, Congress established the United States Customs Service to further "administer and examine" customs implementation. This administrative agency, coupled...
with judicial review of its decisions, is the focus of this paper. While Congress holds legislative authority in conducting foreign commerce, in reality, of course, that power is delegated to the federal executive, the judiciary, and administrative agencies statutorily entrusted to carry out the customs and international trade laws of the United States.\(^7\)

The Twentieth Century witnessed the most progressive evolution of the Customs-judiciary dynamic. Prior to 1890, the Nineteenth Century had “shown that there were no specialized courts for handling customs litigation, and that the method of obtaining judicial review evolved in an unplanned and unsystematic manner.”\(^8\) During the first 100 years of the United States, customs disputes were under the judicial review of the federal courts of general jurisdiction.\(^9\)

1799 Act “served as the foundation for the system of customs administration throughout the nineteenth century and, in fact, well into the twentieth century.” \(\textit{Id.}\) Among the duties and authority of the Customs Service were to “receive entries . . . of the goods, wares and merchandise imported [through the port]; . . . estimate the duties payable thereupon . . . receive all monies paid for duties, and take all bonds for securing the payment thereof . . . .” \(\textit{Id.}\)

Of considerable importance in the twentieth century was the Tariff Act of 1930, or the infamous Smoot-Hawley Act, historically attributed to inducing the Great Depression, as well as the system promulgated in 1962 introducing the Tariff Schedules of the United States (TSUS). \(\textit{KlaseN, supra note 5, \S 6.02.}\)

7 \textit{REED, supra note 6, at 15.} As noted by Senator Julius Caesar Burrows of Michigan in 1909:

While . . . Congress is popularly believed the determinative body of tariff rates and schedules, as a matter of fact the courts and the customs administrative officers finally, in a great number if not great majority of cases, determine these matters . . . . By reason of interpretation and construction of [the statutory] provisions[,] whole schedules and numerous rates have been changed greatly from the supposed, if not manifest, purpose of Congress . . . . That administration and judicial construction of a tariff law determine its character has been the history of every such law.

44 CONG. REC. 4192 (1909), \textit{reprinted in REED, supra note 6, at 15–16.}\n
8 \textit{REED, supra note 6, at 66.} For a detailed overview of the legislative and judicial tumult of the nineteenth century regarding customs law, \textit{see id.} at 37–67. Involvement by the judiciary “did not follow a structured or a systematic institutional framework. Individual problems were handled as they arose, and there was no specific court or tribunal to adjudicate tariff and customs disputes.” \textit{Isaac Unah, The Courts of International Trade 16–17 (1998).}\n
9 \textit{Unah, supra note 8, at 17.}
With the advent of the Customs Administration Act of 1890, Congress provided the foundational structure promoting the “first key action toward the historical evolution of U.S. trade courts.” The 1890 Act created the Board of General Appraisers, a nine-member, quasi-judicial administrative body under the Department of the Treasury. The Board’s “primary function was to ‘examine and decide’ cases involving decisions of the U.S. Customs Service concerning protests against tariffs levied upon imported merchandise.”

Eventually, the Board of General Appraisers was dissolved in 1926, with functional power transferred to the U.S. Customs Court. This shift was only nominal in nature; “these changes were more symbolic than substantive . . . because they pertained largely to the nomenclature.” Fundamentally, the jurisdiction and function of the Customs Court were tantamount to that of the Board. Unlike the Board, however, members of the Customs Court

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10 Customs Administration Act of 1890, ch. 407, 26 Stat. 131.
11 Id.
12 Id.
13 UNAH, supra note 8, at 17. Under the 1890 Act, classification decisions by the Board were “subject to judicial review in the circuit courts, with appeals to the circuit court of appeals and then the Supreme Court.” REED, supra note 6, at 84.
14 UNAH, supra note 8, at 17. The Board of General Appraisers was “finding that its title was a source of confusion, since most persons assumed that it was an administrative body. More important, this impression was hindering its operation.” REED, supra note 6, at 108. The problem was that “‘[s]ome foreign governments refuse to honor commissions to take testimony issued by the board upon the ground . . . that it bears the name of a board and not the title of a court.’” REED, supra note 6, at 108, quoting S. REP. NO. 781, at 1–2 (1926).
15 UNAH, supra note 8, at 17.
16 Id. Appeals from the Customs Court went to the U.S. Court of Customs Appeals (CCA) created in 1909. REED, supra note 6, at 88. The CCA, a five-judge court located in Washington D.C., exercised “exclusive jurisdiction to review by appeal . . . final decisions by a Board of General Appraisers” [renamed the Customs Court] on issues of law and fact in cases involving the classification of merchandise and the rate of duty imposed on it.” Act of Aug. 5, 1909, ch. 6, § 28, 36 Stat. 11, 106.

In 1929, the CCA was given broader jurisdictional powers as well as a new name. See Act of Mar. 2, 1929, ch. 488, 45 Stat. 1475. The CCA’s “new jurisdiction consisted in appeals from the U.S. Patent Office in cases relating to the registration of patents and trademarks; its new name was the Court of Customs and Patent Appeals [CCPA].” 45 Stat. 1475. It must be noted that prior to the 1980 Act and the creation of the Court of International Trade, infra, only the importer, consignee of the imported merchandise, or persons paying duties had the right to file protests with the Customs Courts. Richard A.
Court became justices. This “produced a significant change of perspective in the institutional framework of customs litigation, for it changed what had been an administrative body into a judicial body.” This shift in institutional role-playing from administrative body to court came to the fore a mere three years after the inception of the customs court.

In 1929, the United States Supreme Court tackled the issues regarding the actual constitutional status of the customs juridical regime. The controversy in *Ex parte Bakelite Corp.*, was whether the authority of the customs courts was based under either Article I or Article III of the Constitution. In short, the high

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Even if one gained access to the court, there were a number of special procedures which could present difficulties for the unwary. The most noteworthy was the so-called dual burden of proof. [Under this system] to succeed in [customs] actions, the plaintiff was not only required to prove that the Customs Service’s determination had been incorrect, but also had to bear the burden of proving that its own alternative classification or valuation was correct.

*Id.* at 280.

The doctrine of dual burden of proof was abolished by the Court of Appeals for the Federal Circuit in *Jarvis Clark Co. v. United States*, 733 F.2d 873 (C.A. Fed. 1984); *see also* REED, *supra* note 6, at 258. In this case, the court held that the trial court cannot determine the correct result simply by dismissing the importer’s alternative as incorrect. It must consider whether the government’s classification is correct, both independently and in comparison with the importer’s alternative. In some cases, the government’s classification may be so patently incorrect that the importer can overcome the presumption of correctness without producing a more satisfactory alternative. In other cases, the importer’s alternative may have faults and yet still be a *better* classification than the government’s. In either case, the court’s duty is to find the correct result by whatever procedure is best suited to the case at hand.

733 F.2d at 878.

17 REED, *supra* note 6, at 109.
18 *Id.* at 109–10.
19 279 U.S. 438 (1929).
20 Under Article I, legislative courts are creatures of Congress and, hence, derive their powers from congressional mandate. REED, *supra* note 6, at 112. “The [Customs Courts were] created by Congress in virtue of its power to lay and collect duties on imports and to adopt any appropriate means of carrying that power into execution...
Court found that the Board of General Appraisers, the predecessor of the Customs Court, was, "although mostly quasi-judicial,"21 merely an "executive agency"22 created by Congress, "susceptible of performance by executive officers."23 Justice van Devanter held that the Customs Courts were clearly posited on legislative and not constitutional, or Article III, authority.24 From a practical standpoint, the Bakelite decision had little impact on the actual authority of the Customs Courts as their powers and functions remained intact.25 Nevertheless, Congress appeared remiss in its statutory creation of these courts, through its failure to express its intent for either Article I or Article III adjudication. As the late Judge Giles Rich stated, the Bakelite decision "'slapped the court[s] down.'"26 In essence, the Supreme Court relegated the Customs Courts to a purgatorial muddle. "[Bakelite] announced that the courts' existing status was not as elevated as had been believed. The Customs Courts occupied an intermediate status above administrative agencies but clearly below full constitutional courts."27

Congress's aim to further "greater institutional recognition"28 of the customs court system was realized in 1956 when the

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[T]he true test lies in the power under which the court was created and in the jurisdiction conferred." Bakelite, 279 U.S. at 458–59.

In contrast,

it long has been settled that Article III does not express the full authority of Congress to create courts, and that other articles invest Congress with powers in the exertion of which it may create inferior courts and clothe them with functions deemed essential or helpful in carrying those powers into execution. . . . [Article III courts] share in the exercise of the judicial power defined in [section 2, article III of the Constitution], can be invested with no other jurisdiction, and have judges who hold office during good behavior, with no power in Congress to provide otherwise.

279 U.S. at 449.

21 Bakelite, 279 U.S. at 458.
22 Id. at 457.
23 Id. at 458.
24 Id. at 460.
25 Reed, supra note 6, at 114.
26 Id.
27 Id.
28 UNAH, supra note 8, at 17.
national legislature passed a statute that declared the Customs Court to be “established under Article III of the Constitution ...

The current framework of the customs legal system was established by 1982. With the Customs Courts Act of 1980, Congress created the United States Court of International Trade (CIT).  The Act provides that the CIT shall “possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States.” Furthermore, the 1980 Act authorizes the CIT to “enter money judgments, direct agencies to conduct further administrative proceedings, and with certain exceptions, ‘order any other form of relief that is appropriate in a civil action, including but not limited to, declaratory judgments,

29 Act of July 14, 1956, ch. 589 § 1, 70 Stat. 532. The congressional declaration bestowing almost arbitrary Article III status to the Customs Court was affirmed by the Supreme Court in Glidden Co. v. Zdanok, 370 U.S. 530 (1962).


30 Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (1980). The CIT “has been given exclusive jurisdiction over all civil actions arising from importation of goods.” Schiller, supra note 3, at 34. Areas of CIT jurisdiction include: 1) review of prohibitions by customs law to import certain goods; 2) cases of classification of imported goods under the U.S. tariff schedules; 3) cases concerning reappraisal of the value of imported merchandise for the determination of an ad valorem duty; 4) review of the administrative proceedings which initiate antidumping and countervailing duty investigations, and all final determinations by the Department of Commerce or the International Trade Commission. See 28 U.S.C. § 1581 (2000); see also Schiller, supra note 3, at 34.

The CIT is composed of nine judges appointed by the President with the advice and consent of the Senate. 28 U.S.C. § 251 (2000). See also U.S. Const. art. II, § 2, cl. 2. Normally, cases are assigned to a single judge by the chief judge. 28 U.S.C. § 253. While based in New York City, the CIT may conduct trials in “every court throughout the United States . . . . In exceptional cases, the court may also hold hearings in foreign countries.” Schiller, supra note 4, at 35.

The Customs Courts Act of 1980 represents an enormous advance in the evolution of the Customs Court. It expands the jurisdiction and the remedial powers of the court in a manner which will finally enable the court to dispose of a broad range of cases in accordance with its [A]rticle III status.


orders of remand, injunctions, and writs of mandamus and prohibition.’”32 As prescribed by the 1980 Act, the CIT became a full-fledged Article III court, on par with federal district courts.33 Overall, the CIT became the means through which international trade litigation in the United States experienced a stability, uniformity, and harmonization unattainable for the first two hundred years of this country due to what appeared to be legislative and judicial ambivalence and experimentation.34

If a party before the CIT is displeased with the outcome of a decision, the case may be appealed to the United States Court of Appeals for the Federal Circuit (CAFC).35 This court was created

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33 “The CIT came to exercise judicial review under a mixed system of import regulation consisting of tariff laws, import-relief laws, and discretion-oriented import statutes. In this function, the powers of the CIT are equivalent to those of a district court.” REED, supra note 6, at 177.

The Customs Court’s origins as an administrative organ with very limited functions had significant and lasting impact upon it. Until the 1980 Act, the court possessed narrowly-defined jurisdiction, unique procedures, and very limited powers of relief. Most of the actions before the court involved narrow issues pertaining to the classification and valuation of goods by the United States Customs Service upon their entry to the United States. The court’s jurisdiction, procedures, and remedial authority reflected this for quite some time.


The CIT has

exclusive jurisdiction over disputes which deal with the classification of imported merchandise. Because the [Tariff Schedules of the United States] assign rates of duty according to the nature of the imported article, classification is critical in determining the amount of duties that are assessed on the imported merchandise. The legal question presented by classification cases is whether the United States Customs Service has properly classified the imported merchandise under the appropriate category of the Tariff Schedules.


in 1982 by the Federal Courts Improvement Act.\textsuperscript{36}

Under the current regime, decisions and regulations of the Customs Service are subject to the scrutiny of the CIT, the CAFC, and the Supreme Court. The focus of this paper is to examine the role of administrative law since the New Deal and its relationship with customs law adjudication. Part I will discuss briefly the rise of judicial deference to federal administrative agencies since the 1940s. Part II will analyze the case of \textit{Chevron U.S.A., Inc. v. National Resources Defense Council},\textsuperscript{37} and how it revolutionized the notion of judicial deference in administrative law. Part III will discuss the specific application of \textit{Chevron} to customs law.\textsuperscript{38} Parts IV, V, and VI of this paper will conclude with an analysis of how two cases, in particular, over the past three years have promulgated a near schizophrenic series of court decisions, which could eventually produce a juggernaut of burdensome, overwhelming, if not superfluous, rule-making for the Customs Service.

\begin{footnotesize}
\textsuperscript{36} Federal Courts Improvement Act of 1982, Pub. L. 97-164. This appellate court was established by the merger of the CCPA and the U.S. Court of Claims. From the CCPA the new court received jurisdiction in appeals from the Court of International Trade, the International Trade Commission, and the Patent and Trademark Office. From the Court of Claims, it received that Court's appellate functions. The trial functions of the Court of Claims were assigned to the newly created U.S. Claims Court (renamed the Court of Federal Claims in 1992), whose decisions would now be reviewed by the CAFC. The CAFC was also given exclusive jurisdiction in appeals from district courts in patent cases.


\textsuperscript{38} Id.
\end{footnotesize}
I. The New Deal and the Rise of Judicial Deference to the Administrative Agency

Throughout the 1930s and 1940s, the United States was in the throes of both the Great Depression and the Second World War. It was during this period that under the leadership of President Franklin Roosevelt, this country saw both an increase in the role of administrative agencies and judicial leniency to the decision-making processes of these bodies. The New Deal era of ideals, which pervaded American politics, economics, and law during the Roosevelt years (1933–1945), witnessed the gradual demise of judicial activism in a Supreme Court once willing to “[strike] down as unconstitutional virtually all of the New Deal legislation that came before it.” The increasingly “expansive and expanding role that the New Deal charted for the federal government was eventually accepted, both legally and politically.”

Evidence of

39 ALFRED C. AMAN, JR., ADMINISTRATIVE LAW IN A GLOBAL ERA ix (1992). Mr. Aman points out that 1935, and in particular, May 27 of that year was “not a good one for the Roosevelt administration.” Id. On May 27, 1935, the Supreme Court struck down New Deal legislation and executive decision-making powers in three cases. In Humphrey’s Ex’r v. United States, 295 U.S. 602 (1935), the Court restricted the President’s authority to remove government officials for reasons beyond the scope of controlling legislation. The Supreme Court struck down a bankruptcy provision of the Frazier-Lemke Act aimed at protecting farmer-debtors in Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935). Finally, in A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935), the high Court declared unconstitutional the National Industrial Recovery Act, which granted executive authority to approve regulations promoting fair competition, a forty-hour work week, and a minimum wage. Chief Justice Charles Hughes stated that:

We [the Supreme Court] are told that the provision of the statute authorizing the adoption of codes must be viewed in the light of the grave national crisis with which Congress was confronted. Undoubtedly, the conditions to which power is addressed are always to be considered when the exercise of power is challenged. Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power.

295 U.S. at 528.

40 AMAN, supra note 39, at x.

[T]he judicial hands-off approach that typified [the New Deal] was part of a much larger pattern of change, very much of a piece with the Court’s willingness to let Congress decide how best to deal with the essentially
this evolution to judicial laissez-faire became fully realized by the mid-1940s as a decision by the Supreme Court and an act of Congress laid the foundation of administrative law for the next forty years. In *Skidmore v. Swift & Co.*, the United States Supreme Court, unwilling to give plenary authority to administrative bodies, did acquiesce a considerable amount of weight to agency decisions. The Court believed that "although [the judiciary] makes its own independent decision on what a statute means, it may nevertheless take an agency’s interpretation into consideration."

In 1946, Congress passed the Administrative Procedure Act (APA), “arguably the most important piece of legislation economic issues spawned by the Great Depression. It was all part of a deferring to a Congress that had, in large part, passed the programs demanded by a strong and popular president . . . [J]udicial deference in the context of administrative law was an attempt to give the New Deal agencies created by Congress at least a chance to work.”

Id. at 8–9.

41 323 U.S. 134 (1944). In this case, the Court upheld the ruling of an agency Administrator in interpreting certain provisions of the Fair Labor Standards Act. Id. The Court stated that decisions of an administrative agency do not constitute an interpretation of [an] Act or a standard for judging factual situations which binds a district court’s processes, as an authoritative pronouncement of a higher court might do. But the [agency’s] policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case . . . . The fact that the [agency’s] policies and standards are not reached by trial in adversary form does not mean that they are not entitled to respect.

Id. at 139–40.

42 REED, supra note 6, at 278. Justice Robert Jackson stated that:

We [the Supreme Court] consider that the rulings, interpretations and opinions of the [agency] under [the] Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon 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.

323 U.S. at 140.

governing federal regulatory agency policy making.\(^{44}\) The APA set forth the fundamental rules of operation for administrative agencies, including the implementation and definition of regulatory procedural due process.\(^{45}\) "As such, it served to codify, rationalize, unify, clarify, and extend the operating procedures of all federal agencies."\(^{46}\)

The APA was Congress's response to the gradual judicial trend of passivity, as the late 1930s and early 1940s "were the high water mark of judicial deference to the administrative process. Federal courts deferred to administrative agencies on factual, legal, and even constitutional issues."\(^{47}\) It appears that the APA's purpose was to reign in any threats, real or perceived, of unbridled administrative authority. While the APA is considered to "codify the previously existing judge-made law in this area[,] . . . [t]he APA states that 'the reviewing court shall decide all relevant questions of law, [and] interpret constitutional and statutory provisions . . . . ' "\(^{48}\) However, the federal courts declined to exercise the greater judicial review mandated under the APA. "In fact, agency interpretations of law rarely received the judicial scrutiny that the APA itself would allow."\(^{49}\)

Judicial leniency would continue until the 1960s when any remnants of "deference would disappear as distrust of the administrative state and of the political branches grew"\(^{50}\) in an

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\(^{45}\) Id.

\(^{46}\) Id.


\(^{48}\) REED, supra note 6, at 278 (quoting 5 U.S.C. § 706 (2000)).

\(^{49}\) AMAN, supra note 39, at 8. Reuel E. Schiller also noted that:

Though the Court stopped its New Deal-era passivity to agency decision-making, it nevertheless recognized that agency expertise justified deference to administrative legal determinations. As the Court held in one of a series of cases upholding agency statutory interpretations in the late 1940s and early 1950s, "'cumulative experience' begets understanding and insight by which judgments not objectively demonstrable are validated."

Schiller, supra note 47, at 1421 (quoting NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 349 (1953)).

\(^{50}\) Schiller, supra note 47, at 1421. It must be noted that "[b]etween 1966 and 1981, the administrative bureaucracy grew considerably, both in terms of the number of
American environment beleaguered by the conflict in Vietnam and domestic racial and societal strife. The emerging judicial "hard look" approach of increased scrutiny would pervade administrative law until the revolution which was to occur in 1984.

In regards to customs decisions, the courts, prior to 1984, were in line with other rulings dealing with federal administrative agencies, namely, adherence to the Skidmore doctrine of agency persuasiveness, not deference. For example, the former Court of Customs and Patent Appeals, which evolved into the United States Court of Appeals for the Federal Circuit, asserted that "[l]ong-established administrative practice may bear on the construction of new laws and agencies involved and the amount of new regulation these agencies produced. Both aspects of this growth created a need for greater supervision of the bureaucracy." AMAN, supra note 39, at 26.

In Greater Boston Television Corp. v. Fed Communication Comm'n., 444 F.2d 841 (D.C. Cir. 1970), the Court of Appeals for the District of Columbia upheld an agency decision, "but only after a painstaking review of every factor that the agency had considered in making its determination." Schiller, supra note 47, at 1422.

The court noted that:

Assuming consistency with law and the legislative mandate, the agency has latitude not merely to find facts and make judgments, but also to select the policies deemed in public interest. The function of the court is to assure that the agency has given reasoned consideration to all material facts and issues. This calls for insistence that the agency articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts, a course that tends to assure that the agency's policies effectuate general standards, applied without unreasonable discrimination .... Its supervisory function calls on the court to intervene not merely in case of procedural inadequacies, or bypassing of the mandate in the legislative charter, but more broadly if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a "hard look" at the salient problems, and has not genuinely engaged in reasoned decision-making. If the agency has not shirked this fundamental task, however, the court exercises restraint and affirms the agency's action even though the court would on its own account have made different findings or adopted different standards .... If satisfied that the agency has taken a hard look at the issues with the use of reasons and standards, the court will uphold its findings, though of less than ideal clarity, if the agency's path may reasonably be discerned, though of course the court must not be left to guess as to the agency's findings or reasons.

444 F.2d at 851 (emphasis added).

Prior to Chevron, "the Customs Courts used a Skidmore-type approach in which the agency's interpretation was considered persuasive to the extent that it appeared to merit it." REED, supra note 6, at 284.
the tariff laws, [but it is] comparable to other extrinsic aids to ascertaining legislative intent which come into play when the construction of a statutory provision is in doubt.\textsuperscript{53}

As a whole, the Customs Courts did not defer to agency interpretations of classification statutes.\textsuperscript{54} While customs officials made decisions at the port of entry, once contested by a party, the courts took primacy over the Customs Service’s interpretations. While there was a presumption of correctness, the basic rule was that the “meaning of a descriptive term used in a tariff act is a matter of law to be decided by the court . . . .”\textsuperscript{55}

II. \textit{Chevron} and the Revolution in Administrative Law

On June 25, 1984, the Supreme Court “worked something of a revolution in administrative law . . . .”\textsuperscript{56} In \textit{Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.},\textsuperscript{57} the Court, in a 6-0 decision,\textsuperscript{58} radically transformed the role of agency decision-making and elevated it well beyond the parameters established under the long-standing \textit{Skidmore} rule.\textsuperscript{59} Until 1984, \textit{Skidmore} was the lodestar for judicial interpretation of agency decisions,

\begin{itemize}
\item \textsuperscript{53} Commonwealth Oil Ref. Co. v. United States, 480 F.2d 1352, 1361 (C.C.P.A. 1973).
\item \textsuperscript{54} REED, supra note 6, at 283.
\item \textsuperscript{56} David M. Hasen, \textit{The Ambiguous Basis of Judicial Deference to Administrative Rules}, 17 \textsc{Yale J. on Reg.} 327, 332 (2000).
\item \textsuperscript{57} 467 U.S. 837 (1984). This case involved the judicial interpretation of the term “stationary source” under certain sections of the Clean Air Act dealing with state output of pollution. \textit{Id.} Unfortunately, the Act did not define the term. Before 1981, the Environmental Protection Agency (EPA) issued a rule defining “stationary source” as a single pollutant-emitting facility. \textit{Id.} at 846–47. In 1981, the EPA promulgated a new rule adopting the so-called “bubble concept,” in essence aggregating all polluting facilities in a given state. \textit{Id.} at 857. The Supreme Court, reversing the United States Court of Appeals for the District of Columbia Circuit, held that the EPA’s new definition of “stationary source” was reasonable and within its purview of administrative authority. \textit{Id.} at 837. \textit{See also} Hasen, supra note 56, at 330–31.
\item \textsuperscript{58} Justices Marshall, O’Connor, and Rehnquist took no part in the decision of this case. 467 U.S. at 839.
\item \textsuperscript{59} Interestingly, the \textit{Chevron} Court mentions \textit{Skidmore} once, relegating it to a footnote. \textit{Id.} at 865 n. 40.
\end{itemize}
invoking a flexible balancing test of administrative reason, consistency, and thoroughness. The Court’s contrasting approach in *Chevron* was quite stark. The *Chevron* decision “provides a very narrow, formalistic reading of statutory language and congressional intent.” The two-prong test promulgated by the Court, which in essence “[s]wept aside [the] Skidmore criteria,” states that:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.

The Court went on to qualify the ambiguity element of the test by stating:

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

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61 AMAN, supra note 39, at 113. The author goes on to state that:

> Only questions involving *ultra vires* matters are considered fair game by the *Chevron* Court . . . . [T]he Court formalistically construes statutes in a manner that defers to the agency in the name of presidential deference whenever Congress has failed to resolve the precise issue. The policymaking area left to the president and his agents is thus significantly expanded.

*Id.*


63 467 U.S. at 842–43.

64 *Id.* at 843–44. Administrative Procedure Act (APA), 5 U.S.C. § 706 (2000) similarly states:
Under this test, "[t]he agency is entitled to deference as a matter of right. Skidmore, in contrast, makes clear that the weight given to the agency interpretation is always ultimately up to the court." Skidmore asserts that an administrative agency is "entitled to deference only if it earns it." Chevron supplants persuasiveness with reasonable, judicious, and circumspect deference to agency decision-making and interpretation.

III. The Application of Chevron in Customs Law

In the aftermath of Chevron, the Court of International Trade and the United States Court of Appeals for the Federal Circuit approached customs classification disputes in fashions ranging from Chevron deference, to Skidmore respect, to utter disregard. For example, in Generra Sportswear Co. v. United States, the Court applied Chevron deference to the Customs Service's interpretation of a technically vague duty provision. Apparently
based on the gap-filling prong of the *Chevron* test,\textsuperscript{70} the Federal Court of Appeals gave the impression that the judiciary was about to embark on producing a line of decisions adhering to the Supreme Court’s ruling of six years earlier. Instead, a strong reversal ensued,\textsuperscript{71} as *Generra* quickly became an anomalous divergence and deference to Customs gradually eroded.

In what appears to be an about-face, the CIT in *Sulzer Escher Wyss, Inc. v. United States*\textsuperscript{72} tacitly indicated some degree of reservation about the ruling in *Generra*. Buried in a footnote, the CIT regained the reigns of control in exercising its congressionally mandated role, and the Court of Appeals took heed. The CIT stated:

In connection with construction of a valuation statute the Court of Appeals has held that [*Chevron*] applies, so that any permissible construction of the statute by Customs will control . . . . It is not clear to what extent this issue was seriously argued before that court. Congress may have intended a less deferential approach when a court established to have particular expertise is construing a statute within its assigned area of expertise. Furthermore, in construing tariff classification, as opposed to valuation, provisions, the court must often make factual determinations regarding the meaning of terms used in a particular industry. These factual determinations are made in a trial *de novo*. Deference to Customs’s statutory interpretation in this context would violate the statutory scheme and decades of practice.\textsuperscript{73}

Throughout the 1990s, the CIT and CAFC, while recognizing *Chevron*, tended to diminish its role in customs law. The situation appears to be due to a struggle of historical deference: that of the

\textsuperscript{70} 467 U.S. 837, 843 (1984).

\textsuperscript{71} “Despite the seeming adoption of deferential review in *Generra*, the CAFC abandoned this approach in subsequent customs cases.” REED, *supra* note 6, at 287. For example, in the same year *Generra* was decided, the court made no mention of *Chevron* at all in its ruling against Customs’s classification of imported liquid crystals. *E.M. Chems. v. United States*, 920 F.2d 910 (C.A. Fed. 1990). *See also* Nissho Iwai Am. Corp. v. United States, 982 F.2d 505 (Fed. Cir. 1992) (declining deference to Customs’s interpretation of transaction value between buyer and seller of subway cars).

\textsuperscript{72} 17 Ct. Int’l Trade 609 (1993).

\textsuperscript{73} *Id.* at 612 n. 6.
courts versus that of Customs. Under 28 U.S.C. § 2639(a)(1), decisions of the Customs Service are presumed correct with the burden falling on the challenging party. However, under 28 U.S.C. § 2640(a), the CIT is to render determinations based on the record made before the court. This is merely a codification of the traditional de novo standard of review afforded the lower Customs Courts of the past. When an appeal is presented at the Federal Circuit, the judicial review of a classification ruling generally entails a two-step process of (1) ascertaining the proper meaning of specific terms within the tariff provision and (2) determining whether the merchandise at issue comes within the description of such terms as properly construed. The first step is a question of law which we review de novo and the second is a question of fact which we review for clear error.

This struggle undoubtedly caused friction between Customs and the judiciary during the last decade. The referential treatment,

Another tool of review for the CIT is in 28 U.S.C. § 2643(b), which provides:

If the Court of International Trade is unable to determine the correct decision on the basis of the evidence presented in any civil action, the court may order a retrial or rehearing for all purposes, or may order such further administrative or adjudicative procedures as the court considers necessary to reach the correct decision.

Customs classification cases, which represent the bulk of customs cases before the Federal Circuit . . . can present both issues of law and fact. The meaning of a tariff classification term is a question of law, which the Federal Circuit theoretically reviews de novo. The determination whether the merchandise in question comes within a particular tariff provision, as properly interpreted, is a question of fact. Questions of fact are not reviewed de novo, but are reviewed under the clearly erroneous standard.

with an absence of deference, to *Chevron* persisted. In *Crystal Clear Industries v. United States*, the Court of Appeals, in affirming a decision of the CIT, went so far as to assert that *Chevron* does not even apply to routine classification disputes.\(^7\)

*Rollerblade, Inc. v. United States* continued this judicial abandonment of *Chevron* in customs cases.\(^7\) The appellate court, reaffirming that interpretations of classification terms are questions of law reviewable *de novo*, discounted Customs's arguments pleading that deference is mandated both judicially and legislatively. The Court stated:

Customs . . . argues that its classification decisions should be entitled to deference based on either the statutory presumption of correctness under 28 U.S.C. § 2639(a)(1) (1994) or the *Chevron* doctrine . . . . We do not find either argument meritorious here, where the sole issue concerns the proper scope of a classification term . . . . [W]e squarely held that the statutory presumption of correctness under § 2639 is irrelevant where there is no factual dispute between the parties . . . [W]e also agree with the line of cases from the Court of International Trade that hold that the Court of International Trade’s statutory mandate to find the correct result in a classification case is logically incompatible with *Chevron* deference . . . . We reiterate here that no *Chevron* deference applies to classification decisions by Customs. In sum, no deference attaches to Customs’s classification decisions either under 28 U.S.C. § 2639 or under *Chevron*, where there are no disputed issues of material fact.\(^8\)

For the remainder of the 1990s, the courts adhered to their control of classification determination. It must be stressed that Customs did not necessarily lose in the multiple classification cases presented before the CIT and CAFC. Rather, these courts, while reaching conclusions in favor of Customs, refused to give a perceived automatic deference to agency decision-making.\(^8\)

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\(^7\) 44 F.3d 1001, 1003, n. * (Fed. Cir. 1995). “Our agreement with the opinion of the CIT does not extend to the suggestion that a routine classification dispute is entitled to special deference under [*Chevron*].” *Id.*

\(^7\) 112 F.3d 481 (Fed. Cir. 1997).

\(^8\) *Id.* at 483–84.

\(^8\) *See* e.g., Blakley Corp. v. United States, 15 F. Supp. 2d 865 (Ct. Int’l Trade 1998); Samsung Elecs. Am., Inc. v. United States, 35 F. Supp. 2d 942 (Ct. Int’l Trade
was not until 1999, that the Supreme Court finally intervened to save the application of *Chevron* in customs law and shield the Customs Service, once thought protected by that previous decision of the High Court, from a persistent abusive judicial onslaught.\(^2\)

**IV. *Haggar* and the Resurgence of Deference in Customs Law**

Until April 21, 1999, the federal Customs Courts continued to resist the controlling nature of *Chevron*. The esteemed judges on the CIT and CAFC tenaciously held on to the rules of *Crystal Clear*\(^3\) and *Rollerblade*.\(^4\) Until either Congress or the Supreme Court stepped in to elucidate the proper approach of judicial review in light of the apparent conflict between 28 U.S.C. § 2639, bolstered by *Chevron*, 28 U.S.C. § 2640, and 28 U.S.C. § 2643, the customs judiciary inevitably would continue on its current path. Much needed succor for the Customs Service arrived in *United States v. Haggar Apparel Co.*\(^5\) This was the first case

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\(^2\) As one author noted in 1998: “Even though the Supreme Court has ruled in *Chevron* that courts should accord agencies considerable deference, the Court of International Trade is not extending administrators as much deference as they might expect.” UNAH, *supra* note 8, at 141.

\(^3\) *Crystal Clear Indus. v. United States*, 44 F.3d 1001 (Fed. Cir. 1995).

\(^4\) *Rollerblade, Inc. v. United States*, 112 F.3d 481 (Fed. Cir. 1997).

\(^5\) 526 U.S. 380 (1999). In this case, Haggar sought a refund of customs duties paid on clothing shipped to the United States from a Mexican assembly facility. Under the tariff schedule, HTSUS subheading 9802.00.80, if the articles were merely assembled in Mexico, they would be entitled for a partial duty exemption. However, Haggar performed an additional process on the clothing, which entailed chemically pretreating and baking the items to maintain creases and avoid wrinkles. The Customs Service determined this was not incidental, but rather an additional step in assembly under 19 CFR § 10.16(c)(4), known as permapressing. *Id.* at 383–84. This additional step would take the garments out of the duty exemption provisions. *Id.* at 396. See also William Funk, *Supreme Court Addresses Chevron Issues in Several Cases*, 24 ADMIN. & REG. L. NEWS 4, 5 (Summer 1999).

At the lower judicial levels, the *Haggar* case was one of the progeny following *Crystal Clear*, refusing deference to Customs ruling in tariff classification matters. 938 F. Supp. 868, 875 (Ct. Int’l Trade 1996), *aff’d* 127 F.3d 1460, 1462 (Fed. Cir. 1997).

See Joseph I. Liebman, *A Panel Discussion—Review of Customs and Trade Developments at the CAFC with a Particular Emphasis on the Haggar Decision*, 9 FED. CIR. B.J. 247 (1999), for the legal community’s concerns while awaiting the Supreme Court’s decision in *Haggar*.

By denying . . . customary deference to the Treasury regulations that interpret the detailed classification provisions . . . the Federal Circuit decision in this case
before the Supreme Court involving the *Chevron*-customs law nexus. The Court’s opinion in *Haggar*, written by Justice Anthony Kennedy for the majority, basically declared that *Chevron* deference applies to customs classification rules, hence reversing the decisions of the CIT and CAFC. The Court held that the “statutes authorizing customs classification regulations are consistent with the usual rule that regulations of an administering agency warrant judicial deference; and nothing in the regulation itself persuades us that the agency intended the regulation to have some lesser force and effect.”

The Court then tackled the ubiquitous *de novo* argument of the Customs Courts in regard to tariff classification determinations. The Court found *de novo* adjudication and *Chevron* deference not to be incongruous.

A central theme in respondent’s argument is that the trial court proceedings may be, as they were in this case, *de novo*, and hence the court owes no deference to the regulation under *Chevron* principles. . . . *De novo* proceedings presume a foundation of law. The question here is whether the regulations are part of that controlling law. Defeference can be given to the regulations without impairing the authority of the court to make factual determinations, and to apply those determinations to the law, *de novo*.  

At the decision’s conclusion, the Court declared in fairly strong language that:

The customs regulations may not be disregarded. Application of

would leave both importers and the Customs Service without effective guidance for a wide range of transactions. If the agency’s interpretative regulations were deprived of any effect, the ultimate application of customs provisions could not be determined until completion of a cumbersome, case-by-case inquiry to obtain an ad hoc judicial ‘balancing [of] the relevant factors.’

**Id.** at 262 (citation omitted).


88 *Haggar*, 526 U.S. at 390.

89 **Id.** at 391.
the *Chevron* framework is the beginning of the legal analysis. Like other courts, the Court of International Trade must, when appropriate, give regulations *Chevron* deference. The expertise of the Court of International Trade guides it in making complex determinations in a specialized area of law; it is well positioned to evaluate customs regulations and their operation in light of the statutory mandate to determine if the preconditions for *Chevron* deference are present.

Clearly, *Haggar* was a victory for the Customs Service. The decision indicated that *Chevron* deference to the customs laws is "quite strong." However, the "remnants of Haggar likely will be strewn throughout customs litigation in the future." The *Haggar* decision appears narrowly tailored to customs regulations. In the alternative, the decision left, to the dismay of Customs and the delight of importers’ attorneys, sufficient vagueness. It has been pointed out that the Court’s language in *Haggar* indicates that the CIT and CAFC need only apply the deference doctrine in cases involving regulations, i.e., those rules made into law either legislatively or through informal processes, such as notice and comment rulemaking. Just two years later, last spring, the Supreme Court while attempting to clarify any ambiguities in the aftermath of *Haggar*, may have actually set forth a maelstrom of confusion and calls for further congressional involvement in clarification.

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90 Id. at 394.


92 Merrill & Hickman, supra note 65, at 841.


94 See Kelly & Reed, supra note 86, at 1187. The Supreme Court stated that “valid regulations establish legal norms [and create controlling law, as do] controlling statutes, rules, and judicial precedents." *Haggar*, 526 U.S. at 391. See also Kelly & Reed, supra note 87, at 1187. “The Court did not mention other administrative interpretations that may set norms. Nor did it include administrative interpretations other than regulations in the list of authorities to which a trial court must conform its rulings (i.e., statutes, rules, and judicial precedents).” Kelly & Reed, supra, note 86, at 1187.
V. Mead: Clarity or Confusion in Customs Law?

_Haggar_ pronounced a rule that regulations of the Customs Service are accorded _Chevron_ deference. In particular, when Customs employs its gap-filling authority, the Court must give any reasonable agency interpretation of a regulation or statute "controlling weight." While appearing to elucidate the judicial review powers of the CIT and CAFC in classification cases, the decision, in fact, keeps the law unsettled. Evidence of this came on June 18, 2001, when the Supreme Court handed down the decision in _United States v. Mead Corp._ considered by many

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533 U.S. 218 (2001). This case focuses on the Customs Service's treatment and interpretation of respondent's well-known day planners. The tariff schedule at issue falls under the heading for "[r]egisters, account books, notebooks, order books, receipt books, letter pads, memorandum pads, diaries, and similar articles". HTSUS subheading 4820.10. This subheading is further divided into two categories. Items deemed "[d]iaries, notebooks and address books, ... memorandum pads, letter pads and similar articles" were subject to a 4% tariff rate. All "others" were afforded duty-free status. Between 1989 and 1993, Customs consistently treated Mead's day planners as "other." In January 1993, however, Customs determined, through the issuance of a brief headquarters ruling letter and, following Mead's protest, a more carefully reasoned letter, that the items at issue were to be classified as "[d]iaries ... bound," hence subject to the 4% rate. _See Mead_, 533 U.S. at 224-25. Mead protested the decision under the provisions of 19 C.F.R. § 174. _Mead_, 533 U.S. at 225.


However, the CAFC reversed. _Mead Corp. v. United States_, 185 F.3d 1304 (C.A. Fed. 1999). Relying on _Haggar_, which was decided by the Supreme Court three months earlier, the appeals court conceded that under decisions like _Rollerblade_, the courts "accorded Customs's classifications no deference." _Id._ at 1306. However, if a tariff provision is ambiguous and Customs promulgates a regulation to clarify the provision, _Chevron_ deference is mandated. _Id_. The CAFC stressed that when a Customs regulation follows the "procedural rigors" of notice and comment rulemaking under the APA, 5 U.S.C. § 553, the _Haggar/Chevron_ rule has been satisfied as the regulations carry the force of law. 185 F.3d at 1307.

General notice of proposed rule making shall be published in the Federal Register. The notice shall include (1) a statement of the time, place, and nature of the public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.
"to be a blockbuster administrative law decision." While certainly relying on the *Haggar* decision of deference to Customs regulations, the majority of the Court, led by Justice David Souter, affirmed the decision of the CAFC and found that tariff classification ruling letters not promulgated under rulemaking procedures do not deserve *Chevron* treatment. The Court held:

[An] administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.

The Court went on, that “in sum, classification rulings . . . are beyond the *Chevron* pale.” Citing a decision of one year prior, the Court held that classification rulings are synonymous with “interpretations contained in policy statements, agency manuals,


Furthermore, “after notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.” 5 U.S.C. § 553(c) (2000).

On remand from the Supreme Court, the CAFC upheld its previous reversal of the CIT. Mead Corp. v. United States, 283 F.3d 1342 (Fall 2002).


98 *Mead*, 533 U.S. at 226. Since the rendering of the *Mead* decision, courts have extended the *Chevron/Mead* analysis beyond tariff classification cases. For example, see Koyo Seiko Co. v. United States, 258 F.3d 1340 (Fed. Cir. 2001), Pesquera Mares Australes Ltda. v. United States, 266 F.3d 1372 (Fed. Cir. 2001), and Thai Pineapple Canning Indus. Corp. v. United States, 273 F.3d 1077 (Fed. Cir. 2001), which are concerned with the Department of Commerce’s imposition of anti-dumping duties. In *Pesquera Mares*, the CAFC touches on the potential confusion set forth under *Mead*. “We understand *Mead* to clearly recognize that *Chevron* deference is not limited to regulations adopted after notice-and-comment rulemaking. The line that *Mead* draws is not defined with great clarity.” 266 F.3d at 1380. See also U.S. Freightways Corp. v. Commissioner, 270 F.3d 1137 (7th Cir. 2001), which discusses the *Chevron/Mead* rule in interpretation of Internal Revenue Service regulations.

100 *Mead*, 533 U.S. at 234.
and enforcement guidelines, and hence, are outside of the scope of Chevron. The Mead Court stressed, however, that Customs ruling letters are not completely worthless from a judicial standpoint, as the Skidmore balancing approach was resurrected. Rather, such letters remain persuasive, as “Chevron did nothing to eliminate Skidmore’s holding that an agency’s interpretation may merit some deference.” However, the Court points out that while Customs decisions are presumed correct, the CIT retains its authority of de novo review and congressional delegation has not

101 Id. (citing Christensen v. Harris County, 529 U.S. 576, 587 (2000)). In Christensen, the Court stated:

Here we . . . confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant Chevron-style deference.

529 U.S. at 587.

102 Mead, 533 U.S. at 234.

103 Id. This remains much to the chagrin of Justice Antonin Scalia, who pronounced in his dissent in Christensen that “Skidmore deference to authoritative agency views is an anachronism, dating from an era in which we declined to give agency interpretations (including interpretative regulations, as opposed to ‘legislative rules’) authoritative effect . . . . That era came to an end with our watershed decision in [Chevron].” Christensen, 529 U.S. at 589 (Scalia, J., dissenting).
mandated any special privilege to classification matters. To the majority, the absence of Congress's intent to elevate classification rulings beyond deferential level as well as the CIT review framework evidences a "counterbalanced" relationship between legislative and judicial rulemaking.

The inherent nature of Customs rulings is also fundamental to the argument of the majority. Customs officials must make thousands of classification rulings every year. The Court stresses that elevating each of these rulings to the status of law is "simply self-refuting." Customs rarely engages in notice-and-comment rulemaking when issuing classification alterations as these changes are intended only for the transaction at issue.

104 Mead, 533 U.S. at 232. Under § 1581(h), "classification rulings are on par with the Secretary's rulings on 'valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters.'" Id. at 232–33.

105 Id. at 232.

106 The Court points out that "46 different Customs offices throughout the country issue 10,000 to 15,000 classification rulings each year." Mead, 533 U.S. at 233.

107 Id.

108 Id. Under 19 C.F.R. § 177.9(a) (2002), "a ruling letter issued by the Customs Service . . . represents the official position of the Customs Service with respect to the particular transaction or issue described therein and is binding on all Customs Service personnel in accordance with the provisions of this section until modified or revoked."

Furthermore, a ruling letter is subject to modification or revocation without notice to any person, expect the person to whom the letter was addressed. Accordingly, no other person should rely on the ruling letter or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter.

19 C.F.R. § 177.9(c) (2002).

The Customs Modernization Act of 1993, Pub. L. No. 103-182, amended 19 U.S.C. § 1625(c) (2000) states that notice-and-comment rulemaking is required in regards to "a proposed interpretive ruling or decision which would (1) modify . . . or revoke a prior interpretive ruling or decision . . . or (2) have the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions." These rulings or decisions need only be published in the Customs Bulletin, not the Federal Register. Id. This new law did not come into effect until nearly one year after the classification issue in this case arose. Hence "Customs was not required to—and, in fact, did not—go through notice-and-comment procedures before changing the classification of Mead's day planners." Brief for Respondent at 10, United States v. Mead Corp., 533 U.S. 218 (2001) (No. 99-1434); see also Mead, 533 U.S. at 234. The Court asserted that even the amendments of the Customs Modernization Act of 1993 would not alter its conclusions. Id. "The statutory changes reveal no new congressional
Hence, to the Court, the volume of Customs decisions, their restricted authority in the statutory framework, and inadequate participation by interested parties in the rulemaking process indicate a rather limited legislative understanding, well below the threshold of lawmaking.

The sole dissent of Justice Antonin Scalia is both sardonic and thorough. The venerable jurist asserts that with the majority holding

[w]e will be sorting out the consequences of the Mead doctrine, which has today replaced the Chevron doctrine, for years to come. I would adhere to our established jurisprudence, defer to the reasonable interpretation the Customs Service has given to the statute it is charged with enforcing, and reverse the judgment of the Court of Appeals.

He continues:

As to principle: The doctrine of Chevron — that all authoritative agency interpretations of statutes they are charged with administering deserve deference — was rooted in a legal presumption of congressional intent, important to the division of powers between the Second and Third Branches. When, Chevron said, Congress leaves an ambiguity in a statute that is to be administered by an executive agency, it is presumed that Congress meant to give the agency discretion, within the limits of reasonable interpretation, as to how the ambiguity is to be resolved. By committing enforcement to the statute to an agency rather than the courts, Congress committed its initial and primary

objective of treating classification decisions generally as rulemaking with force of law, nor do they suggest any intent to create a Chevron patchwork of classification rulings, some with force of law, some without.” Id.

109 Some of the Justice’s witty gems include:

[T]he Court now resurfaces, in full force, the pre-Chevron doctrine of Skidmore deference . . . . The Court has largely replaced Chevron, in other words, with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th’ ol’ ‘totality of the circumstances’ test.

Mead, 533 U.S. at 241 (Scalia, J., dissenting). Scalia advises those reading his dissent to “buy stock in the GPO,” id. at 246, as he foresees a dramatic increase in informal rulemaking by the Customs Service to satisfy the Mead test; and he describes the majority’s Mead test as “wonderfully imprecise” and of “utter flabbiness.” Id. at 245.

110 Id. at 239–40.
interpretation to that branch as well.\textsuperscript{111}

Scalia, the textualist master, sees that while formal adjudication procedures are prescribed, like under 5 U.S.C. §§ 554 & 556, informal rulemaking, such as notice-and-comment procedures, is usually authorized but not required.\textsuperscript{112} Agencies, empowered with such broad and flexible legislative mandates, should prevail under \textit{Chevron} authority and deference. Scalia declares that forcing agency administrators to obtain formal adjudication (i.e., from the courts) for ambiguities arising now and in the future “makes no sense.”\textsuperscript{113} While the majority has “breath[ed] new life into the anachronism of \textit{Skidmore},” this approach is misguided.\textsuperscript{114} Scalia believes this decision to be a relic of simpler times. In 1944, the year of the \textit{Skidmore} decision, the American bureaucracy was only beginning to burgeon.

But in an era when federal statutory law administered by federal agencies is pervasive, and when the ambiguities (intended or unintended) that those statutes contain are innumerable, totality-of-the-circumstances \textit{Skidmore} deference is a recipe for uncertainty, unpredictability, and endless litigation. To condemn a vast body of agency action to that regime . . . is irresponsible.\textsuperscript{115}

Scalia concludes his diatribe with a thorough analysis of the inconsistent case law handed down by his brothers and sisters on

\textsuperscript{111} Id. at 241 (Scalia, J., dissenting); see also \textit{Chevron U.S.A., Inc. v. Natural Res. Def. Council}, 467 U.S. 837, 843–44 (1984). Justice Scalia’s dedication to \textit{Chevron} runs strong. During a 1989 speech at Duke University School of Law, Scalia “note[d] that the capacity of the \textit{Chevron} approach to accept changes in agency interpretation ungrudgingly seems to me one of the strongest indications that the \textit{Chevron} approach is correct.” Antonin Scalia, \textit{Judicial Deference to Administrative Interpretations of Law}, 1989 DUKE L. J. 511, 518. He continued,

\begin{quote}
I tend to think . . . that in the long run \textit{Chevron} will endure and be given its full scope — not so much because it represents a rule that is easier to follow and thus easier to predict . . ., but because it more accurately reflects the reality of government, and thus more adequately serves its needs.
\end{quote}

\textit{Id.} at 521.


\textsuperscript{113} \textit{Mead}, 533 U.S. at 244.

\textsuperscript{114} \textit{Id.} at 250.

\textsuperscript{115} \textit{Id.} at 249.
the Court in recent years, most notably the Christensen and Nationsbank cases. In the previously mentioned case of Christensen v. Harris County, the Court ruled that opinion letters and other informal agency decisions are not within the realm of Chevron. In his Mead dissent, however, Scalia stresses that what ruled the day in Christensen was that the Department of Labor's opinion was clearly erroneous on its face, forcing it outside of Chevron. The judiciary's statements regarding opinion letters and other informal interpretations are mere dictum, irrelevant to the Court's holding.

At the dissent's conclusion, Scalia looks at the 1995 case of Nationsbank of N.C., N.A. v. Variable Annuity Life Insurance Co. This decision provides a strong basis for the argument in support of ruling letters enjoying Chevron treatment. In Nationsbank, the Court found a letter from the Comptroller of Currency to be a reasonable and permissible reading of the statute at issue and therefore deserving of Chevron treatment. The Mead majority cites Nationsbank and concedes that in that case Chevron deference was granted despite the absence of administrative formality, such as notice-and-comment rulemaking. Souter declares, however, that "the fact that the tariff classification here was not a product of such formal process alone does not alone, therefore, bar the application of Chevron." Oddly, the lack of a rulemaking procedure in the tariff classification seems to be at the crux of the majority's decision.

Further, Scalia declares that the Mead reasoning "makes [the] decision one of the most significant opinions ever rendered by the

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116 Id. at 255-59 (Scalia, J., dissenting).
117 Christensen v. Harris County, 529 U.S. 576, 587 (2000). Not surprising, Scalia, while concurring with the majority, found the Department of Labor's letter deserving of Chevron deference, if reasonable. Scalia found the opinion an unreasonable interpretation of the statute at issue.
118 Mead, 533 U.S. at 255 (Scalia, J., dissenting).
119 Id. (Scalia, J., dissenting).
121 Id. at 254.
122 Mead, 533 at 230.
123 Id.
Court dealing with the judicial review of administrative action." He forecasts: "Its consequences will be enormous, and almost uniformly bad." While this pessimism has yet to make manifest a flood of judicial, legislative, and administrative disorder, the majority's seeming disregard of history, law, and judicial economy will inevitably produce an environment of animus between the courts and the Customs Service.

VI. Analysis and Conclusions

The author of this article is inclined to favor the arguments put forth by Scalia. The decision rendered in *Mead*, while appearing to elucidate any ambiguities remaining in the aftermath of *Haggar*, and the customs regulation versus ruling letter (or notice-and-comment procedures versus the absence of such) dichotomy, possibly has unleashed confusion affecting customs law. The majority in *Mead*, in essence set up a two-tier system of judicial review in administrative law: that of *Skidmore* persuasiveness and *Chevron* deference. It had appeared that since the inception of *Chevron*, the *Skidmore* approach was relegated to the annals of history. However, under *Mead*, *Skidmore* was brought back to life like a jurisprudential Lazarus. As stated in the last sentence of the previous section, I would argue that this reprise of the old rule is violative of history, law, and judicial management.

As pointed out by one author and cited in the Scalia dissent in *Mead*, "consistent with the *Chevron* methodology, and has long been the rule in customs cases, customs regulations are sustained if they represent reasonable interpretations of the statute." *Chevron* does not provide the Customs Service carte blanche authority in classification rulings. Rather, the decision, while giving broad discretion, certainly tempers and confines that power within a regime of reason and "permissible construction."

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124 *Nationsbank*, 513 U.S. at 260.
125 Id.
126 For an approach supported by the author of this paper, see also Carla Garcia-Benitez, *The "Deference to the Agency" Doctrine: To What Extent Should it Apply to the Customs Service's Interpretation of a Tariff Term in Classification Cases?*, 20 BROOK. J. INT'L L. 577, 580–583 (1995).
127 *Reed*, supra note 6, at 289; see *Mead*, 533 U.S. at 260.
should review the *Chevron* test again. In sum, the two prongs consist of: (1) the call for the presence of a clear congressional or statutory mandate, and (2) in the absence of unambiguity, the creation of a reasonable assumption of agency correctness in interpretation.

For classification concerns, the rulings of the Customs Service appear to usually satisfy the first prong, in that “if the intent of Congress is clear, that is the end of the matter; for the court ... must give effect to the unambiguously expressed intent of Congress.” Various statutes within the customs legal framework show a clear legislative intent to imply an instruction to the judiciary to defer to agency decisions in light of *Chevron*. These statutes indicate and codify Congress’s faith and reliance in the Customs Service as the guardians of import regulation in this country.

For example, under 19 U.S.C. § 1202, “[t]he Secretary of the Treasury is hereby authorized to issue rules and regulations governing the admission of articles under the provisions of the tariff schedules.” Furthermore, Congress has mandated that:

> [t]he Secretary of the Treasury shall establish and promulgate such rules and regulations not inconsistent with the law (including regulations establishing procedures for the issuance of binding rulings prior to the entry of the merchandise concerned), and may disseminate such information as may be necessary to secure a just, impartial, and uniform appraisement of imported merchandise and the classification and assessment of duties thereon at the various ports of entry.

Congress has provided a broad faculty to Customs through a catch-all provision, which states that “[i]n addition to the specific powers conferred [under Chapter 19 of the U.S.C.] the Secretary of Treasury is authorized to make such rules and regulations as may be necessary to carry out the provisions of this chapter.”

Certainly, thousands of import transactions occur daily at this

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129 *See id.* at 842–44.
130 *Id.*
131 *Id.*
nation's ports of entry.\textsuperscript{135} To consider the decisions of individual agents, regardless of their level of expertise, as embodying law is certainly beyond the vision of \textit{Chevron}, Congress, or common sense. However, in \textit{Mead}, the ruling letter at issue was sent forth by the Director of the Commercial Rulings Branch of Customs's Office of Regulations and Rulings.\textsuperscript{136} The majority in \textit{Mead} indicates that their decision hinges on the origins of the letter.\textsuperscript{137} It is true that the ruling letter did not come directly from the desk of the Secretary of the Treasury or the Commissioner of the Customs Service. However, one certainly could argue that the Director's decision is that of the Department of Treasury's agent, proxy, or delegate. The necessity for bureaucratic efficiency and notions of human ability would dictate that the Commissioner or Secretary cannot review the 10,000 to 15,000 rulings issued by Customs annually. The delegation of authority is reasonable, economical, and realistic. To compel Customs to engage in notice-and-comment rulemaking for every classification ruling is overly burdensome, both to the courts and the agency. As Scalia portends, thousands of rulings will equate to thousands of rulemaking procedures.\textsuperscript{138}

Congress's bestowal is concise and clear. Customs has been given the authority to promulgate rules and regulations to carry out its duties. The mandate of Customs is certainly broad, but absent a congressional decision to the contrary, its broad purview remains. The legal current under which the \textit{Mead} ruling letter was made effective deserves \textit{Chevron} deference. For whatever reason, the \textit{Mead} majority believed that a bureaucracy which administers best

\textsuperscript{135} According to recent statistics from the government, on an average day, the Customs Service examines 1.3 million passengers, 2,642 aircraft, 50,889 trucks/containers, 355,004 vehicles, 588 vessels, and 64,923 entries. U.S. Customs Service, \textit{A Day in the Life of the U.S. Customs Service} (Oct. 20, 2001), available at http://www.customs.gov/about/weare.htm.


\textsuperscript{137} While the majority defends its holding on the notice-and-comment rulemaking process, or absence thereof, in this case the Court concedes in a footnote that had the Commissioner or Secretary himself issued the ruling letter a different result may have occurred. 533 U.S. at 237, n. 19. The "'highest level' at Customs is the source of the regulation in \textit{Haggar}, the Commissioner of Customs with the approval of the Secretary of the Treasury . . . . [In \textit{Mead}, the] Commissioner did not issue the Headquarters ruling . . . . This explains why the Court has not accepted Justice Scalia's position." \textit{Id}.

\textsuperscript{138} \textit{Mead}, 533 U.S. at 245 (Scalia, J., dissenting).
administers least. The *Mead* decision presents a sublime case study in the canons of textualism and loose constructionism. The majority and Scalia seem to be following both simultaneously, as they selectively pick and choose to adhere to the strict language of the APA, the Customs statutes, and the hybrid test of rigidity and flexibility of *Chevron* and its progeny.\(^{139}\)

In conclusion, *Mead* seems to have created more questions and uncertainty. *Chevron* and a liberal reading of *Haggar* indicated a harbingering of concretion in customs classification law. Instead, *Mead* has now forced the Customs Service to either endeavor in an ultimately endless cycle of APA-style rulemaking or rampant litigation to obtain judicial acknowledgment. Customs has proposed new rules to 19 C.F.R. § 177 granting the agency greater leeway to avoid the cumbersome rules of the APA.\(^{140}\) While I am in no way asserting, in essence, that means of skirting due process are laudable in light of the dramatic increase in international trade, the judiciary must ensure a viable and realistic framework based on *stare decisis* and clear congressional intent. That paradigm was established under *Chevron* and *Haggar*. Unfortunately, *Mead* has opaqued what was arguably a clearer vision of customs law. Without more decided authorization from Capitol Hill, the detrimental aftermath of *Mead* will inevitably burden an already beleaguered federal bureaucracy and judiciary.

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\(^{139}\) For example, the majority cites the APA notice-and-comment rulemaking provisions, yet seemingly ignores the first part of the *Chevron* test. Scalia, the stalwart of conservatism and textual interpretation, prefers the simplicity of *Chevron*, while paying little deference to APA procedures and relegating apparent rulings of the Court in prior cases to mere dicta.

\(^{140}\) For example, under the proposed rules, Customs must provide notice-and-comment procedures following rulings that have "the effect of modifying or revoking the treatment previously accorded by Customs to substantially identical transactions." Treatment Previously Accorded to Substantially Identical Transactions, 66 Fed. Reg. 37370, 37388 (proposed July 17, 2001). However, the publication and issuance requirement is

inapplicable in circumstances in which a Customs position is modified, revoked, or otherwise materially affected by operation of law or by publication pursuant to other legal authority or by other appropriate action taken by Customs in furtherance of an order, instruction, or other policy decision of another governmental agency or entity pursuant to statutory or delegated authority. Such circumstances include, but are not limited to, the following: . . . (iii) . . . issuance of a decision or policy determination pursuant to authority delegated by the President.