Vanderbilt Journal of Transnational Law

Volume 18
Issue 4 *Fall 1985*

Article 1

1985

Civil Customs Penalties under Section 592 of the Tariff Act: Current Practice and the Need for Further Reform

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Vanderbilt Journal of Transnational Law

VOLUME 18 FALL 1985 NUMBER 4

CIVIL CUSTOMS PENALTIES UNDER SECTION 592 OF THE TARIFF ACT: CURRENT PRACTICE AND THE NEED FOR FURTHER REFORM

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I. INTRODUCTION

Civil Customs penalties imposed under Section 592 of the Tariff Act[1] are among the harshest allowed by federal law. Multi-million-dollar penalty claims and settlements are not uncommon.[2]

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1. Act of June 17, 1930, ch. 497, § 592, 46 Stat. 750, *as amended by* Act of October 3, 1978, Pub. L. No. 95-410, § 110(a), 92 Stat. 893 (presently codified at 19 U.S.C. § 1592 (1982)).

2. *See, e.g.*, United States v. F.A.G. Bearings, Ltd., 598 F. Supp. 401 (Ct. Int'l Trade 1984) (claim for $541.9 million). This claim was ultimately settled upon payment to Customs of $4.1 million; FAG Bearings to Pay $4.1 Million Penalty, Wall St. J., Dec. 31, 1984, at 3. *See also* DAILY REPORT FOR EXECUTIVES (BNA) at L-7 (Jan. 9, 1985). Timex Corporation recently paid almost $3.9 million to Customs representing penalties, withheld duties and interest, *see Timex Settles Customs Charges*, UPI Wire Service, Sept. 27, 1984 (Available on NEXIS), (Sept. 27, 1984), while Thyssen Steel Detroit paid $3.25 million, *see* 1 INT'L TRADE REP. (BNA), No. 10, at 269 (Sept. 12, 1984), and Saks International paid $3.3 million in penalties to settle Section 592 claims. *See Saks Settlement*, PR Newswire, Apr. 16, 1984 (Available on NEXIS) (April 16, 1984).

In 1982, Mitsui and Co. paid $11 million in penalties in order to settle civil charges arising from the importation of steel. 6 U.S. IMPORT WEEKLY, (BNA), No. 138, at 511 (July 28, 1982). A year earlier, Volkswagen of America, Inc. agreed to pay $25 million over four years in settlement of Section 592 claims arising from the alleged undervaluation of imported automobiles. *See Volkswagen to Pay U.S. $25 Million*, N.Y. Times, March 25, 1982, at D4.

These claims and settlements are comparable to those made prior to the 1978 reforms. For example, a pre-1978 penalty of $42.5 million assessed against Standard-Kollsman, Inc. ultimately was settled upon payment of a mitigated penalty of $1.65 million. *See* Herzstein, *The Need to Reform Section 592 of the Tariff Act of 1930*, 10(2) INT'L LAW. 285, 287 (1976). Similarly, a $110 million penalty claim against Electronic Memories & Magnetics Corp., resulting from an alleged duty underpayment of $330,000, was settled upon payment of $1 million. *See Importers Win One on Customs*, BUS. WEEK, July 10, 1978, at 66.

By contrast, the largest civil penalty ever assessed for violation of Federal Aviation Administration safety rules was a $1.5 million assessment against American Airlines. This sum actually represented several consolidated penalties. *See American Air Pays FAA Fine of $1.5 Million*, Wall St. J., Sept. 30, 1985, at 42. The largest penalty ever assessed for violations of Commodity Futures Trading Commission rules was a $425,000 claim against Commodities Corporation. *See*

Since the early 1970s, Section 592 has emerged as the Customs Service's (Customs) most powerful weapon[3] in its war against allegedly negligent and fraudulent import practices.[4]

For years, many commentators had criticized Section 592 as being an unduly harsh remedy that often imposed unintended hardships on importers.[5] Much of this criticism subsided when Congress adopted the Customs Procedural Reform and Simplification Act of 1978,[6] which importers hailed as a major victory.[7] Many believed that the "reformed" Section 592 would result in less drastic penalty claims, greater procedural rights for penalized importers, and improved judicial review of penalty assessments. Years after the adoption of the 1978 reforms, however, those promises seem largely unfulfilled. Huge initial penalty claims continue to be the rule rather than the exception, while relatively few importers have obtained complete judicial review of penalty

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Commodities Firms Hit by C.F.T.C. Penalties, N.Y. Times, Oct. 3, 1985, at D1.

3. Although Section 592 and predecessor civil Customs penalty provisions have been in effect since 1799, *see* Act of March 2, 1799, ch. 22, § 66, 1 Stat. 677, the Customs Service began aggressively using the statute in the early 1970s to combat a wide range of allegedly fraudulent or negligent importing practices. For a review of the types of practices targeted during the "pre-reform" era, see Dickey, *Survivals from More Primitive Times; Customs Forfeitures in the Modern Commercial Setting Under Sections 592 and 618 of the Tariff Act of 1930,* 7 L. & POL'Y IN INT'L BUS. 691 (1975) (hereinafter cited as Dickey I); and Dickey, *Customs: Fines, Forfeitures, Penalties and the Mitigation Procedures—Sections 592 and 618 of the Tariff Act of 1930,* 30 BUS. LAW. 299 (1975) (hereinafter cited as Dickey II), the two seminal articles on the topic.

4. *See* SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS, HOUSE COMMITTEE ON ENERGY AND COMMERCE, UNFAIR FOREIGN TRADE PRACTICES: CRIMINAL COMPONENTS OF AMERICA'S TRADE PROBLEM, 99th Cong., 1st Sess. (Comm. Print. 1985) (hereinafter cited as ENERGY AND COMMERCE REPORT); *see also* UNITED STATES CUSTOMS SERVICE, CUSTOMS U.S.A.: A REPORT ON THE ACTIVITIES OF THE U.S. CUSTOMS SERVICE DURING FISCAL YEAR 1983 (hereinafter cited as 1983 ANNUAL REPORT).

5. *See* Donohue and Arkin, *Customs Fraud,* in 5 BUSINESS CRIME: CRIMINAL LIABILITY OF THE BUSINESS COMMUNITY ¶ 21.05 (1985 ed.); Herzstein, *supra* note 2; Dickey I, *supra* note 3; and Dickey II, *supra* note 3.

6. Act of October 3, 1978, Pub. L. No. 95-410, tit. I, § 110(a), 92 Stat. 893.

7. *See, e.g.,* Dickey, *Customs: Fines and Forfeiture Under Section 592 of the Tariff Act of 1930—Revisited,* 35 BUS. LAW. 149 (1979) (hereinafter cited as Dickey III); Note, *Anachronism Laid to Rest: Customs Reform Act Accomplishes Long Overdue Reform of Section 592 of the Tariff Act of 1930,* 10 L. & POL'Y INT'L BUS. 1305 (1978); *see also Importers Win One on Customs,* BUS. WEEK, July 10, 1978, at 66.

assessments.[8]

This article analyzes civil Customs penalty claims and procedures under the "reformed" Section 592, evaluates the efficacy of the 1978 reforms, and recommends additional changes to make Section 592 a fairer, more realistic remedial provision.

II. History and Development of Section 592

In 1789 the first Congress, by its second act, created the United States Customs Agency and gave it statutory responsibility "to regulate the collection of duties" on imported merchandise.[9] Customs also has the responsibility of preventing commercial fraud and smuggling, and regulating carriers, persons, and articles entering and leaving the United States. Today, Customs administers more than four hundred provisions of law on behalf of some forty federal agencies.[10]

Since 1789, the Customs Service has evolved from a simple appraising and collections office to a major revenue-producing and law enforcement agency, with a substantial presence in most of the major cities in the United States.[11] Customs has always relied

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8. A United States Court of International Trade opinion has made it clear in a case involving a Section 592 claim made after the 1978 reforms became effective that the severity of Section 592 remedies has been "a jealously guarded tradition on American law." United States v. F.A.G. Bearings, Ltd., 598 F. Supp. 401, 404 (Ct. Int'l Trade 1984).

9. Act of July 31, 1789, ch. 5, 1 Stat. 29.

10. *See* R. Sturm, 1 Customs Law and Administration, § 14.1 (3d ed. 1985). Approximately 40% of the 10,000 or more provisions of the Tariff Schedules of the United States cover merchandise subject to requirements of agencies other than Customs. Approximately 35% of all Customs transactions (accounting for 63% of total entered merchandise by value) contain products subject to standards and regulations of other agencies. *Id.*

11. During fiscal 1983, for example, Customs collections totalled nearly $9.8 billion, representing a return of $17.01 for every dollar of agency appropriations. *See* 1983 Annual Report, *supra* note 4, at 4. The Customs Service is currently comprised of seven regions, which feature 44 Customs districts or areas, and a much larger number of Customs ports and stations. *Id.* at 16-17.

Customs has periodically reassessed its priorities and shifted its resources to service areas of perceived need. During the 1970s, for instance, Customs emphasized its role in expediting commercial operations and assisting United States importers and exporters in the smooth conduct of their business. To exemplify this attitude, the agency added the word "Service" to its name in 1973, integrated its senior operational officials into the day-to-day processing of Customs transactions, and urged the senior officials to maintain close contact and cooperation with international traders.

on statutes that authorize the seizure and forfeiture of goods imported by means of false or fraudulent practices. During the first century of import regulation, Customs imposed the forfeiture penalty only when an importer filed entry papers[12] "with design to evade" payment of duties[13] or with "intention to defraud the United States,"[14] or when an importer "knowingly"[15] made a false statement. With the Customs Administrative Act of 1890, Congress removed the "intent" requirement and allowed Customs, for the first time, to collect cash penalties equal to the value of the imported goods, rather than actually seizing the goods.[16] The legislative history of the 1890 Act, however, indicates that Congress amended the forfeiture statute "to enable the Government to recover the value of merchandise *fraudulently* imported which has passed into consumption."[17] This language suggests that knowledge or intent remained a prerequisite to the imposition of a penalty.

The Tariff Act of 1913[18] introduced the concept of penalizing importers who produced statements "without reasonable cause to believe [their] truth."[19] Congress adopted the change to preserve

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12. Each shipment of merchandise imported into the Customs Territory of the United States (the 50 states, the District of Columbia, and Puerto Rico) from abroad must be "entered" with Customs upon importation. 19 U.S.C. § 1484 (1982); *see also* 19 C.F.R. Parts 141-44 (1985). A Customs "entry" for a shipment of imported goods consists of certain entry documents prepared for the special use of Customs Service officials, together with supporting commercial documentation. *See* Donohue and Arkin, *supra* note 5, ¶ 21.02; R. STURM, *supra* note 10, § 2.5. In general, entry documentation presented to Customs must contain sufficient information regarding the imported merchandise to enable Customs to determine the goods' entitlement to enter the United States, proper tariff classification, appraised value and rate and amount of Customs duty owed thereon. *See* 19 C.F.R. § 141.61—.92 (1985).

13. Act of March 2, 1799, ch. 22, § 66, 1 Stat. 627, 677.

14. Act of June 22, 1874, ch. 391, § 16, 18 Stat. 186, 189.

15. Act of March 3, 1863, ch. 76 § 1, 12 Stat. 737, 738.

16. Act of June 10, 1890, ch. 407, § 9, 26 Stat. 131, 135. The option to seek a cash "forfeiture value" penalty aided Customs in cases where the imported goods in question could not be located or had been released from Customs custody prior to the discovery of the alleged violation.

17. H.R. REP. No. 6, 51st Cong., 1st Sess. at 5 (1890) (emphasis added).

18. Act of October 3, 1913, ch. 16, 38 Stat. 114. The Tariff Acts of 1922 (Act of September 21, 1922, ch. 356, tit. IV, § 592, 42 Stat. 858, 982) and 1930 (Act of June 17, 1930, ch. 497, tit. IV, § 592, 46 Stat. 750) reenacted the civil penalty and forfeiture provisions of the 1913 Act without significant change.

19. Act of October 3, 1913, ch. 16, § III(H), 38 Stat. 114, 183.

the integrity of Customs entries by requiring persons with actual knowledge of material facts regarding the imported goods to prepare and file any necessary documentation.[20] Again, Congress most likely intended to direct this penalty statute to persons who, with knowledge of the facts, falsely entered or invoiced goods. In such situations, Customs could impute willful or intentional motives. In the late 1960s, no longer required to enforce certain federal narcotics laws, Customs began using its civil penalty authority, particularly Section 592, to address a wide array of unlawful or questionable commercial practices.

Prior to the 1978 reforms, Section 592 provided that Customs would impose forfeiture or a penalty equal to the full value of the imported goods on any importer who entered or attempted to bring merchandise into the United States

> by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance whatsoever, or . . . any false statement in any declaration . . . without reasonable cause to believe the truth of such statement. . . .[21]

Consequently, Customs penalized importers who made written or verbal statements that were not fraudulent, but simply incorrect ("false").[22] Customs issued penalty claims to importers for a variety of allegedly illegal practices, including improper classification of goods, misrepresentation of a product's country of origin, failure to disclose payments deemed by Customs to be dutiable, double invoicing, and inaccurate cost allocations pertaining to foreign assembly or processing operations.

Frequently, Customs demanded penalties that bore no relation to the seriousness of the conduct involved or to the financial consequences of such conduct. Assume, for example, that a company importing a $1,000,000 machine failed to declare a $10,000 engi-

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20. H.R. REP. No. 5, 63rd Cong., 1st Sess. at xliv-xlv (1913).

21. 19 U.S.C. § 1592 (1976). Under Section 592, both before and after the 1978 reforms, it is irrelevant whether the importers have deprived the United States of revenue by reason of the practices stated in Customs' complaint.

22. In some instances, a false statement may be the result of "sloppy business practices, [indicating] a standard of care below that which Customs believes it must demand of one entering goods into the commerce of the United States." Dickey II, *supra* note 3, at 302. However, many penalty claims resulted simply from instances in which Customs and the importer honestly differed on a close question of law. *Id.* at 304.

neering charge which was properly includable in the machine's dutiable value. If the machine were subject to a five percent *ad valorem* duty rate, the actual or potential loss of revenue would amount to only $500. Customs, however, would demand a penalty of $1,000,000 as required by the statute. Where a violation involved large quantities of merchandise imported over many years, the claimed penalty amounts could prove staggering.[23]

Recognizing that initial penalty assessments were often unduly harsh, the Secretary of the Treasury frequently mitigated the claims, pursuant to Section 1618 of the Tariff Act of 1930.[24] As the number of penalty assessments increased, the Treasury Department developed internal guidelines to instruct Customs officers in handling petitions for mitigation.[25] These guidelines classified Section 592 violations into the following three categories: intentional fraud, gross negligence, and simple or ordinary negligence.[26] Unpublished administrative rulings further refined these concepts. Customs would find "fraud" only in cases involving clear evidence of a deliberate scheme to defraud or evade. In such cases, Customs might decline to mitigate the penalty or assess a

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23. *See generally* Herzstein, *supra* note 2.

24. 19 U.S.C. § 1618 (1982).

25. Some years after adoption, these guidelines were published as T.D. 74-287, 8 Cust. B. & Dec. 553 (1975).

26. Customs' guidelines defined these terms as follows:

1. *Intentional*

An intentional violation is an act or acts (of commission or omission) which defrauds the revenue or otherwise violates 19 U.S.C. 1592, deliberately done with intent to defraud the revenue or otherwise violate the statute.

2. *Negligence*

A negligent violation is an act or acts (of commission or omission) which defrauds the revenue or otherwise violates 19 U.S.C. 1592, done without demonstrable intent to defraud the revenue or otherwise violate the statute—

a. *Gross negligence*

—but with actual knowledge of or wanton disregard for the relevant facts and with indifference or disregard for the offender's obligations under the statute.

b. *Ordinary negligence*

—but with failure to exercise due care in ascertaining or recording the truth of the facts or with failure to use due care in ascertaining the offender's obligations under the statute.

T.D. 74-287, 8 Cust. B. & Dec. 553, 555 (1975).

penalty equal to eight times the loss of revenue.[27] Customs found "gross negligence" in cases in which an importer frequently or repeatedly violated the law, but in which Customs could discern no intentional violations. When "gross negligence" was found, Customs ordinarily imposed a penalty equal to four times the loss of revenue.[28] When ordinary "negligence" was found, Customs generally imposed a penalty equal to twice the loss of revenue.[29] Customs could fully remit the penalty claim if the importer demonstrated that no violation had occurred.[30]

A penalized importer had little choice but to pay the mitigated penalty.[31] If an importer refused, Customs withdrew the offer of mitigation and referred the case to the United States Attorney, who sued the importer in federal district court to recover the merchandise's full forfeiture value. The district court could determine only whether a violation of law had occurred. If the court found a violation, pre-1978 law required the court to enter judgment in the Government's favor for the full forfeiture value regardless of the importer's culpability.[32] The court remained powerless to consider the size of the penalty.[33] That Customs had previously offered to settle the case upon payment of a lesser sum was immaterial because the court retained no power to compel mitigation, essentially an act of grace.[34] Judicial review of a Section 592 penalty assessment equated to an all-or-nothing gamble that few importers were willing to take.[35]

Business injury to a penalized importer often extends beyond the value of the goods or the amount of the penalty. Following

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27. *Id.* at 556.

28. *Id.* "Gross negligence" was often found in cases where an importer ignored Customs officials' instructions to change a statement on a declaration or to cease a particular practice.

29. *Id.*

30. *Id.*

31. Customs' mitigated penalty collections generally represented but a small fraction of the initial forfeiture value assessment. *See, e.g.,* Donohue and Arkin, *supra* note 5, ¶ 21.07.

32. *See, e.g.,* United States v. Brown, 404 F. Supp. 968 (S.D.N.Y. 1975), *aff'd* 538 F.2d 315 (2d Cir. 1976); United States v. Wagner, 434 F.2d 627 (9th Cir. 1970).

33. *See, e.g., Brown,* 404 F. Supp. 968.

34. *See, e.g.,* Winters v. Working, 510 F. Supp. 14 (W.D. Tex. 1980).

35. *See Customs Procedural Reform Act of 1977: Hearings on H.R. 8149 Before the Subcomm. on Int'l Trade of the Senate Comm. on Finance,* 95th Cong., 2d Sess. 74 (Feb. 2, 1978) (statement of William D. Outman, Esq.).

issuance of a penalty notice, importers necessarily must disclose the forfeiture value assessment as a contingent liability on public financial reports and credit applications. Investor confidence in publicly-held corporations often is shaken by these huge initial claims. One commentator describes a representative pre-1978 case as follows:

> In a recent proceeding which attracted wide attention, a penalty notice was issued to Standard-Kollsman, Inc., an electronics manufacturer, claiming a penalty of some $42.5 million. The duty underpayment which gave rise to the penalty proceeding was reported to be around $115,000, *i.e.*, about 0.3 percent of the penalty asserted.
>
> Although statutory penalties are frequently mitigated by the Customs Service, the mere issuance of a penalty notice of such magnitude creates an extraordinarily serious problem for the firm receiving it. Publicly-held companies must disclose contingent liabilities of this kind, and any company attempting to obtain financing would have to reveal the contingent liability in its financial statements. It is almost certainly no coincidence that the publicly-quoted price of Standard-Kollsman's stock dropped by 20 percent in the four weeks following the issuance of the penalty notice, but recovered most of this on the day after the penalty had been mitigated to $1.65 million.[36]

Customs' lack of time constraints when considering petitions for mitigation[37] often required corporations to note the contingent liabilities for years. Faced with huge contingent liabilities and lacking meaningful judicial review, many importers agreed to pay mitigated penalties, even though they honestly believed that they were within the law or had committed merely a clerical error. Frequently, these penalties were much larger than the fines that could be assessed as penalties for criminal violations of the

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36. Herzstein, *supra* note 2, at 287.

37. The sole practical constraint on the consideration of petitions was the very liberal statute of limitations for suits by the Government to recover Section 592 penalties from an importer. Under Section 621 of the Tariff Act of 1930, 19 U.S.C. § 1621 (1982), government suits to recover penalties were barred unless commenced within five years after the discovery of the violation. *See, e.g.*, United States v. R.I.T.A. Organics, Inc., 487 F. Supp. 75 (N.D. Ill. 1980); United States v. Brown 404 F. Supp. 968, 971 (S.D.N.Y. 1975), *aff'd* 538 F.2d 315 (2d Cir. 1976); United States v. Eight Rhodesian Stone Statues, 449 F. Supp. 193, 206 (C.D. Cal. 1978); United States v. Alcatex, Inc., 328 F. Supp. 129, 134 (S.D.N.Y. 1971).

Customs laws.[38]

Angered and frustrated by the draconian nature of Section 592 penalties, importers pressed for reform. Title I of the Customs Procedural Reform and Simplification Act of 1978[39] completely revised Section 592. The following were the most important reforms:

(1) transformation of Section 592 from an essentially in rem forfeiture law to an in personam monetary penalty statute;[40]

(2) classification of violations according to the culpability of conduct involved and the establishment of lower maximum penalties for violations resulting from gross or simple negligence;[41]

(3) improvement of procedural safeguards in administrative penalty proceedings;[42]

(4) creation of stricter recordkeeping requirements for importers[43] and expansion of Customs' information-gathering powers;[44] and

(5) establishment of de novo judicial review of all issues relating to penalty claims, including the amount of the penalty assessed.[45]

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38. *See, e.g.*, 18 U.S.C. §§ 542, 545 and 1001 (1982).

39. Act of October 3, 1978, Pub. L. No. 95-410, tit. I, 92 Stat. 888 (codified in scattered sections of 19 U.S.C.).

40. *See* 19 U.S.C. § 1592(c) (1982). The Court of International Trade recently held that revised Section 592 did not provide the Government with an in rem cause of action to seek the forfeiture of imported goods. *See United States v. One Red Lamborghini*, No. 85-10-01393, slip op. 86-3 (Ct. Int'l Trade Jan. 6, 1986).

41. *See* 19 U.S.C. § 1592(c) (1982).

42. *See id.* § 1592(b).

43. *See id.* § 1508.

44. *See id.* §§ 1509, 1510.

45. *See id.* § 1592(e)(i). In addition, the 1978 reforms sought to limit Customs' power to seize and detain merchandise which is the subject of a Section 592 investigation. Specifically, Section 592(c)(5) authorizes Customs officers to seize such goods only in cases where there is a reasonable belief that a person has violated the law's provisions and (1) the alleged violator is insolvent or beyond the jurisdiction of the United States or (2) seizure is otherwise essential to protect the revenue of the United States or to prevent the importation of prohibited or restricted merchandise. 19 U.S.C. § 1592(c)(5). While Congress' intent was to transform Section 592 from an essentially in rem to an in personam penalty, the 1978 reforms provided no viable mechanism whereby an importer could review a Customs decision to seize imported goods. In many cases, Customs still seizes goods as a means of exerting extra pressure on the importer, who may be contractually obligated to deliver the seized goods by a certain date, or who may

The Customs Courts Act of 1980[46] transferred exclusive jurisdiction of Section 592 penalty claims suits from the district courts to the United States Court of International Trade.[47]

Notwithstanding these reforms, Customs persists in using Section 592 as a major weapon to fight unlawful import practices. Current developments suggest that Customs, in a reorganization of unprecedented breadth and scope, is transforming itself into an agency with primary emphasis on systematic intelligence gathering, detection of unlawful practices, and prosecution of violators.[48] Examination of Customs' *1983 Annual Report*[49] and the agency's recently prepared *Five Year Plan for the Years 1986 to 1990*[50] confirms Customs' intent to shift its resources away from commercial operations to concentrate instead on enforcement activities. Since the 1978 reforms, importers have seen a marked increase in penalties[51] and an increase in general merchandise seizures.[52] Customs' metamorphosis dictates a review of the oper-

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need the goods to keep his own firm in operation. Such added business pressures often force importers to accept heavy penalties in order to obtain release of their property.

In United States v. Gold Mountain Coffee, Ltd., No. 84-6-00858, slip op. 84-117 (Ct. Int'l Trade Oct. 16, 1984), the court specifically ruled that forfeiture of goods under Section 592 is not an ordinary remedy in addition to monetary penalties imposed under that section. Furthermore, the court ruled that Customs should not circumvent Section 592's limitations on seizure by resorting to other statutory remedies, such as civil arrest of imported merchandise.

46. Act of October 10, 1980, Pub. L. No. 96-417, 94 Stat. 1727.

47. *Id.* § 201, 94 Stat. 1728 (presently codified at 28 U.S.C. § 1582(1) (1982)).

48. *See infra* notes 81-90 and accompanying text.

49. 1983 ANNUAL REPORT, *supra* note 4.

50. *U.S. Customs Service, 5-Year Plan, 1986-1990* [Internal Customs Service Information Memorandum dated June 29, 1984] (hereinafter "Five Year Plan").

51. During fiscal years 1979 through 1982, penal collections resulting from violations of the Customs laws totalled approximately $25 million per year. In fiscal 1983, these collections skyrocketed to $43.2 million, an increase of 68.8% over the prior year. 1983 ANNUAL REPORT, *supra* note 4, at 31. Penalty collections are Customs' second-largest source of revenue, trailing only duty collections on consumption entries and warehouse withdrawals. *Id.* The penalty amounts described herein do *not* include seizures of narcotics ($7.8 billion in 1983), vehicles ($63.9 million in 1983), aircraft ($19.1 million in 1983), vessels ($33.2 million in 1983), or monetary instruments ($50.2 million in 1983). *Id.* at 33.

52. During fiscal 1983, for example, Customs made 36,972 seizures of general merchandise having a collective value of $142,823,959. This represents a substantial increase from fiscal year 1982, when Customs made 27,132 seizures of merchandise worth $92,015,268 and 1981, when Customs made 23,250 seizures of

ation of "reformed" Section 592.

III. Penalty Procedures Under the "Reformed" Section 592

A. General Prohibition

Subsection (a) of Section 592 prohibits importers from making false statements or engaging in false practices. The subsection reads:

> (A) Prohibition
>
> (1) General Rule.—Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty thereby, no person, by fraud, gross negligence, or negligence—
>
> (A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of—
>
> (i) any document, written or oral statement, or act which is material and false, or
>
> (ii) any omission which is material, or
>
> (B) may aid or abet any other person to violate subparagraph (A).
>
> (2) Exception
>
> Clerical errors or mistakes of fact are not violations of paragraph (1) unless they are part of a pattern of negligent conduct.[53]

Section 592(a) penalizes all false and material statements, acts, and omissions, regardless of whether they result from intentional fraud, gross negligence, or ordinary negligence. Loss of revenue due to the illegal activity is likewise irrelevant.[54] Actionable false statements and practices are diverse, including double invoicing and undervaluation schemes,[55] misdescription of imported goods,[56] false claims for duty exemptions or entitlement to special

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merchandise valued at $63,491,257. 1983 Annual Report, *supra* note 4, at 33.

53. 19 U.S.C. § 1592(a) (1982).

54. *See, e.g.*, United States v. Quintin, No. 81-9-01320, slip op. 83-56 (Ct. Int'l Trade Apr. 3, 1984). *See generally* United States v. Ven-Fuel, Inc., 758 F.2d 741 (1st Cir. 1985) (the opinion discusses both case law and legislative history surrounding liability based on mere negligence).

55. *See, e.g.*, Rivera-Siaca v. United States, 754 F.2d 988, 989 (Fed. Cir. 1985); United States v. Priscilla Modes, Inc., No. 84-4-00493, slip op. 85-122 (Ct. Int'l Trade Nov. 27, 1985).

56. *See, e.g.*, United States v. F.A.G. Bearings, Ltd., 598 F. Supp. 401 (Ct.

tariff benefits,[57] false certifications for tax-free import permits,[58] and entry of prohibited merchandise.[59] Additionally, Customs places greater priority on punishing serious violations that do not result in revenue losses, such as evasion of steel and textile quotas.[60]

B. Penalty Amounts

Maximum penalties for violations of "reformed" Section 592(a) vary widely, according to: the culpability of the violator, the value of the imported merchandise, and the amount of lost duty. Regardless, maximum statutory penalties are likely to be substantial.

When a violation of Section 592 results from intentional fraud, Customs may assess a maximum penalty equal to the "domestic value" of the imported merchandise.[61] According to penalty guidelines established by the Customs Service, a violation is fraudulent when it "results from an act or acts (of commission or omission) deliberately done with intent to defraud the revenue or to otherwise violate the laws of the United States, as established by clear and convincing evidence."[62]

Int'l Trade 1984); United States v. R.I.T.A. Organics, Inc., 487 F. Supp. 75 (N.D. Ill. 1980).

57. *See, e.g.*, ITT Semiconductors v. United States, 576 F. Supp. 641 (Ct. Int'l Trade 1983); United States v. RCA Corp. 5 INT'L TRADE REP. DEC. (BNA) 1807 (S.D. Ind. 1983); United States v. Digital Equipment Corp., 3 C.I.T. 52 (1982).

58. United States v. Ven-Fuel, Inc., 758 F.2d 741 (1st Cir. 1985).

59. *See* United States v. Gordon, No. 84-1-00074, slip op. 84-68 (Ct. Int'l Trade June 13, 1984).

60. *See generally,* ENERGY AND COMMERCE REPORT, *supra* note 4. Under Operation Tripwire, a Customs antifraud initiative targeted largely at imports of textiles, steel and electronic goods, millions of dollars worth of Section 592 penalties have been imposed. *Id.* at 50-66 (steel), 67-73 (textiles), 74-97 (electronics). In various cases, particularly involving steel fraud, criminal charges have also been brought.

61. 19 U.S.C. § 1592 (c)(1) (1982). Section 162.43 of the Customs Regulations defines "domestic value" as "the price at which such or similar property is freely offered for sale at the time and place of appraisement. . . ." 19 C.F.R. § 162.43 (1985). In one case where the maximum penalty for a fraudulent violation was imposed, the Court of International Trade computed "domestic value" as the sum of: (1) the invoice value of the merchandise involved; (2) freight costs; (3) profit; and (4) Customs duties owing on the merchandise. United States v. Quintin, No. 81-9-01320, slip op. 84-33 (Ct. Int'l Trade Apr. 3, 1984).

62. 19 C.F.R. Part 171, app. B, § (B)(3) (1985). In "fraud" cases Customs

When a violation results from gross negligence and in a loss of revenue, Customs may assess a maximum penalty equal to four times the duties lost because of the violation.[63] If a violation occurs as a result of gross negligence without affecting duty assessment, Customs may assess a penalty equal to forty percent of the dutiable value of the merchandise.[64] The penalty may never exceed the value of the merchandise.[65] Customs guidelines state that an importer acts with gross negligence when it commits acts "done with actual knowledge of or wanton disregard for the relevant facts and with indifference or disregard for the offender's obligations under the statute, but without intent to defraud the revenue or violate the laws of the United States."[66]

If an importer negligently violates Section 592 resulting in a loss of duty, the maximum penalty Customs may assess cannot exceed twice the duties lost.[67] If the negligent violation did not result in a loss of revenue, the maximum penalty may not exceed twenty percent of the dutiable value of the imported merchandise.[68] Again, Customs may not impose a penalty in excess of the value of the merchandise. Customs guidelines define negligence as acts resulting "from the offender's failure to exercise reasonable care and competence to ensure that a statement made is correct."[69]

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may assess a penalty claim equal to the value of the merchandise regardless of whether the violation resulted in a loss of revenue. 19 U.S.C. § 1592(c)(1) (1982).

63. 19 U.S.C. § 1592(c)(2)(A) (1982). "Loss of revenue" is generally defined as the lawful duties of which the Government has been or may have been deprived by reason of an allegedly false or fraudulent practice. An "actual loss of revenue" occurs when the Government has been deprived of duties with respect to entries which have been "liquidated" (subjected to a final appraisement and determination of duty liability) and made final as against both the importer and the Government. A "potential loss of revenue" is said to have occurred where the entries involved have not yet been "liquidated." In such instances, Customs may recoup these duties from the importer by liquidating the entry and making a demand for additional duties.

Ordinarily, liquidations may not be disturbed more than 90 days after made. 19 U.S.C. § 1501 (1982). In cases of actual fraud, however, Customs may recoup lost revenue by reliquidating the entry within two years of the date of liquidation. *See* 19 U.S.C. § 1521 (1982).

64. 19 U.S.C. § 1592(c)(2)(B) (1982).

65. *Id.* § 1592(c)(2)(A)(i).

66. 19 C.F.R. Part 171, app. B, § (B)(2) (1985).

67. 19 U.S.C. § 1592(c)(3)(A) (1982).

68. *Id.* § 1592(c)(3)(B).

69. 19 C.F.R. Part 171, app. B, § (B)(1) (1985).

C. Discovery and Investigation of Violations: Recordkeeping Requirements

Customs discovers violations in a variety of ways, including detection during routine processing of entries and detection through intense, sector-specific audit and investigation programs.[70] Frequently, investigations begin with information supplied by an importer's injured competitors,[71] who may seek an informer's compensation award.[72]

Laws requiring importers to maintain complete business records have greatly aided Customs' investigative efforts. Prior to 1978, Congress did not require importers to keep records of most Customs transactions.[73] Congress amended Section 508 of the Tariff Act of 1930 to require that importers and their agents keep records of transactions for a period of five years from the date of entry.[74] Section 509 as amended[75] authorizes Customs to examine these records[76] and to issue administrative summonses directing importers and certain third parties to furnish the records to investigating agents.[77]

Customs may seek judicial enforcement of an improperly answered summons.[78] Failure to comply with a court's enforcement

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70. *See* ENERGY AND COMMERCE REPORT, *supra* note 4.

71. *See* Dickey II, *supra* note 3, at 300 n.6.

72. Under 19 U.S.C. § 1619 (1982), informers who furnish Customs with information leading to the discovery of a violation may receive an award of compensation equal to 25% of the monies recovered, but not to exceed $50,000 in any case.

73. *See, e.g.*, S. REP. No. 778, 95th Cong., 2d. Sess. 12, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 2211, 2224. Prior to the 1978 reforms, importers were only required to retain records pertaining to Customs entries which were unliquidated or made within the past year. *See* United States v. Molt, 444 F. Supp. 491, 495 (E.D. Pa.), *aff'd*, 589 F.2d 1247 (3d Cir. 1978). Where a target refused to comply with a Customs summons, judicial enforcement was not available; rather, only administrative sanctions, imposed by the Secretary of the Treasury, could be imposed. *See* S. REP. No. 776, 95th Cong., 2d Sess., at 14, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 3941, 3954-55.

74. *See* 19 U.S.C. § 1508 (1982).

75. *Id.* § 1509.

76. *Id.* Customs officers may also examine witnesses under oath to obtain relevant information.

77. *See id.* § 1509(a)(2) (authority to summon importers) and § 1509(c) (special procedures for third-party summonses including importers' attorneys, customs brokers, and accountants.)

78. *Id.* § 1510(a).

order may subject an importer to contempt of court sanctions[79] and to additional administrative orders prohibiting importation of merchandise into the United States and withholding delivery of consigned merchandise held by Customs.[80] As importers accumulate more extensive business records, Customs is increasing the use of summons and related enforcement procedures.[81]

Customs also has increased its use of computer technology, which streamlines its operations by the integration of its computer facilities to produce a nationwide intelligence network. Customs has expressed the importance of automation in its *Five Year Plan*:

> Extensive use of computer based technology is the key foundation upon which Customs will improve its enforcement and commercial performance. In the enforcement area, this will involve the complete redesign of the Treasury Enforcement Communications System, improvement of its database, and the development of very advanced capabilities relating to intelligence analysis. In the commercial area, the complete implementation and refinement of the automated commercial system should revolutionize our entire processing of commercial merchandise. The development of an Integrated Communications Network will improve efficiency and allow the linkage of commercial and enforcement automated systems. And finally the use of automation at all organizational levels should revolutionize the way we reproduce, disseminate, file and retrieve information.[82]

Customs already has initiated efforts to provide nationwide intelligence support for penalty-related activities. In December 1982, Customs' Offices of Enforcement and Commercial Operations established a Fraud Investigation Center at Customs head-

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79. *Id.*

80. *Id.* § 1510(b).

81. The first reported decisions regarding Section 509 summonses have clearly supported the Government's requests for access to records. In United States v. Frowein, 727 F.2d 227 (2d Cir. 1984), the Second Circuit upheld Customs' right to serve and enforce an administrative summons in furtherance of a penalty investigation, even *after* Customs had filed suit in the Court of International Trade for the purpose of collecting the penalty. Further, the court held that Customs, by its summons, could obtain *all* of the target's extant records, and not simply those whose retention was required by law. *Id.* at 233; *see also* United States v. Weinberg, No. 84C 5390, slip op., (N.D. Ill. Jan. 9, 1985); *In re* Clubman, Inc., 532 F. Supp. 92 (D.P.R. 1982).

82. *Five Year Plan, supra* note 50, at 5.

quarters in Washington, D.C. With an extensive staff of import specialists, inspectors, database managers, and senior special agents, the Center gathers, analyzes, and distributes information concerning penalty matters and furnishes support to local investigators. The Center uses a computer to track major fraud investigations and distributes monthly reports concerning these cases. Because of these initiatives, many single-district Customs investigations have been expanded to include additional districts and penalty claims.[83] In addition, Customs has established seven regional fraud coordinators and forty district fraud teams to assist and oversee local Customs investigations. In their first year of operations, these two groups uncovered a substantial number of illegal operations, resulting in numerous penalty claims and several criminal indictments.[84]

Customs' resolve to build a major intelligence network is clear. In 1983 alone, the agency (1) formulated a national intelligence system; (2) established intelligence units in each Customs region; (3) allotted new positions to the intelligence function nationwide; and (4) initiated steps to create within the Customs Service a professional cadre of intelligence officers.[85]

As Customs consolidates its available information on commercial transactions into a single database, investigators will have virtually instant access to information from all ports of entry. This result will eliminate much routine effort and thereby enable Customs to complete additional civil and criminal investigations.[86]

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83. 1983 ANNUAL REPORT, *supra* note 4, at 13.

84. *Id.* at 20-21.

85. *See id.* at 19.

86. Several criminal law provisions pertain to violations of Customs laws. Section 542 of the Federal Criminal Code, 18 U.S.C. § 542 (1982), is the criminal law counterpart to Section 592. Section 542 makes it a felony to enter or attempt to enter merchandise into the United States by means of false statements or practices. *Id.* Smuggling is a separate felony that makes criminal attempts to clandestinely import goods, or attempts to enter goods by means of false, forged or fraudulent documents. *Id.* § 545. Proof of possession of smuggled goods is sufficient grounds for conviction under the smuggling statute, unless such possession is satisfactorily explained to a jury. *Id.*

In many prosecutions for violations of the Customs laws, the Government seeks an indictment or information to charge a violation of 18 U.S.C. § 1001, which prohibits the making of false statements or entries to government agencies. A variety of other statutes contain criminal penalties for such practices as forgery of Customs documents and falsification of duty drawback claims. *Id.* §§ 496, 550. *In addition,* parties who obstruct a Customs investigation may be

The reorganization of Customs' operations has altered the agency's investigative techniques. For instance, the agency has stopped manually processing and reviewing all Customs entries. Instead, Customs now uses a "selective bypass" system, in which Customs officials liquidate most transactions "as entered." The removal of prior scrutiny furthers Customs' intent to remove commodity specialists from the routine processing of entry documents and involve them more fully in enforcement activities. Some critics have charged that the "selective bypass" system has allowed fraudulent schemes to escape detection.[87] To insure compliance, Customs increasingly has relied on formal post-entry audits. During 1983, Customs carried 483 audits in progress, including 195 "major importer" audits, and completed the first of many "multiregion" audits.[88]

Selectivity is a key element to Customs' enforcement strategy. The agency is striving to select for intense examination those transactions in which the possibility of fraudulent practices is greatest.[89] As the *Five Year Plan* indicates, Customs intends to "select the aircraft, vessel, cargo shipment, entry document, airline passenger, etc., that represents the highest potential threat and return for our efforts."[90] To attain these goals, Customs will make further use of specialized task forces, conduct industry-specific fraud analysis, and measure its effectiveness in terms of fraud detection in specific target areas.[91]

D. The Prior Disclosure Option

Occasionally, an importer will discover that his actions violate Section 592. In such circumstances, the importer must decide

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found guilty of obstruction of justice. *See* United States v. Browning, 630 F.2d 694 (10th Cir. 1980), *cert. denied* 451 U.S. 998 (1981).

87. *See* ENERGY AND COMMERCE REPORT, *supra* note 4, at 24-32.

88. 1983 ANNUAL REPORT, *supra* note 4, at 22.

89. Examples of present Customs enforcement efforts which are selective in scope include Operation TRIPWIRE (detection of fraud in imports of steel, textiles and electronics), Operation EXODUS (interdiction of exports of high-technology and militarily sensitive material and technology to Communist nations), Operation GREENBACK (an interagency effort directed at curtailing movements of currency gained as a result of illegal operations), and Operation EL DORADO (an intensive effort to stem the tide of illegal drug imports). *See id.* at 11-14, 21.

90. *Five Year Plan, supra* note 50, at 5.

91. *Id.* at 7.

whether to make a "prior disclosure" of these violations in hopes of limiting his liability. During the mid-1970s, Customs experimented with a program that reduced penalty liabilities of importers who, prior to the commencement of a formal investigation by Customs, voluntarily disclosed Section 592 violations.[92] Regulations subsequently formalized this program.[93] The 1978 "reforms"[94] codified the "prior/voluntary disclosure" program.

Under Section 592(c)(4),[95] an importer may limit his liability if he voluntarily discloses a violation either before Customs commences a formal investigation or without knowledge that Customs has commenced such an investigation. When an importer discloses a fraudulent violation of Section 592, which has resulted in a loss of revenue, the maximum penalty is one hundred percent of the revenue lost.[96] If the voluntarily disclosed fraudulent violation did not result in a revenue loss, the maximum penalty is ten percent of the dutiable value of the merchandise.[97] When a voluntarily disclosed violation results from gross or ordinary negligence, the maximum penalty is the interest, computed from the date of liquidation, on the amount of duties lost because of the violation.[98] When a nonrevenue-loss violation occurs because of gross or ordinary negligence, voluntary disclosure insulates the violator from significant penalty liability. Nonetheless, Customs may require restitution of any revenues lost due to the violation.

Customs has issued extensive regulations governing prior disclosure. In order that a party receive the benefits of prior disclosure, Customs requires the party to disclose the circumstances surrounding the violation by submitting a written statement that:

> (1) Identifies the class or kind of merchandise involved in the violation;
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> (2) Identifies the importation included in the disclosure by entry number or by indicating each Customs port of entry and the approximate dates of entry;
>
> (3) Specifies the material false statements or material omissions made; and

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92. *See* U.S. Customs Service Circular: ENF-4-R:E:P (Mar. 15, 1974).
93. *See, e.g.,* former 19 C.F.R. § 171.1 (1975).
94. Act of October 3, 1978, Pub. L. No. 95-410, tit. I, § 110, 92 Stat. 888, 893.
95. 19 U.S.C. § 1592(c)(4) (1982).
96. *Id.* § 1592(c)(4)(A)(i).
97. *Id.* § 1592(c)(4)(A)(ii).
98. *Id.* § 1592(c)(4)(B).

> (4) Sets forth, to the best of the violator's knowledge, the true and accurate information or data which should have been provided in the entry documents, and states that the person will provide any information or data which is unknown at the time of disclosure within 30 days of the initial disclosure date or within an extension of the 30-day period as the district director may permit in order for the person to obtain the information or data.[99]

Customs also has issued regulations that identify the date on which Customs commences formal investigations of a Section 592 violation.[100] A party disclosing a violation after Customs commences a formal investigation bears the burden of proving that he was unaware of the Customs initiated investigation.[101]

Importers must approach carefully any decision to exercise the prior disclosure option. Although the prospect of limiting liability is attractive, a prior disclosure does not compel other agencies to grant leniency. When a violation occurs because of fraud or criminal conduct, a prior disclosure may prompt criminal prosecution. Furthermore, voluntary disclosure limits a party's Customs liability only on the precise transactions and violations disclosed. The importer may be liable for full penalties regarding any undisclosed violations that Customs discovers while investigating a vol-

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99. 19 C.F.R. § 162.71(e) (1985). Customs has proposed additional regulations that would limit importers' access to the "prior disclosure" option. *See* 50 Fed. Reg. 27829 (July 8, 1985). In certain circumstances, Customs may extend the benefits of prior disclosure where an importer makes an *oral* disclosure that provides the agency with substantially all of the information outlined above. 19 C.F.R. § 162.74(b)(3) (1985).

100. 19 C.F.R. § 162.74(d) (1985). Where a matter is referred by an import specialist or other Customs officer who suspects that a violation has occurred, a formal investigation is considered to have commenced on the date recorded in writing as the date on which the matter was referred to Customs' Office of Investigations. *Id.* § 162.74(d)(1). In cases where a Customs official refers a matter to the Office of Investigations for a routine nonpenalty-type inquiry (*e.g.*, as to classification or value), an investigation is considered to commence on the date an investigative agent records in writing when facts and circumstances were first discovered which suggested the possibility of a violation with respect to the disclosing party and the disclosed information. *Id.* § 162.74(d)(2). An investigation prompted by information received from a party outside the Customs Service is generally considered to have commenced on the date an investigating officer first recorded the matter in writing. *Id.* § 162.74(d)(3).

101. Section 592(c)(4) provides that "[t]he person asserting lack of knowledge of the commencement of a formal investigation has the burden of proof in establishing such lack of knowledge." 19 U.S.C. § 1592(c)(4) (1982).

untarily disclosed violation.[102] When an importer makes a prior disclosure, Customs generally refers the matter for formal investigation[103] and penalty assessment proceedings.

E. Assessment and Mitigation of Section 592 Penalties

If upon investigation the District Director of Customs at the port in question believes that an importer has violated Section 592, the district director will issue the importer a prepenalty notice that must:

> (i) describe the merchandise;
>
> (ii) set forth the details of the entry of introduction [of merchandise], the attempted entry or introduction, or the aiding or procuring of the entry or introduction;
>
> (iii) specify all laws and regulations allegedly violated;
>
> (iv) disclose all the material facts which establish the alleged violation;
>
> (v) state whether the alleged violation occurred as a result of fraud, gross negligence, or negligence;
>
> (vi) state the estimated loss of revenue, if any, and (taking into account all circumstances), the amount of the proposed monetary penalty; and
>
> (vii) inform such person that he shall have a reasonable opportunity to make representations, both oral and written, as to why a claim for a monetary penalty should not be issued in the amount stated.[104]

A prepenalty notice informs an alleged violator that Customs is considering assessing a Section 592 penalty.[105] The notice also

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102. *See* 19 C.F.R. § 162.74(i) (1985), which provides:

> Undisclosed violations discovered by Customs as the result of an investigation of a prior disclosure shall not be entitled to treatment under the prior disclosure provisions.

103. *See* 19 C.F.R. § 162.74(c) (1985). Where certain minor violations are disclosed, Customs may opt not to institute a formal investigation or penalty proceedings. *Id.* § 162.74(j).

104. 19 U.S.C. § 1592(b)(1) (1982). Issuance of a prepenalty notice may be waived where the alleged violation is noncommercial in nature or the amount of the proposed penalty is $1,000 or less. *Id.* § 1592(b)(1)(B).

105. Issuance of a prepenalty notice is not required in cases where less than one year remains before expiration of the statute of limitations. 19 C.F.R. §

gives the alleged violator an opportunity to furnish Customs with any pertinent facts that explain why Customs should assess no penalty or a lesser penalty. Customs generally issues prepenalty notices for maximum penalties, particularly when Customs suspects fraud.[106]

Within thirty days after issuance of a prepenalty notice, the importer may file a written reply with the District Director of Customs.[107] In this reply the importer may argue why Customs should not issue a penalty claim. Absent extraordinary circumstances, the district director will not extend the thirty-day response period.[108] The prepenalty response provides the importer with an extremely important opportunity to explain his actions to Customs and persuade the agency not to issue a penalty claim. The importer must take great care to insure that the response does not contain any false or misleading statements, or information that inadvertently discloses additional violations.

The District Director of Customs will consider the prepenalty response and any oral conferences held in connection with the response. If the district director believes that a violation has occurred, he subsequently will issue a written penalty claim to the importer.[109] The penalty claim specifies changes in the prepenalty notice and advises the alleged violator of his right to petition for a mitigated penalty.

In the 1978 "reforms" Congress did nothing to effectively control the penalty assessed by the district director. Because a penalty for the value of the merchandise is more formidable than a

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171.1(b)(1) (1984).

106. 19 C.F.R. Part 171, app. B, § (C)(1)(b) (1985): "If the violation is determined to be the result of fraud, the proposed claim *shall* be equal to the domestic value of the merchandise." (Emphasis added). This is true even though Congress has indicated that Customs should not always issue prepenalty notices or penalty claims for the maximum statutory penalty, 19 C.F.R. Part 171, app. B, § (C)(1)(a) (1985), and even though Customs guidelines admonish the district director to take all facts and circumstances into account in setting the amount of the proposed penalty. *See* S. REP. No. 778, 95th Cong., 2d Sess. 21 *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 2211, 2223.

In addition, the relevant statute of limitations is more favorable to governmental interests in the case of fraudulent violations, thereby providing an impetus for allegations of fraud.

107. 19 C.F.R. § 171.1(b)(2) (1984).

108. *Id.*

109. 19 U.S.C. § 1592(b)(2) (1982).

penalty based upon a loss-of-revenue-multiple,[110] a district director may allege fraudulent conduct and assess a full value penalty in order to obtain leverage in settlement discussions. Some district directors may consider such action prudent, since Customs may not have completed its investigation and may be unaware of relevant facts.[111] Also, the statute of limitations is more liberal for fraud actions under Section 592 than in cases alleging gross or simple negligence.[112] Finally, a district director risks nothing by alleging fraud, because Customs apparently is not estopped from assessing lesser penalties if a court finds a lower level of culpability.[113] In light of these considerations, Congress has not realized the principal reform sought by the 1978 Act—penalty assessments that are less harsh.[114]

The amended Section 618 of the Tariff Act of 1930[115] empowers the Secretary of the Treasury to mitigate any penalty incurred under the Customs laws.[116] An importer assessed with a penalty

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110. For instance, where a violation has resulted in a $5,000 loss of revenue with respect to imported merchandise having a value of $2 million, a District Director of Customs may lawfully threaten the violator with a $2 million penalty by alleging fraudulent conduct. 19 U.S.C. § 1592(c)(1) (1982). If the conduct is characterized as "gross negligence," the maximum penalty which might be sought is "just" $20,000. *Id.* § 1592 (c)(2)(A)(ii).

111. Instances have occurred in which Customs has assessed penalties before completing its investigative activities. *See, e.g.*, United States v. Frowein, 727 F.2d 227 (2d Cir. 1984); *see also*, United States v. R.I.T.A. Organics, Inc., 487 F. Supp. 75 (N.D. Ill. 1980).

112. *See* 19 U.S.C. § 1621 (1982). Legislation has been introduced to extend the "discovery" rule to all actions seeking recovery of Section 592 penalties, regardless of alleged culpability.

113. *But see* notes 229-33 *infra* and accompanying text.

114. The United States Court of International Trade has held that in presenting prepenalty notices and penalty claims Customs must follow the procedures set forth in the statute and regulations. In Rey Cafe Coffee Co. v. Pitman, 5 C.I.T. 112 (1983), an importer was suspected of attempting to enter coffee into the United States by means of a falsified certificate of origin. The District Director of Customs initially directed the importer to export the coffee in question, and to deposit with Customs an amount equal to 40% of the dutiable value of the coffee (i.e., the maximum penalty for a grossly negligent non-revenue violation). In setting aside the district director's action, the Court of International Trade held that the Customs Service, if it wishes to present a claim for a violation of Section 592, must follow the procedures set forth in the statute and regulations.

115. 19 U.S.C. § 1618 (1982).

116. *Id.* In addition, 19 U.S.C. § 1617 empowers the Secretary to compromise penalty claims. *See* Comm.to Preserve Am. Color Television v. United States,

may petition the Commissioner of Customs for mitigation.[117] On review, the Secretary may mitigate the penalty as he deems "reasonable and just."[118] Generally, the importer must file the petition for mitigation within sixty days after Customs mails the penalty notice.[119]

In determining whether to mitigate a Section 592 penalty claim, Customs must consider all facts and circumstances surrounding the case. Customs considers the following circumstances to be "mitigating factors":

(1) *Contributory Customs Error.* When a Customs official has given an importer erroneous or misleading advice, which is partly responsible for any alleged violation, Customs' contributory error may be considered in mitigation of the penalty. The effect of the misinformation will be weighed according to the concepts of comparative negligence, so if it is determined that Customs' error is the sole cause of the violation, the penalty claim will be cancelled.

(2) *Cooperation with the Investigation.* A penalty may be mitigated if an alleged violator exhibits "cooperation beyond that expected from a person under investigation for a Customs violation." For instance, if an importer assists Customs officers to an "unusual degree" in auditing its books and records, or assists Customs in obtaining additional information, such cooperation

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706 F.2d 1574 (Fed. Cir.), *cert. denied,* 464 U.S. 825 (1983); Montgomery Ward & Co., Inc. v. Zenith Radio Corp., 673 F.2d 1254 (C.C.P.A.), *cert. denied,* 459 U.S. 943 (1982). However, exercise of the compromise power is often highly controversial, so it is rarely used.

117. 19 C.F.R. § 171.11 (1985). In an unpublished opinion, the Court of International Trade recently held that the Government may not bring a lawsuit to recover a Section 592 penalty while a Section 618 petition is pending. Further, the Court ruled that an importer does not waive its right to a Section 618 mitigation decision if it sues the Government to contest matters relating to the penalty while a Section 618 petition is pending. Kritschker v. Greenleaf, No. 885-500657 (Ct. Int'l Trade Sept. 19, 1985) (unreported slip opinion), *as discussed in* United States v. One Red Lamborghini, No. 85-10-01393, slip op. 86-3 (Ct. Int'l Trade Jan. 6, 1986).

118. 19 U.S.C. § 1618 (1982).

119. 19 C.F.R. § 171.12(b) (1985). In extraordinary circumstances (for example, where the statute of limitations is about to run), the response period may be shortened to as few as seven days. 19 C.F.R. § 162.32 (1985). In United States v. Ross, 574 F. Supp. 1067 (Ct. Int'l Trade 1983), the court held that Customs did not act unreasonably in requiring an alleged violator to respond to a penalty notice within the seven day minimum period.

may be taken into account in mitigating the penalty. Simply providing corporate books and records to a Customs investigator, however, will not be considered a mitigating factor.

(3) *Immediate Remedial Action.* An importer may obtain mitigation if it promptly pays any actual loss of duty prior to issuance of a penalty notice or within thirty days after a determination of the duties owed. In extreme circumstances, the removal of an offending corporate employee may be considered appropriate remedial action. The mere correction of organizational or procedural defects, however, will not be considered a mitigating factor, because Customs expects that all importers will remove or change any condition that may have contributed to the existence of a violation.

(4) *Inexperience in Importing.* The importer's inexperience will be considered a mitigating factor only if the penalty did not result from fraud or gross negligence.

(5) *Prior Good Record.* This factor will be considered in mitigation if the penalty under investigation did not result from fraud, and if the violator can show "a consistent pattern of importations without violation of Section 592, or any other statute prohibiting false or fraudulent importation practices."[120]

Mitigating factors may be offset by certain "aggravating factors", including obstructing the investigation, withholding evidence, providing misleading evidence, and committing prior Section 592 violations.[121] Obstructing a Customs investigation may also result in criminal prosecution.[122]

Customs has established mitigation guidelines[123] according to the violation involved and the culpability of the offender, as shown in the following table:

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120. 19 C.F.R. Part 171, app. B, § (F) (1985). With respect to prompt payment under the immediate remedial action factor, an importer must be careful because the tender of allegedly withheld duties in certain circumstances may preclude the importer from later recovering them or protesting their exaction. *See infra* notes 170-82 and accompanying text.

121. 19 C.F.R. Part 171, app. B, § (G) (1985).

122. *See* United States v. Browning, 630 F.2d 694 (10th Cir. 1980), *cert. denied,* 451 U.S. 988 (1981) (obstruction of justice by furnishing Customs with false information).

123. 19 C.F.R. Part 171, app. B, §§ (D)(1)-(4) (1985). In certain circumstances, Customs may remit or cancel the penalty claim in full. *Id.* §§ (D)(5)-(6).

MITIGATION OF 19 U.S.C. § 1592 CIVIL PENALTIES UNDER CUSTOMS SERVICE GUIDELINES (19 C.F.R. PART 171, APPENDIX B)

A. REVENUE LOSS VIOLATIONS

Level of Culpability	Maximum Statutory Penalty[a]	Ordinary "Mitigated" Penalty Amounts[a] *Minimum Penalty*	*Maximum Penalty*	Maximum Statutory Penalty If Violation
1. Fraud	Domestic Value of Merchandise	500% of Loss of Revenue	Domestic Value, or 800% of Loss of Revenue (Whichever is Less)	100% of Loss of Revenue
2. Gross Negligence	400% of Loss of Revenue or the Domestic Value of Merchandise, Whichever is Less	250% of Loss of Revenue	400% of Loss of Revenue or the Domestic Value, (Whichever is Less)	Interest on Loss of Revenue
3. Negligence	200% of Loss of Revenue or the Domestic Value of Merchandise, Whichever is less	50% of Loss of Revenue	200% of Loss of Revenue or the Domestic Value (Whichever is Less)	Interest on Loss of Revenue

B. NONREVENUE VIOLATIONS

1. Fraud	Domestic Value of Merchandise	50% of Dutiable Value of Merchandise	80% of Dutiable Value of Merchandise, or Ful Domestic Value (Whichever is Less)	10% of Dutiable Value
2. Gross Negligence	40% of Dutiable Value	25% of Dutiable Value	40% of Dutiable Value	Interest (None)
3. Negligence	20% of Dutiable Value	5% of Dutiable Value	20% of Dutiable Value	Interest (None)

[a] Customs also has power to demand restitution of "withheld duties," in addition to penalties.
[b] Mitigation is usually conditioned on payment of "withheld" duties.
[c] Presence of "aggravating factors" may preclude mitigation of fraud claims.

Customs may also consider "extraordinary factors" in reducing penalties. Such factors include Customs' inability to obtain jurisdiction over the violator or its inability to enforce a judgment against the violator, and the violator's inability to pay the mitigated penalty or the violator's extraordinary expenses incurred in assisting the Customs investigation.[124]

After considering representations made in the mitigation petition, Customs issues the importer a written statement detailing the agency's final determination,[125] giving the agency's findings of fact and conclusions of law, and demanding payment of the mitigated penalty.[126] The alleged violator then must decide whether to settle the case administratively by paying the mitigated penalty, plus any withheld duties, or whether to engage in further proceedings. Once the importer tenders these monies, Customs has no need to commence collection proceedings and very little incentive to grant additional mitigation. The alleged violator effectively has forsaken judicial review of the penalty. A penalized importer may file supplemental mitigation petitions,[127] but only if he first tenders the mitigated penalty and any withheld duties.[128] If the importer declines to pay the mitigated penalty, Customs will refer the matter to the Justice Department for the institution of civil collection proceedings in the United States Court of International Trade.[129]

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124. *Id.* § (H).

125. Courts consider the granting of mitigation as within Customs' discretion. *See, e.g.*, Greikspoor v. United States, 433 F. Supp. 794, 798 (M.D. Fla. 1977).

126. 19 U.S.C. § 1592(b)(2) (1982).

127. 19 C.F.R. § 171.33 (1985).

128. *Id.* § 171.33(c) (1985). Customs may not claim refunds owed an importer as an "offset" for Section 592 penalty liabilities unless the amount of the penalty is "legally fixed and undisputed" by being reduced to final judgment. *See, e.g.*, 31 U.S.C. § 3728 (1982); 19 C.F.R. § 24.72 (1985).

129. Section 603 of the Tariff Act of 1930, as amended, provides that when a violation of the Customs laws is discovered and legal proceedings by the Attorney General are required in connection therewith, the appropriate Customs officer has the duty to report the violation to the Attorney General and to furnish him with a statement of pertinent facts. 19 U.S.C. § 1603 (1982). Section 604 provides that the Attorney General, upon reviewing such information, must investigate the facts of the alleged violation and commence necessary proceedings to collect any fine, forfeiture or penalty. *Id.* § 1604. The Attorney General may decline to institute such proceedings if he determines that the ends of justice so require. *Id.*

An importer should be wary of tendering any penalties or duties for a Section 592 violation. Courts have held that monies tendered as "withheld duties" during the course of a Section 592 penalty investigation are voluntary payments to the Government, rather than "exactions" that the importer may protest and recover.[130] Similarly, courts have held that importers, through a protest, cannot recover any amounts tendered as withheld duties in administrative penalty settlements.[131] In most circumstances, particularly where the importer disputes his basic liability, he may be wiser to withhold duty payments and force the Government to sue for collection of the payment.

F. Judicial Review of Penalty Claims

Since 1980, the United States Court of International Trade has exercised exclusive jurisdiction for all actions to collect Section 592 penalties and duties.[132] The Government generally must institute an action to recover Section 592 penalties within five years of the alleged offense; but when the Government alleges an intentionally fraudulent violation, it must institute the action within five years of the violation's *discovery*.[133]

Although Section 592 does not limit the time the Government has to demand restitution of withheld duties, one court recently ruled that the applicable statute of limitations is the one governing the penalty claims.[134] Courts are reluctant to dismiss summarily complaints based on a tolling of the statutes of limitations

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130. *See, e.g.*, Carlingswitch, Inc. v. United States, 720 F.2d 656 (Fed. Cir. 1983); *see also* Carlingswitch, Inc. v. United States, 651 F.2d 768 (C.C.P.A. 1981).

131. ITT Semiconductors v. United States, 576 F. Supp. 641 (Ct. Int'l Trade 1983).

132. 28 U.S.C. § 1582(1) (1982); United States v. Appendagez, Inc. 560 F. Supp. 50 (Ct. Int'l Trade 1983); United States v. Accurate Mould Co., Ltd., 546 F. Supp. 567 (Ct. Int'l Trade 1982); *see also* United States v. Digital Equipment Corp., 4 C.I.T. 83 (1982), *rev'g*, United States v. Digital Equipment Corp., 3 C.I.T. 52 (1982).

133. 19 U.S.C. § 1621 (1982). In addition, the time that any person subject to the penalty or forfeiture is absent from the United States, or the time of any concealment or absence of property relating to the penalty, will not be considered in calculating the limitation. *Id.*

134. United States v. RCA Corp., 5 INT'L TRADE REP. DEC. (BNA) 1807 (S.D. Ind. 1983). While the *RCA* court's decision on this point relies on rather thin legal support, the alternative would conclude that *no* limitation existed on Customs' efforts to recover these monies.

without an evidentiary hearing.[135]

The Court of International Trade has held that Customs may recover penalties and withhold duties from any available source and that the assessment of such penalties against an individual is not tantamount to a criminal penalty.[136] Consequently, the Government has repeatedly brought lawsuits to recover penalties against both corporate importers and their individual officers and owners.[137]

When the Government sues to recover a Section 592 penalty, the court makes a de novo determination of all issues, including the amount of the penalty.[138] Actions taken during prepenalty and mitigation proceedings do not bind the Government, the importer, or the court. The Government has the burden of proving that a violation of Section 592 occurred. The burden, however, varies according to the degree of culpability alleged. If the Government alleges fraud, the Government has the burden "to establish the alleged violation by clear and convincing evidence."[139] If the alleged violation occurred because of gross negligence, the Government carries the burden of proving "all the elements of the alleged violation."[140] When negligence is alleged, the Government need only establish that an act or omission constituting a violation occurred. The burden then shifts to the alleged violator to prove that the act or omission did not result from negligence.[141] The courts have yet to decide the scope of these differ-

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135. *See, e.g.*, United States v. Ven-Fuel, Inc., 758 F.2d 741 (1st Cir. 1985); United States v. Gordon, No. 84-1-00074, (Ct. Int'l Trade June 13, 1984); United States v. RCA Corp., 5 INT'L TRADE REP. DEC. (BNA) 1807 (S.D. Ind. 1983); United States v. R.I.T.A. Organics, Inc., 487 F. Supp. 75 (N.D. Ill. 1980).

136. United States v. Murray, 561 F. Supp. 448 (Ct. Int'l Trade 1983). Thus, the defense of "double jeopardy" to prevent assessment of a civil penalty is not available to an individual who has previously been tried on criminal charges arising out of the same Customs transactions. *Id.*

137. *See, e.g.*, United States v. Ven-Fuel, Inc., 758 F.2d 471 (1st Cir. 1985); United States v. Priority Products, Inc., 615 F. Supp. 591 (Ct. Int'l Trade 1985); United States v. Ross, 574 F. Supp. 1067 (Ct. Int'l Trade 1983); United States v. Murray, 561 F. Supp. 448 (Ct. Int'l Trade 1983); United States v. Appendagez, Inc., 560 F. Supp. 50 (Ct. Int'l Trade 1983); United States v. Olympic Adhesives, Inc., 5 C.I.T. 171 (1983).

138. United States v. Priority Products, Inc., 615 F. Supp. 591 (Ct. Int'l Trade 1985).

139. 19 U.S.C. § 1592(e)(2) (1982).

140. *Id.* § 1592(e)(3).

141. *Id.* § 1592(e)(4); *see also* United States v. Rockwell Int'l Corp., No. 82-

ent burdens of proof.[142] Also, few penalty collection cases have been litigated to final determination.[143]

12-01744, slip op. 86-11 (Ct. Int'l Trade Jan. 22, 1986). In United States v. Zuber & Co., Inc., No. 82-9-01335, slip op. 85-106 (Oct. 9, 1985), the court held that an importer who is time-barred from protesting Customs decisions on tariff classification and appraisement of merchandise for duty recovery purposes nonetheless may prove such matters for defense against a Section 592 claim.

142. However, in *Rockwell*, No. 82-12-01744, slip op. 86-11, at 10 n.5, the Court of International Trade suggested in dictum that while it was "[a]ware of no case which defines negligence under [Section 592]," it would adopt the negligence standard used in tax penalty cases, i.e., "lack of due care or failure to do what a reasonable and ordinarily prudent person would do under the circumstances." *Id.*, citing Marcello v. Commissioner, 380 F.2d 499, 506 (5th Cir. 1967), *cert. denied*, 389 U.S. 1044 (1968). In at least one case, however, a court first found that a violation occurred, and then ordered further proceedings to determine the level of culpability attributable thereto. United States v. Ven-Fuel, Inc., 758 F.2d 741, 745 n.1 (1st Cir. 1985).

In *Rockwell*, the Court of International Trade entered partial summary judgment in favor of the Government on the question of whether a penalized importer had entered goods by means of false and material statements. Rockwell entered into the United States certain pinball machine components which were assembled in Mexico, and sought to claim a partial duty exemption under item 807.00 of the Tariff Schedules, 19 U.S.C. § 1202, on the value of the United States-origin components contained therein. In pre-entry submissions to Customs, Rockwell indicated that it would claim an exemption for certain cadmium batteries of United States origin which it subsequently found to be of Mexican origin. Although Rockwell discovered its error and submitted corrected declarations when the imported goods were finally appraised for duty purposes, the court found that the pre-entry statements were false and "material," even though they were intended only as an *estimation* of duties owed. The court concluded that "[t]he primary purpose of filing documentation in connection with foreign assembly operations is to ascertain which components are dutiable and which are not." *Rockwell*, slip op. 86-11, at 8. Thus, an importer may be liable for Section 592 penalties as a result of statements and omissions which do not actually control the assessment of a duty.

143. In one such case, however, the court found the violator guilty of fraud and entered judgment in favor of the Government for the full domestic value of the merchandise involved. United States v. Quintin, No. 81-9-01320, slip op. 84-33 (Ct. Int'l Trade Apr. 3, 1984), *appeal dismissed*, 746 F.2d 1452 (Fed. Cir. 1984). Both the domestic value and the loss of revenue involved in this case were exceedingly small.

Where the United States Court of International Trade enters judgment in favor of the Government for recovery of a penalty, the judgment bears interest from the date it is docketed with the clerk of the court. In United States v. Servitex, Inc., 535 F. Supp. 695 (Ct. Int'l Trade 1982), the court adopted the New York State statute on the payment of interest on judgments, and directed that interest be paid at the rate of 9% per annum, in the absence of a statute

G. Evolution of Customs Service Enforcement Goals

Because Customs is dramatically changing its approach to enforcement matters, an examination of Section 592 penalties and procedures is important. A recent *Five Year Plan*[144] indicated that Customs would shift more resources to enforcement matters:

> We will improve our performance in detecting violations of laws related to the importation of merchandise into the United States, including those that are caused by omission, negligence and intentional fraud.
>
> . . . .
>
> We will improve the "tools" of our enforcement personnel through better training, technology, intelligence, and legislative changes. . . .[145]

Customs plans to achieve these goals by increasing the use of information-gathering powers,[146] automating the processing of commercial transactions, and creating an integrated intelligence network that examines and post-audits particular transactions and shifts personnel from commercial to enforcement operations. For example, the current responsibilities of import specialists include processing commercial transactions and maintaining contacts with importers. Under Customs' reorganization plans, however, "the import specialist will continue to move away from routine paper processing and into a more participative enforcement role working closing with regulatory auditors, agents and inspectors."[147] In 1983, Customs created a five-member Import Specialist Enforcement Team in the Los Angeles Customs district on a six-month test basis. Within the first month the team seized merchandise having a domestic value of $104,219 and initiated nine penalty cases with statutory liability of $506,315.[148] As a result of such initiatives, Customs should increase both the efficacy and

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setting a different specific rate.

144. *See supra* note 50.

145. *Id.* at 4.

146. *See supra* notes 69-90 and accompanying text.

147. One of the most significant changes in this respect is Customs' use of selectivity in examining commercial transactions. *See supra* notes 86-90 and accompanying text.

148. 1983 ANNUAL REPORT, *supra* note 4, at 20. Customs has also initiated efforts to provide substantial nationwide intelligence support for penalty-related activities. *See supra* notes 81-90 and accompanying text.

volume of enforcement activities.

IV. Major Problem Areas Under Reformed Section 592

Although the 1978 reforms represent a noble attempt to soften Section 592's more outrageous features, the reforms fall short of transforming the statute into a fair and equitable remedy. Potential problems in Section 592 cases are as diverse as the many fact patterns giving rise to claims under the statute. Selected major and recurring problem areas, however, should be singled out for analysis.

A. Lack of Due Process in Administrative Proceedings

Although the "reformed" Section 592 entitles a penalized importer to receive notice of charges against him,[149] and allows the importer to present written and oral responses,[150] administrative proceedings under "reformed" Section 592 do not provide importers with effective "due process." As a consequence, the complaint in 1976 of one critic that such proceedings "make beggars of honest citizens and willful violators alike"[151] remains sound.

One glaring deficiency is the absence of an independent decisionmaker at the administrative level. Local Customs officials who previously investigate the importer's conduct and initiate the Section 592 claim are the first to review prepenalty and penalty petitions. When an importer makes a strong case that no violation occurred, these officials understandably defend their prior judgments and keep the case alive.[152] When officials at Customs headquarters in Washington, D.C. later make the final decision, they rely heavily on the factual findings and recommendations of local the officials.[153]

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149. 19 U.S.C. § 1592(b) (1982); *see also* 19 C.F.R. § 162.31 (1985).

150. 19 U.S.C. § 1592(b) (1982); *see also* 19 C.F.R. §§ 171.11-.12, .14 (1985).

151. *Customs Modernization Act and Section 592 of the Tariff Act of 1930: Hearings on H.R. 9220 Before the Subcomm. on Trade of the House Ways and Means Comm.*, 94th Cong., 2d Sess. 309 (1976) (statement of Robert Martin, General Counsel, Beech Aircraft Corp.).

152. *See* Herzstein, *supra* note 2, at 289.

153. *Id.* Such criticism is not unique to Section 592. Over a quarter century ago, Professor Davis noted the inequities in administrative mitigation procedures generally:

> The system is unsatisfactory in that (a) petty officials to whom the agency heads delegate the power (b) act without procedural safeguards in imposing and fixing the amount of penalties (c) with no substantial pro-

Furthermore, importers seeking remission or mitigation of a penalty have no right to discover the evidence used against them or to cross-examine Government witnesses. In contrast, Customs officials generally have access to investigative reports prepared by the Customs Agency Service or by Customs auditors[154] and can obtain information through compulsory process.[155] Attempts by importers to use the Freedom of Information Act[156] to examine Customs' investigative reports at the administrative stage of proceedings have been uniformly unsuccessful.[157] Consequently, importers are substantially disadvantaged when negotiating a settlement at the administrative level. The result is often a "bluffing" contest between Customs, which alleges evidence that will prove a certain violation, and the importer, who knows that the facts are different than the evidence may suggest or who legitimately views the case differently. Customs officials may view the administrative mitigation procedure as an extension of their own investigation, hoping that the importer's petitions will explain facts developed by investigators or will divulge additional incriminating evidence.

Finally, no statutory or regulatory time constraints govern administrative proceedings in Section 592 cases, except possibly the practical considerations dictated by the statute of limitations for

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tection against arbitrariness and lack of uniformity and (d) with no practical opportunity for judicial review. The theoretical justification for the system is that the statutes provide opportunity for de novo judicial review, but this justification is usually unreal.

K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 4.05, at 252-53 (1958).

154. Herzstein, *supra* note 2, at 288-89.

155. *See* 19 U.S.C. §§ 1508-10 (1982); *see also supra* notes 74-76 and accompanying text.

156. 5 U.S.C. § 552 (1982). Customs generally denies requests for disclosure of investigative materials, citing the exemption contained in 19 U.S.C. § 552(b)(7). Ironically, such reports would probably be readily discoverable by an importer defending an action brought by the Government to collect a Section 592 penalty.

157. *See* Container Transport, Inc. v. United States, No. 85-9-01224, 81 Civ. 0079 (S.D.N.Y. Feb. 17, 1982); Electronic Memories and Magnetics Corp. v. United States, 431 F. Supp. 356 (C.D. Cal. 1977). Recently, in Bowman Trading Co. v. Area Director of Customs, No. 85-09-01214, slip op. 85-103 (Ct. Int'l Trade Oct. 4, 1985), the Court of International Trade refused to stay or enjoin administrative Section 592 proceedings pending an importer's (thus far unsuccessful) efforts to bolster its defense by seeking disclosure of documents under FOIA.

judicial review of penalty claims.[158] An importer petitioning for relief from a penalty may wait months or even years, often under the cloud of a huge contingent liability, before he receives a response. Frequently, Customs will request the importer to waive in writing the statute of limitations, so that the agency may extend its investigations or review of petitions.[159] In such cases, the importer must execute the waiver or Customs will proceed immediately to sue for the full penalty assessment.[160]

By delaying investigations, Customs may prejudice materially an importer's chances of successfully defending a Section 592 penalty collection action. For example, assume Customs discovers an allegedly fraudulent violation three years after its commission and then commences a timely penalty claim within five years from the date of discovery. Given the time needed for pleadings, pretrial discovery, and trial preparation, an importer may need to defend an action concerning transactions that occurred a decade earlier. In *United States v. Joan and David Helpern Company,*

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158. 19 U.S.C. § 1621 (1982). The Supreme Court recently held that unexplained delay in processing an importer's Section 618 petition for mitigation did not deprive the importer of property without due process of law in violation of the Fifth Amendment. In United States v. Von Meumann, 106 S. Ct. 610 (1986), an importer's automobile was seized when he failed to declare it to Customs officers in violation of 19 U.S.C. § 1497. The vehicle was returned after 14 days, when the importer posted a bond and Customs imposed and collected a mitigated penalty some thirty-six days after the importer filed its Section 618 petition. Justice Brennan, writing for a unanimous Court, held that the Section 1618 mitigation process was "constitutionally irrelevant", since the statute "[s]imply grants the [Treasury] Secretary the discretion not to pursue a complete forfeiture despite the Government's entitlement to one." 106 S. Ct. at 615, and is not an essential step in the extinguishment of an importer's property right.

Justice Stevens, in a concurring opinion, suggested that despite the constitutional irrelevance of the mitigation procedure, the statute implicitly commands the secretary to act diligently. *Id.* at 616.

159. *See* 19 C.F.R. § 171.24 (1985); United States v. F.A.G. Bearings Corp., 598 F. Supp. 401 (Ct. Int'l Trade 1984); *see also* In Re: Grand Jury Proceedings (Daewoo), Misc. No. 84-217-PA, slip op. (D. Or. June 18, 1985).

160. United States v. F.A.G. Bearings Corp., 598 F. Supp. 401 (Ct. Int'l Trade 1984). The Court of International Trade has refused to compel Customs to assert Section 592 claims promptly, stating that it will not mandate the Service to perform a discretionary act. Seaside Realty Co. v. United States, 607 F. Supp. 1481 (Ct. Int'l Trade 1985). The court has also refused to render a declaratory judgment prior to the assertion of a penalty claim regarding whether a Section 592 violation has occurred. *Id.*

Inc.,[161] Customs sued to collect a Section 592 penalty arising from conduct that occurred five years earlier. Further delays arising after commencement of the suit postponed consideration of the case for eighteen months.[162] Before trial both the defendant's attorney and the Customs broker died, the defendant's comptroller and chief financial investigator retired, and witnesses' recollections dimmed.[163] Although the court denied defendant's motion to dismiss the case for failure to prosecute, the court expressed its concern on the possible prejudice to the importer at trial that resulted from the Government's delay. Consequently, the court kept open the possibility of dismissal if the importer could demonstrate such prejudice at trial.[164]

Congress enacted the 1978 reforms to "insure due process for persons potentially liable for penalties,"[165] but did not provide penalized importers with the basic elements of procedural "due process;" afforded in proceedings under the Administrative Procedure Act.[166] From a constitutional standpoint, the ultimate availability of de novo judicial review may excuse the lack of administrative due process in Section 592 proceedings.[167] Such judicial review, however, becomes meaningless when unreasonably delayed.

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161. 611 F. Supp. 985 (Ct. Int'l Trade 1985).

162. The delays included amendment of pleadings, discovery and settlement talks. *Id.* at 987-88.

163. *Id.* at 988.

164. *Id.* at 989. Years earlier, the United States District Court for the Central District of California dismissed a Section 592 collection action because of procedural due process considerations which were not present in the *Helpern* case. *See* United States v. Eight Rhodesian Stone Statues, 449 F. Supp. 193 (C.D. Cal. 1978).

165. S. REP. No. 778, 95th Cong., 2d Sess. 1, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 2211, 2212.

166. *See* 5 U.S.C. § 554 (1982).

167. *See, e.g.*, Lichter v. United States, 334 U.S. 742 (1948) (de novo review of excess profits tax assessment); Nickey v. Mississippi, 292 U.S. 393 (1934) (de novo review of tax assessment); Phillips v. Commissioner, 283 U.S. 589 (1931) (de novo review of deficiency assessment); Hagar v. Reclamation District, 111 U.S. 701 (1884) (de novo review of assessment by Reclamation Board). However, the requirements of due process are not satisfied if the scope of judicial review is limited. *See, e.g.*, Southern Ry. Co. v. Virginia, 290 U.S. 190 (1933).

B. Collection By Customs of Withheld Duties

Customs may issue a Section 592 penalty claim long after liquidating[168] and making final[169] the entries of merchandise and assessments of duty. Prior to the 1978 "reforms," Customs frequently assessed penalties in cases in which the statute of limitations barred recovery of duties lost as a result of the penalized conduct. To overcome this perceived loophole, Customs conditioned mitigation offers on the repayment of such "withheld" duties.

In an effort to clarify the law, Congress in 1978 created a new subsection (d) to Section 592 which provides:

> Deprivation of lawful duties.—
>
> Notwithstanding section 1514 of this title, [relating to the filing of administrative protests against certain Customs assessments], if the United States has been deprived of lawful duties as a result of a violation of subsection (a) of this section, the appropriate customs officer shall require that such lawful duties be restored, whether or not a monetary penalty is assessed.[170]

Under this provision, importers must tender withheld or unpaid duties in addition to penalties under Section 592. Unfortunately, Congress failed to provide usable guidelines to effectively imple-

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168. "Liquidation" is the term of law ascribed to the procedure by which a Customs officer makes a final determination regarding the classification, rate of duty, quantity and appraised value of merchandise covered by a particular Customs entry. 19 U.S.C. § 1500 (1982). Upon liquidation of an entry, the importer is issued a refund of excess duties deposited at the time of entry or billed for any additional amounts determined to be due and owing.

In most cases, liquidation is an affirmative act performed by a Customs officer. However, entries not liquidated within one year from the date of entry, in some instances, may be deemed liquidated by operation of law at the rate of duty, value, quantity and amount of duties asserted at the time of entry by the importer. 19 U.S.C. § 1504 (1982).

169. Where a Customs officer affirmatively liquidates an entry, the importer may, within 90 days from liquidation, protest certain decisions embodied in the liquidation. 19 U.S.C. § 1514 (1982). Similarly, Customs may on its own initiative, "reliquidate" the entry within 90 days from liquidation to correct errors. 19 U.S.C. § 1501 (1982). Unless a protest is filed or reliquidation occurs within 90 days, the liquidation becomes final and binding on both the importer and Customs. *See* R. STURM, *supra* note 10, § 8.3. Exceptions are provided for cases involving certain clerical errors, 19 U.S.C. § 1520 (1982), and cases involving actual fraud. 19 U.S.C. § 1521 (1982).

170. 19 U.S.C. § 1592(d) (1982).

ment Section 592(d). This omission resulted in great confusion in the importing community.

An importer may contest assessments of duties or other charges by filing an administrative protest within ninety days after notice of liquidation or reliquidation of an entry.[171] After expiration of the ninety-day filing period, Customs cannot assess additional duties.[172] Section 592(d) deviates from this general rule. Congress, however, failed to indicate whether Section 592(d) requires Customs to reliquidate an entry and assess additional duties without regard to the usual time limitations, or whether Customs should implement some other procedure for collecting such duties. Customs has adopted the view that Section 592(d) does not require reliquidation.[173]

Courts have held that the voluntary payment by an importer of "withheld" duties, whether during the investigative phase of a penalty proceeding[174] or as part of a penalty settlement,[175] is not a protestable "exaction." Furthermore, courts have held that Section 592(d) "withheld" duty claims are not subject to the administrative procedures applicable to Section 592 penalty claims,[176] but are subject to the same statute of limitations.[177]

Faced with these uncertainties, importers are reluctant to tender Section 592(d) duties. In addition, some importers fear that Customs officials could initiate spurious penalty claims to recover otherwise uncollectible duties under Section 592(d). For example, Section 162.79(b)(2) of the Customs regulations[178] contemplates[179] that Customs collect withheld duties within thirty days

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171. *See generally* 19 U.S.C. § 1514(c)(2) (1982) (an importer may not, however, file a protest with the appropriate customs officer before notice of liquidation or reliquidation).

172. *See, e.g.*, Saji & Kariya Co. v. United States, 9 Ct. Cust. App. 78, 83-84 (1919).

173. *See, e.g.*, 19 C.F.R. § 162.79b (1985). This regulation contemplates a summary demand for payment rather than reliquidation.

174. *E.g.*, Carlingswitch, Inc. v. United States, 651 F.2d 768, 773 (C.C.P.A. 1981).

175. *E.g.*, ITT Semiconductors, Inc. v. United States, 576 F. Supp. 641, 644-46 (Ct. Int'l Trade 1983).

176. United States v. Ross, 574 F. Supp. 1067, 1069 (Ct. Int'l Trade 1983).

177. United States v. RCA Corp., 5 INT'L TRADE REP. DEC. (BNA) 1807 (S.D. Ind. 1983).

178. 19 C.F.R. § 162.79(b)(2) (1985).

179. Customs may not require that an importer make an advance tender of withheld duties in all cases. *See, e.g.*, T.D. 82-134, 16 Cust. B. 370 (1982).

after issuance of a penalty claim. If an importer were to tender such duties, Customs thereafter could find a Section 592 "violation" but remit its claim in consideration of the importer's payment of the withheld duties. Customs would have no reason to sue the importer to collect duties or penalties. If the entries involved were liquidated and made final, the importer probably could not seek review of the assessment in the United States Court of International Trade.[180] Whether the court will review this type of a case under its "residual jurisdiction" is unclear.[181] An action brought in the United States Claims Court to recover such duty payments probably would not succeed.[182] The lack of impartial review of duty assessments made in conjunction with penalty claims possibly remains a constitutional infirmity within the statute.[183]

C. Statute of Limitations Problems

Another area of confusion arises concerning the statute of limitations for certain actions to recover Section 592 penalties. Sec-

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180. This court has jurisdiction to entertain protests against "exactions." *See, e.g.*, Scherk Importing Co. v. United States, 17 C.C.P.A. 135 (1929).

181. Under 28 U.S.C. § 1581(i) (1982), the Court of International Trade has "residual jurisdiction" over:

> any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for —
>
> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

However, the court is reluctant to exercise this jurisdiction in cases involving decisions of a type that are usually protestable. *See, e.g.*, Arbor Foods, Inc. v. United States, 600 F. Supp. 217 (Ct. Int'l Trade 1984).

182. The Claims Court's predecessor generally held that it lacked jurisdiction over cases involving refunds of duty. *See, e.g.*, Alex D. Shaw & Co. v. United States, 58 Ct. Cl. 642 (1923).

183. Constitutional due process usually requires that a taxpayer have an opportunity to challenge a tax assessment in an impartial forum. *See, e.g.*, Creque v. Shulterbrandt, 121 F. Supp. 448, 452 (D.V.I. 1954); Inland Milling Co. v. Houston, 12 F. Supp. 554, 555 (S.D. Iowa 1935).

tion 621 of the Tariff Act of 1930,[184] provides a "dual" statute of limitations. When Customs alleges that a violation of Section 592 has occurred as the result of negligence or gross negligence, Customs must commence an action within five years of the commission of the alleged violation.[185] When Customs bases its allegation on fraud, Customs must commence an action to recover Section 592 penalties within five years after the date of Customs' discovery of the violation.[186] Customs has an obvious motive to allege fraudulent intent in cases in which the agency discovers a violation long after the commission of alleged violative acts, or in which the statute of limitations for negligent actions has expired.

The few courts considering this issue have adopted divergent views regarding what constitutes "discovery" of a violation for statute of limitations purposes.[187] Some courts have held that the statute of limitations begins to run only when Customs discovers "evidence of fraud."[188] Other courts have adopted the principle of "constructive discovery," and have held that the statute begins to run when Customs receives information that, if investigated with due diligence, would have led to the discovery of the violation.[189]

In *United States v. Brown*[190] Customs charged an importer with unlawfully evading duties by presenting invoices bearing falsely low prices and by failing to declare certain dutiable payments. Evidence adduced at trial indicated that in 1964 an import specialist first inquired about the invoices and charges and in 1965 requested a special agent to verify the importer's data. A

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184. 19 U.S.C. § 1621 (1982).

185. *Id.* Prior to adoption of the 1978 reforms, the statute of limitations was measured according to the *date of discovery* of the violation, regardless of the degree of culpability alleged. *See* 19 U.S.C. § 1621 (1976).

186. 19 U.S.C. § 1621 (1982). The statute of limitations is tolled for such time as the penalized party may be absent from the United States, or during such period as the penalized party conceals the whereabouts of property subject to the penalty. *Id.*

187. *See* Donohue and Arkin, *supra* note 5, ¶ 21.08.

188. United States v. Brown, 404 F. Supp. 968, 971 (S.D.N.Y. 1975); *see also* United States v. H. & H. Trading, Inc., W.D. Wash., No. C 78-262 R. (July 24, 1981) (unpublished bench decision).

189. United States v. R.I.T.A. Organics, Inc., 487 F. Supp. 75, 77 (N.D. Ill. 1980). The United States Court of International Trade has yet to indicate which of these views it will embrace. As a result, importers sued for recovery of Section 592 penalties may be tempted to settle the case, rather than find out whether they have the absolute defense of the statute of limitations.

190. 404 F. Supp. 968 (S.D.N.Y. 1975), *aff'd*, 538 F.2d 315 (2d Cir. 1976).

Report of Investigation subsequently prepared by the agent indicated that the investigating agent obtained knowledge of the actual falsity on July 26, 1966. After administrative Section 592 penalty proceedings failed to produce a settlement, the Government sought to recover the penalty in district court on July 23, 1971. Although the importer argued that evidence showing the false practice had been in Customs' possession in 1964 and 1965, the court ruled that Customs did not "discover" the offense until July 26, 1966, when the investigating agent actually learned that the value data submitted was false.[191]

Another court took a similar view in *United States v. H. & H. Trading Company.*[192] In *H & H Trading,* the importer submitted value statements that failed to include certain dutiable charges. An import specialist suspected that the declared values were low. Several months later an investigating customs agent discovered the actual falsity of these values. The court ruled that the statute of limitations did not begin to run until the actual discovery of falsehood:

> The standard that defendant urges would require the taking into account of hindsight by the Court. It did indeed turn out in this case that the acquiring of the fact of the fraud was quite simply and quickly obtained, but that is not the same as this Court's imposing that as some kind of preknowledge on the part of the Government. The fact that fortuitously in this case it became apparent quite easily on the face of the documents that there was fraud involved, does not influence how the Government should have acted at the time it first recognized there might be a possibility [of fraud]. One cannot equate the two. The standard is what the Government knew at the time, and whether it had actual knowledge of the falsity or whether it merely had a suspicion or knew there was a probability or possibility.[193]

In essence, the court held that the statute of limitations did not run during the period between the time Customs acquired suspicious information and when Customs began an investigation of

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191. The *Brown* decision does not appear to lay down a firm rule concerning interpretation of 19 U.S.C. § 1621's "discovery" standard. The court's holding seems based primarily upon evidence of actual discovery by Customs on July 26, 1966, and the importer's failure to conclusively prove an earlier discovery date.

192. W.D. Wash., No. C 78-262 R. (July 24, 1981) (unpublished bench decision).

193. *Id.* at 3-5.

that information. Under this ruling, Customs' own delay or negligence in pursuing information regarding fraudulent conduct would benefit the agency by extending the time for bringing an action to collect Section 592 penalties arising from such fraud.[194]

A more cogent approach is "constructive discovery" adopted in *United States v. R.I.T.A. Organics, Inc.*[195] In *R.I.T.A. Organics*, the court held that discovery occurred when Customs came into possession of information that, if investigated with due diligence, would have led to actual discovery of the violation.[196] This view comports with the concept of discovery embodied in the federal securities laws,[197] as well as that applied by Customs in numerous administrative rulings.[198]

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194. In *H. & H. Trading Company*, the court explicitly adopted the view of "discovery" set forth in the *Brown* opinion, and noted that "allowing a year even for the investigation to take place was reasonable and . . . within the exercise of due diligence. . . . And the Court took into account in the *Brown* case the overworked schedule of the Customs personnel, and the Court would take into account here the fact that the [investigating] agent himself testified as to the number of very, very complex and pressing matters that he was engaged in at this time." *Id.*

195. 487 F. Supp. 75 (N.D. Ill. 1980).

196. *Id.* at 77. In United States v. Rockwell Int'l Corp., No. 82-12-01744, slip op. 86-11 (Ct. Int'l Trade Jan. 22, 1986), the Court of International Trade held that, in an action alleging a negligent violation of Section 592, the statute of limitations commenced running on the date the alleged violation occurred, i.e., the date goods were actually entered by means of a false statement or omission, rather than on an earlier date when inaccurate pre-entry duty estimates were furnished to Customs. Interestingly, however, the false statements giving rise to the penalty claim appeared only in the pre-entry statement and not on the entry papers themselves.

197. *See, e.g.*, 15 U.S.C. §§ 77m, 77www, 78cc, 78i, 78r and 1711 (1982); *see also*, Goldenberg v. Bache & Co., 270 F.2d 675 (5th Cir. 1959); Fleishhaker v. Blum, 109 F.2d 543 (9th Cir. 1940).

198. Indeed, in Customs Ruling 650920 of August 10, 1978, the agency stated its position regarding "discovery" of alleged violations of Section 592:

> Once common date that has been used as the date of discovery is the date an inspector or import specialist had reason to believe a violation had occurred and [Customs'] Office of Investigations was requested to make any further investigation. A caveat is relevant here. When determining the date of discovery, consideration must also be given to the date on which a Customs officer first received information which, if investigated with due diligence, would have resulted in the discovery of the offense. If that date is earlier than the date of the actual discovery of the offense, the earlier date governs.

This test was repeated virtually verbatim in Customs Ruling 650512 of May 1, 1978. Indeed, in that latter ruling, Customs remitted a Section 592 claim where

The confusion regarding the discovery test is a disservice to both importers and government officials. The Court of International Trade should enunciate a single, consistent standard for "discovery." Unless in the near future courts adopt a consistent rule like the well-reasoned "constructive discovery" approach, Congress should repeal the "discovery" provision of Section 621[199] and adopt an objective rule in all cases.

D. Potential Liability in Judicial Actions to Recover Penalties

Although the 1978 reforms authorized courts to conduct de novo review of Section 592 penalty assessments,[200] questions remain regarding the potential liability of an importer who rejects mitigation and opts for judicial review.[201] For example, if Customs administratively determines that a negligent Section 592 violation has occurred, may the Government allege gross negligence or fraud to seek a larger penalty? Similarly, may the Government allege that certain acts constituted a Section 592 violation even if Customs administratively determined the issue in the negative? The recent Second Circuit decision of *United States v. Frowein*[202] suggests that Customs may continue to investigate Section 592 claims, even after the commencement of a lawsuit to recover such penalties. In light of such continuing investigations, lawsuits to recover Section 592 penalties could take on dimensions far different from those of the administrative proceedings.

When an alleged violation of the customs laws occurs, a Customs officer reports the violation to the Justice Department and submits a statement of pertinent facts.[203] On receiving the report, the Attorney General investigates and commences proceedings for

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it determined that an import specialist had received information more than five years prior to the date of the ruling, although the investigating agents discovered actual falsity at a later date.

199. 19 U.S.C. § 1621 (1982).

200. 19 U.S.C. § 1592(e)(1) (1982).

201. When an importer rejects Customs' offer of mitigation, Customs will sue to recover the full penalty assessed, rather than the mitigated penalty. This practice was recently endorsed by the United States Court of International Trade in United States v. Priority Products, 615 F. Supp. 591 (Ct. Int'l Trade 1985). The nonsettling importer thus subjects himself to the risks inherent in defending a lawsuit brought for a greater amount.

202. 727 F.2d 227 (2d Cir. 1984).

203. 19 U.S.C. § 1603 (1982).

the collection of a fine, forfeiture, or penalty.[204]

Great uncertainty surrounds the Attorney General's action to recover a Section 592 penalty. Is the action merely a lawsuit to "collect" the penalty imposed at the administrative level? Or, because courts try all issues de novo,[205] may the Attorney General disregard Customs' administrative determination and proceed against the importer on a different theory of action? Moreover, because the commencement of a suit to recover Section 592 penalties does not foreclose further investigation,[206] may the Attorney General amend his complaint to proceed on a theory not in the original pleadings? The answers are of importance to a penalized importer who contemplates seeking judicial review. For example, an importer could reject a mitigated penalty demand of $10,000 in a case where Customs alleged negligence and sought an initial penalty of $20,000. The Attorney General, however, could elect to allege intentional fraud and sue to collect a penalty equal to the merchandise's full forfeiture value of millions of dollars. This importer may consider acceptance of the mitigated penalty as his only sensible alternative.

Although courts have not addressed the Attorney General's powers in a Section 592 penalty case, support exists for both the "collection" and "new action" theories. Proponents of the "collection" concept maintain that the Attorney General can only collect the penalty administratively assessed by Customs. The proponents point to the statutory language authorizing the Attorney General to sue for the "recovery" of penalties in cases reported by Customs officers.[207] Furthermore, they note that the Judiciary Act authorizes the Attorney General to "institute and prosecute pro-

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204. *Id.* § 1604. The Attorney General's power to commence actions to recover such penalties is contained in 28 U.S.C. § 547(4) (1982). Civil actions commenced in the United States Court of International Trade to recover Section 592 penalties are handled by the Justice Department, Civil Division, Commercial Litigation Branch, based in Washington, D.C. In some instances, the cases may be filed by the Branch's International Trade Field Office, based in New York City. In Section 592 penalty cases much depends upon the contents of the complaint filed by the Attorney General. For example, the Government's burden of proof varies according to the degree of culpability alleged. *See supra* notes 139-41 and accompanying text.

205. 19 U.S.C. § 1592(e)(1) (1982).

206. *See* United States v. Frowein, 727 F.2d 227 (2d Cir. 1984).

207. 19 U.S.C. § 1604 (1982).

ceedings for the *collection* of fines, penalties and forfeitures."[208]

Cases decided under the Federal Trade Commission Act (FTCA)[209] suggest that the Justice Department should limit recovery demands to the assessed penalty and not substitute the Department's judgment for that of the reviewing agency. Under Section 5(1) of the FTCA,[210] courts can award a civil penalty up to a maximum of $10,000 for each violation of a FTC "cease and desist" order. The court need not assess the maximum penalty in each case.[211] In actions to recover such penalties, the reviewing judge has discretion in assessing the penalty.[212] If enforcement of a penalty assessment requires judicial proceedings, Section 16 of the FTCA[213] directs the FTC to certify the facts regarding penalties to the Attorney General.[214]

In *United States v. St. Regis Paper Company*,[215] the Justice Department attempted to collect penalties for violation of a cease and desist order without first having the facts certified by the FTC. The Second Circuit dismissed the case and held that FTC certification was indispensable to the institution of suit by the Attorney General and that the Attorney General lacked the power to bring such a case on his own initiative.[216] The court noted that the FTCA granted the FTC broad powers to formulate and enforce orders regarding substantive interpretations of law. If the Attorney General could commence a suit to recover a penalty under the statute on his own initiative, he would in fact become the co-administrator of the substantive portions of that law and would bifurcate the administration of the statute.[217] *St. Regis* supports the view that a finding of a violation under a substantive penalty statute is reserved to the agency having jurisdiction over

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208. 28 U.S.C. § 547(4) (1982) (emphasis added).
209. 15 U.S.C. §§ 41-77 (1982).
210. *Id.* § 45(m)(1)(A).
211. *Id.*
212. *Id.* § 45(1).
213. *Id.* § 56.
214. *Id.* § 56(b). The statute also permits the FTC to institute civil suits to collect penalties on its own initiative, if the Attorney General declines to institute suit within 45 days of certification. *See* Top Value Meats, Inc. v. Federal Trade Commission, 586 F.2d 1275 (8th Cir. 1978).
215. 355 F.2d 688, 695 (2d Cir. 1966).
216. *Id.* at 699-700.
217. *Id.* at 695. *See Top Value Meats*, 586 F.2d at 1275; *see also* Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973) (the court held that the FTCA does not allow for private enforcement of its provisions).

administration of the law.

In *United States v. J.B. Williams Co., Inc.*,[218] the court extended the *St. Regis* rule to encompass penalty amounts. In *J.B. Williams*, the FTC jointly fined a manufacturer and its wholly-owned advertising subsidiary a total of $500,000 for broadcasting certain commercials in violation of a cease and desist order. The FTC computed the $500,000 penalty as the maximum statutory penalty, $5,000 assessed for each of 100 separate violations. For some commercials, the FTC levied a single $5,000 penalty per day, regardless of the number of daily broadcasts. The FTC penalized other commercials $5,000 per broadcast. Subsequently, the Attorney General filed suit at the request of the FTC but sought $500,000 penalties against both the manufacturer and the advertising agency. The Second Circuit held that the Attorney General could not substitute his judgment for that of the FTC and seek a penalty that the FTC had declined to assess. The court noted

> [U]nder the circumstances of this case, where the FTC requested only a judgment against both defendants "in the total sum of $500,000" the Attorney General was without authority to seek that amount against each under the fair implications of our decision in *United States v. St. Regis Paper Co.* (citation omitted). . . .
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> The thrust of the . . . [*St. Regis*] decision . . . was that Congress had placed the task of determining when and what penalties should be sought in the FTC and not in the Attorney General (footnote omitted). The draft complaint forwarded in this case by the FTC to the Attorney General shows that the Commission took seriously its responsibilities concerning the amount of the penalty, notably by assessing penalties for each individual broadcast. . . .[219]

Other courts have deferred to FTC penalty determinations,[220]

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218. 498 F.2d 414 (2d Cir. 1974).

219. *Id.* at 437.

220. *See, e.g.*, United States v. Reader's Digest Ass'n, Inc., 494 F. Supp. 770 (D. Del. 1980); Federal Trade Commission v. Consolidated Foods Corp., 396 F. Supp. 1353 (S.D.N.Y. 1975). In United States v. General Motors Corp., 403 F. Supp. 1151, 1162-64 (D. Conn. 1975), the court gave deference to an Environmental Protection Agency penalty amount determination, notwithstanding that the statute in question provided for de novo judicial trial of all issues related to the penalty.

noting that the exercise of judicial discretion protects businessmen from exorbitant administrative penalties.[221]

Transferring the logic of the FTC penalty decisions to Section 592 cases, one can argue that the Attorney General can only seek collection of the penalty that Customs administratively assessed. On the other hand, Section 592[222] and legislative history[223] suggest that the reviewing court should consider de novo all penalty issues, including the degree of violator culpability and penalty amounts.[224]

Prior to the 1978 amendments, Congress restricted the scope of judicial review of Section 592 matters.[225] In light of Congress' desire that all issues be tried de novo, Congress likely intended that courts also review the degree of culpability. If the Attorney General could not allege a degree of culpability greater than Customs alleged in the administrative proceedings, dishonest importers

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221. *See, e.g.*, Brown & Williamson Tobacco Corp. v. Engmon, 527 F.2d 1115 (2d Cir. 1975).

222. 19 U.S.C. § 1592(e)(1) (1982).

223. *See, e.g., Hearings on H.R. 9220, supra* note 150, at 187 (statement of Robert Herzstein); *see also*, H.R. REP. No. 621, 95th Cong., 1st Sess. 17 (1977) ("[Proposed Section] 592 . . . provided that all issues shall be tried de novo. It is intended that this include the question of whether a violation has been committed and, if so, the character of the violation as well as the penalty, if any, to be imposed.").

224. *See Hearings on H.R. 9220, supra* note 150, at 193.

225. Prior to 1978, the Government's burden in actions to collect Section 592 penalties was merely a showing of "probable cause" to believe that the statute had been violated; the burden of proof then rested upon the defendant to show that no violation had occurred. *See* 19 U.S.C. § 1615 (1976) (amended 1978); Ted's Motors, Inc. v. United States, 217 F.2d 777, 780 (8th Cir. 1954). A showing of "probable cause", however, did not of itself sustain the penalty; it merely made out a prima facie case for the Government and justified submitting the case to a trier of fact for determination. United States v. Santini, 266 F. 303, 306 (2d Cir. 1920). The trier of fact was entitled to review the evidence presented at trial, without regard to any administrative penalty proceedings and to determine de novo whether a violation had occurred or whether exculpatory circumstances were present. *See, e.g.*, Jen Dao Chen v. United States, 385 F.2d 939 (9th Cir. 1967). The trier of fact was also empowered to determine whether certain facts constituted "discovery" for statute of limitations purposes. United States v. Alcatex, Inc., 328 F. Supp. 129, 134 (S.D.N.Y. 1971), and to determine the value of the merchandise imported for purposes of setting a forfeiture value. *See* United States v. Brown, 404 F. Supp. 968 (S.D.N.Y. 1975). However, the reviewing court had no authority to consider the amount of penalty to be imposed. Once it found that a violation of Section 592 had occurred, a penalty in the amount of the full forfeiture value was imposed by operation of law.

might conceal fraudulent actions until after the administrative process, in the belief that they thereby had limited their liability. Since the commencement of an action to recover a Section 592 penalty does not terminate the investigative process,[226] Section 592 should permit the Attorney General who discovers new evidence of fraud to allege the more serious degree of culpability and seek the greater penalty. Courts have acknowledged that Customs may need to take action on penalty matters before becoming aware of all pertinent facts.[227]

One also could argue that allowing a prosecuting attorney to amend his complaint is unfair to the importer. For example, an importer charged with negligence may have addressed his petitions to Customs to disprove allegations of negligence, and failed to address the concept of fraud. The opportunity to address the fraud issue in court, even if not raised administratively, would seem to satisfy the constitutional due process requirements.[228] Accordingly, an importer who rejects the Government's offer of mitigation does not limit his liability to the degree of culpability charged by Customs. The prosecuting attorney may find new facts or interpret differently Customs' facts or subsequently charge a higher degree of culpability and seek a much greater monetary penalty. Often, the Government alternatively pleads each degree of culpability.[229]

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226. United States v. Frowein, 727 F.2d 227, 231 (2d Cir. 1984).

227. *See, e.g.*, United States v. R.I.T.A. Organics, Inc., 487 F. Supp. 75 (N.D. Ill. 1980).

228. Courts generally have held that a party's due process rights are protected when given a right to address the claim against it in court, regardless of whether the claim is addressed at an administrative level. *See, e.g.*, Nickey v. Mississippi, 292 U.S. 393 (1934); Hagar v. Reclamation Dist., 111 U.S. 701 (1884). In Lichter v. United States, 334 U.S. 742, 791 (1948), the Supreme Court ruled that the absence of opportunity for notice and of an administrative hearing did not violate due process, where the statute specifically provided for de novo review of tax assessments on excess profits. The rule that a judicial hearing satisfies the requirements of due process is strongest in situations where trial de novo is expressly established by statute. *See, e.g.*, Bowles v. Willingham, 321 U.S. 503 (1944); Phillips v. Commissioner, 283 U.S. 589 (1931).

229. One interesting question not yet addressed by the courts is whether the Government may recover penalties if it proves a lesser degree of culpability than it pleads. Assume, for example, that the Government seeks a Section 592 penalty on the theory of fraud. Upon conclusion of trial, the trier of fact determines that there is insufficient evidence of fraud, but ample evidence of gross negligence. Would the Government thereby be precluded from recovering at all, particularly if it did not plead gross negligence as a ground in its complaint? A

Although the Court of International Trade has yet to deal directly with these issues, the court has shown some confusion regarding the basic nature of actions to recover Section 592 penalties. One example is *United States v. Priority Products, Inc.*,[230] in which Customs administratively assessed a Section 592 penalty against a closely held corporation. Acting through its officers, the corporation sought mitigation of the penalty. When settlement negotiations failed, the Government sued to recover the penalty from both the company and the officers.[231] The officers moved to dismiss the claims against them, noting that Customs had not charged them administratively with any penalty and that they had responded only on behalf of the corporation.[232] Holding that Customs' failure to issue administrative notices to the individual defendants did not deprive them of due process, the court rejected this motion.[233] Specifically, the court stated that "nothing in the statute or regulations . . . expressly provides that suit is precluded against persons not notified and formally named as the subject of the claim during the penalty investigation."[234]

Priority Products is disturbing for several reasons. First, the decision flies in the face of overwhelming Congressional intent giving alleged section 592 violators meaningful and detailed notice of Customs' claims against them at the administrative level, together with an opportunity to present responses.[235] Second, the *Priority Products* court did not "pierce the corporate veil." Presumably, the importer of record was the corporation to which Customs' assessment notices had been directed. By permitting the Government to bring suit against the officers, the court subjected the officers' individual assets to any judgment rendered for the Government. The court, however, made no showing that the officers had acted to render the corporate entity superfluous. Since a corporation must act through its officers and employees,

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better answer would appear to be that the Government is *not* precluded from collecting a lesser penalty based on a theory of gross negligence. To hold otherwise would allow a violator (albeit a nonfraudulent one) to go wholly unpunished.

230. 615 F. Supp. 591 (Ct. Int'l Trade 1985).

231. *Id.* at 591.

232. *Id.* at 592.

233. *Id.* at 592-93. The court relied heavily on the notion that the penalty claim would be tried de novo. *Id.*

234. *Id.* at 592.

235. *See, e.g.*, 19 U.S.C. § 1592(b) (1982).

the Government, under the court's rationale, uniformly could sue the responsible corporate officers as well as the corporation.

Priority Products involved a closely held corporation. The court probably would not have concluded the same regarding officers of a large, publicly held corporation. The court's decision, however, suggests that courts may ignore administrative acts and that Section 592 lawsuits are completely new actions. The uncertainty of judicial review itself may prove a powerful incentive for penalized importers to enter into unfavorable administrative settlements.

V. Conclusion

The promise that the 1978 reforms would make Section 592 a viable remedy in the modern commercial setting remains largely unfulfilled. While huge initial penalty assessments are no longer the invariable rule, they still are sufficiently common that Section 592 remains a terrifying weapon against which importers have no effective defense. Further substantive and procedural reforms are necessary.

A. Substantive Reforms

Large monetary penalties based upon the value of imported merchandise are inappropriate in cases in which importers violate the Customs laws through simple negligence or "gross" negligence. Congress should amend Section 592 to provide more sensible maximum penalties for such cases. An alternative conceivably would penalize negligent violators with a maximum penalty equal to the interest on the loss of revenue plus an "educational" penalty not to exceed $500. In cases without revenue loss, the educational penalty should be sufficient. In those cases involving "gross" negligence, a maximum penalty equal to twice the interest on any loss of revenue plus an educational assessment not to exceed $1,500 would be sufficient. In cases involving an importer's repeated violations, Congress could impose a larger fixed penalty not to exceed $10,000.

Reducing the maximum penalties for unintentional Section 592 violations would better equate the actual harm resulting from such violations with the punishment. In addition, importers penalized by these more reasonable amounts more likely would pay the penalty rather than enter Customs administrative procedures. Paying penalties up front would reduce the number of contested

cases and allow Customs to channel more resources into the detection and punishment of fraud cases. Under present law, an importer faced with a large initial assessment has little choice but to mount a vigorous defense. Customs should retain a maximum penalty equal to the domestic value of the goods for cases involving violations resulting from intentional acts.

Furthermore, reformed laws must protect importers when Customs seeks to recover duties allegedly lost by reason of a Section 592 violation. Although the Section 592(d) authorization of such recoveries is unobjectionable, Congress should amend Section 514 of the Tariff Act to give importers a right to protest such assessments and to seek review in the United States Court of International Trade.

B. Procedural Reforms

Despite the 1978 reforms, administrative procedures for assessing, mitigating, and collecting penalties remain unsatisfactory. The process of seeking mitigation of a Section 592 penalty at the administrative level is little more than an importer's stylized plea for mercy.[236] Frequently, Customs' prepenalty notices and penalty claims fail to state the precise acts alleged to constitute a violation. Investigating Customs officers have access to the importer's records through compulsory process,[237] while the importer lacks even minimal access to Customs' investigatory reports.[238]

Whether de novo review in the Court of International Trade guarantees the importer's due process rights is questionable. Discovery begins anew upon the commencement of suit, and actual trial of the case may not occur for many years after the alleged violations.[239] Even when an importer secures judicial review of a Section 592 claim, the scope and risks of litigation may fluctuate according to the particular facts of the case, the attitude of the prosecuting attorney, or the size and form of the corporate defendant.[240]

Congress should enact an entirely new assessment and mitigation procedure for Section 592 penalties. Administrative penalty proceedings accordingly should be formal, on-the-record adver-

236. *See supra* text accompanying notes 106-08.
237. *See supra* note 154.
238. *See supra* notes 155-56 and accompanying text.
239. *See supra* text accompanying notes 157-66.
240. *See supra* text accompanying notes 204-12.

sary proceedings under the jurisdiction of an independent tribunal. The tribunal could take the form of an interagency group or an existing forum, such as the United States International Trade Commission. The term "Penalty Tribunal" would describe such an independent body.

Congress should require Customs to notify both the importer and the Penalty Tribunal after commencing an investigation of an importer. During the investigation, the Penalty Tribunal could deal with complaints regarding investigative practices. Within one year after the investigation starts, Customs would assert any Section 592 claims in a formal litigative complaint filed with the Penalty Tribunal, which then would appoint an Administrative Law Judge (ALJ) to conduct a full administrative trial of the claim.

The ALJ would conduct the administrative trial in accordance with the requirements of the Administrative Procedure Act.[241] Customs and the importer would have the right to file responsive pleadings, engage in discovery, and participate in a full on-the-record hearing before the ALJ, with each party having the right to cross-examine witnesses. Within one year from the filing of the complaint, the ALJ would make formal findings of facts and law and recommend the imposition of a reasonable penalty amount. The ALJ would forward his recommendations to the Penalty Tribunal, which would either accept them and impose the recommended penalty, accept them and impose a different penalty, or reject them and impose no penalty.

Congress should abolish de novo judicial review in favor of direct review of the Penalty Tribunal's decision by the United States Court of International Trade. Congress should limit the court's review of Penalty Tribunal claims to a determination of whether substantial evidence supports the Penalty Tribunal decision. If the court upheld liability, it then would review the penalty assessed to determine whether the penalty is "fair and reasonable." If the court determined that the penalty imposed by the Tribunal is unfair or unreasonable, Congress should permit the court's imposition of a lesser penalty.

This proposal would result in numerous advantages over current Section 592 procedures. First, the changes would assure the importer of timely and meaningful administrative review of penalty claims on a record made before an impartial decision maker.

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241. 5 U.S.C. §§ 551-559 (1982).

Second, the changes would enable greater protection of the importer's due process rights. Third, the scope of judicial review would become more readily determinable and further would minimize the drastic risks presently associated with ensuing litigation. Finally, the changes virtually would eliminate problems concerning the statute of limitations, form of pleadings, and court-regulated discovery.

Establishment of a formal administrative review procedure within strict time limits might impose a burden on Customs officers to complete their investigations in a timely fashion. Allowing one year to complete an investigation is not unreasonable. Furthermore, if Congress would lower maximum penalties for unintentional violations, such action would free Customs officers from the time-consuming tasks of pursuing mitigation and collection of many penalties. Thus, the agency could shift enforcement resources to the more serious intentional violations.[242]

In an era of expanding international trade, the need to enforce the Customs laws in a fair and efficient manner grows ever more important. The causes of trade expansion and law enforcement, however, are not well served by a Customs penalty statute that remains a "survival from more primitive times."[243] Although the 1978 reforms were a step in the right direction, the time now has come for further and more meaningful reform.[244]

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242. A similar on-the-record proceeding has been successfully used to investigate claims of unfair competition under Section 337 of the Tariff Act of 1930. See 19 U.S.C. § 1337 (1982).

243. Dickey 1, *supra* note 3.

244. As this article went to press, the court in *United States v. Stanley Gordon*, 10 CIT ____, Slip Op. 86-44 (April 25, 1986), held that a defendant in an action to recover Section 592 penalties could not refuse to answer discovery requests by asseting the Fifth Amendment privilege against self-incrimination, finding that "reformed" Section 592 is not a criminal or quasi-criminal statute. However, the defendant in *Gordon* was also definding a civil forfeiture action brought by the United States in Federal District Court under 19 U.S.C. Section 1595a(b); this, the Court held, *was* a quasi-criminal sanction. Thus, the Court concluded that defendant had a limited right to raise the Fifth Amendment privilege in the Section 592 case only to the extent that his responses could be shown to present a real and appreciable threat of prosecution under 19 U.S.C. Section 1595a(b).