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ASSISTANT ATTORNEY GENERAL

Department of Justice
Washington, D.C. 20530

Energy file m

August 8, 1975

MEMORANDUM FOR PHILLIP BUCHEN
Counsel to the President

Re: The effect of a Congressional vote to override Presidential veto of S. 1849

This is in response to your request for the opinion of this Office concerning the legal effect of a possible belated Congressional override should the President veto S. 1849, Title I of which extends the Emergency Petroleum Allocation Act, 15 U.S.C. 751-756 (the Act). Under Section 4(g)(1) of the Act, as amended, Pub. L. No. 93-511, 88 Stat. 1608, any regulation promulgated under section 4(a) of the Act is scheduled to terminate on August 31, 1975. 15 U.S.C. 753(g)(1). Section 102 of S. 1849, the extension of the Act passed by Congress on July 31, 1975, states simply,

> Section 4(g)(1) of the Emergency Petroleum Allocation Act of 1973 is amended by striking out "August 31, 1975," wherever it appears and inserting in lieu thereof "March 1, 1976."

Since Congress has recessed until September 3, 1975, the possibility has arisen that should the President veto the extension, the veto may be overridden subsequent to the Act's expiration on August 31, 1975.

For the reasons set forth in this memorandum, we conclude that, as a theoretical legal matter, most of the harm that could occur during a hiatus between a veto and veto override could be undone by subsequent retroactive revival of the Act and regulations issued thereunder. Penalties could not be assessed, however, for conduct occurring during such a hiatus and this absence of enforcement power during that period may serve as an incentive for some, particularly small suppliers

and local retailers, to "make a killing." Moreover, the problems involved in retroactively restoring controls and enforcing such a restoration may be enormous. The resources do not exist in either FEA or this Department to seek out and undo each and every action taking advantage of temporary decontrol. Further, the nature of the products subject to regulation is such that sales consummated, shipments made or fuel actually used cannot be reallocated or redirected in all instances.

These practical problems cannot be avoided if a hiatus occurs. The hiatus can be avoided, of course, by signing the bill, under protest, or by congressional action prior to August 31, 1975. With respect to the latter course, Congress could be reconvened either at the call of the President or at the call of the Speaker and President pro tempore pursuant to the terms of the adjournment resolution of July 19, 1975, a copy of which is attached.

REVIVAL

Should an override occur after August 31, it is our view that S. 1849, which would then become law, would revive the Act and the regulatory authority thereunder. As stated in Kersten v. United States, 161 F.2d 337 (10th Cir. 1947), which dealt with revival of the Emergency Price Control Act of 1942,

> Congress may revive or extend an Act by any form of words which makes clear its intention so to do.

161 F.2d at 338. See also, Woods v. Cobleigh, 75 F. Supp. 125 (D. N.H. 1947). Congress' language in this case and its passage of the bill prior to the date of expiration of the Act render unmistakeable its intent to continue the Act's effectiveness until March of 1976. 1/ It appears equally clear that the regulation in effect on August 31, 1975, was intended to continue. Thus both the Act and its regulations would be revived by operation of the Congressional override.

RETROACTIVITY

From the nature of the extension provision (amendment

1/ Section 1 of the Price Control Extension Act of 1946 discussed in Kersten, supra, the section effecting revival, was in exactly the same form as the provision here at issue.

of the termination date which was still in the future at the time the Act was passed) and from the legislative history concerning the intended interpretation of the Act should a late override be necessary, see 121 Cong. Rec. H. 7953-H. 7958 (daily ed.), it is evident that Congress intended no hiatus in regulatory authority. Continuity, in the case of a post expiration override, would require retroactivity. Thus the following colloquy occurred on the floor of the House on July 31, 1975:

> Mr. Dingell. Mr. Speaker, I have a question I would like to direct to the Chairman of the Committee in light of the comments I have raised.
>
> There is a possibility of a veto of this extension. If a veto of this legislation does occur, there is a possibility that there would be a hiatus or a brief period during which there would be no authority to enforce the allocation and price control regulations relating to petroleum products, to supply relationships, to allocations and to entitlements.
>
> Mr. Speaker I am satisfied on the basis of reading the language of S. 1849 that it is the intent of the Congress that the extension of the allocation Act included in S. 1849 take effect immediately and retroactively in the event of a veto and an override of that veto and that there be no hiatus or gap during which violations of these regulations would not be subject to civil sanctions. Am I correct?
>
> Mr. Staggers. Mr. Speaker, the gentleman is correct.

121 Cong. Rec. H. 7954. (daily ed.) 2/

2/ Manifestations of legislative intent at the time of the override, of course, may have a significant bearing on this question.

EX POST FACTO CLAUSE

In our opinion the courts will endeavor to implement the Congressional intent that the extension be retroactive to the extent that such intent can be carried out without repugnancy to the Constitution. Irrespective of the intent of Congress, full retroactivity is not constitutionally possible. Since Article I, section 9, Clause 3 prohibits passage of *ex post facto* laws, criminal sanctions subsequently imposed for conduct occurring within the hiatus would be barred. *Calder* v. *Bull*, 3 U.S. 386 (1798). Furthermore despite express congressional intent to the contrary, see 121 Cong. Rec. H. 7984 (daily ed. July 31, 1975) (remarks of Mr. Dingell), H. 7955 (remarks of Mr. Eckhardt), imposition of civil penalties would also be barred. *Ex parte Garland*, 71 U.S. 333, 373 (1966); *Burgess* v. *Salmon*, 97 U.S. 381 (1878) *Cummings* v. *Missouri*, 71 U.S. 277, 320 (1866); *Hiss* v. *Hampton*, 338 F. Supp. 1141 (D.D.C. 1972). 3/ In our view, the private treble damage action provided in Section 210(b) of the Economic Stabilization Act of 1970, *as amended*, 12 U.S.C. 1904, note (incorporated by 15 U.S.C. 754) would not be available.

The *ex post facto* clause, however, is limited in its application to retroactive imposition of punishment, see *Calder* v. *Bull*, *supra*, and retroactive regulatory legislation is controlled by the substantially more flexible standard of the due process clause of the fifth amendment. Retroactive regulatory legislation controlled by the fifth amendment may take two forms:

3/ Congress may impose disabilities for prior conduct if "the restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the proper qualifications for a profession." *De Veau* v. *Braisted*, 363 U.S. 144, 160 (1960). Thus if the disability has a future regulatory effect its imposition for prior conduct excapes *ex post facto* clause condemnation. However there can be no future regulatory effect inherent in the imposition of treble damages for conduct occurring in a unique situation such as the potential hiatus under discussion. Retroactive punishment, civil or otherwise, for conduct occurring during the hiatus has no reasonable bearing upon regulation of conduct once the regulatory scheme has been reestablished.

(1) Attachment of new legal rights, duties or non-penal, civil liabilities to already completed transactions and

(2) Prospective redefinition of preexisting obligations, e.g., declaration that prior contracts are henceforth unenforceable.

See Hochman, "The Supreme Court and the Constitutionality of Retroactive Legislation," 73 Harv. L. Rev. 692 (1960). 4/

IMPAIRMENT OF CONTRACTS

There is now little question concerning Congressional power to abrogate or redefine contractual obligations entered into prior to the passage of the legislation. As stated in Norman v. B&O R.R., 294 U.S. 240, 307-10 (1935)

> Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them. *** The principle is not limited to the incidential effect of the exercise by the Congress of its constitutional authority. There is no constitutional ground for denying to the Congress the power expressly to prohibit and invalidate contracts although previously made, and valid when made, when they interfere with the carrying out of the policy it is free to adopt. Id. at 307-310. 5/

4/ The specific constitutional prohibition against impairment of contract rights, Art. I, Section 10, applies only to the states, not the federal government.

5/ In reaching this decision, however, the Court recognized that "[t]he Government's own contracts -- the obligations of the United States -- are in a distinct category and demand separate consideration." Id. at 306. See Lynch v. United States, 292 U.S. 571 (1934).

The Supreme Court has on numerous occasions upheld the authority of the government to enact legislation affecting previously acquired contract rights of individuals. Thus, in Louisville & N.R.R. v. Mottley, 219 U.S. 467 (1911), the Court held that a lifetime pass for transportation issued in settlement of a tort claim was no longer valid in light of subsequent legislation which prohibited the furnishing of railroad transportation for other than the regular rate paid in cash. The Court reasoned:

> The agreement between the railroad company and the Mottleys must necessarily be regarded as having been made subject to the possibility that, at some future time, Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable or to impair its value. That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations, is inconceivable. The framers of the Constitution never intended any such state of things to exist. [219 U.S. at 482.]

In Fleming v. Rhodes, 331 U.S. 100 (1947), the Court upheld a post revival injunction against enforcement of eviction orders secured in state courts after the expiration of the Emergency Price Control Act of 1942 and prior to the Price Control Extension Act of 1946, stating:

> Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution. So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it. Immunity from federal regulation is not gained through forehanded contracts. Were it otherwise the paramount powers of Congress could be nullified by "prophetic discernment." [331 U.S. at 107.]

Another line of cases, upholding the renegotiation of excessive profits under war contracts and sub-contracts, is also apposite here. In Lichter v. United States, 334 U.S. 742 (1948), the Supreme Court held that Congress could apply the renegotiation process to private contracts between a government contractor and its sub-contractors that had been entered into prior to the passage of the legislation. In many lower court cases, subsequent to that decision, the right of Congress to recover excessive profits on the government's own contracts was also upheld as to pre-existing contracts against claims that such retroactive application was a deprivation of due process under the Fifth Amendment. See Blanchard Machine Co. v. Reconstruction Finance Corporation, 177 F. 2d 727, 729 (D.C. Cir. 1949); Ring Construction Corp. v. Secretary of War, 178 F. 2d 714, 716 (D.C. Cir. 1949), cert denied, 339 U.S. 943. The Sixth Circuit, in arriving at this conclusion stated, "It is settled law that the retroactive reach of a statute may constitutionally cover property rights that have vested *** and also may cover payments already received." Howell Electric Motors Co. v. United States, 172 F. 2d 953, 954 (6th Cir. 1949).

LEGAL LIABILITY FOR PRE-OVERRIDE CONDUCT

Completed preenactment transactions can also be constitutionally reordered. Cf. Howell Electric Motor Co., supra. While each case must be judged on its own facts to determine whether retroactive liability for previously uncontrolled conduct would be so harsh and oppressive as to transgress the constitutional limitation, preenactment notice of the intended retroactive effect of pending legislation has been held to be an important factor. See First National Bank in Dallas v. United States, 420 F.2d 725 (Ct. Cl. 1970). As there stated, widespread and effective notice is not the "stuff of which denial of due process cases are made." In the legislative history cited above, Congress has made clear its intention that there should be no hiatus in regulatory enforcement of the Emergency Petroleum Allocation Act and that should a late override be necessary it is the intent of the Congress that the revived statute be retroactively applied. Notice could be heightened by inclusion in the President's veto message of his understanding that should an override occur the Act would be revived retroactively and of his intention to act under it to undo any improper transactions occurring in the hiatus. A similar statement by the Federal Energy Administration would have a comparable effect.

Furthermore, retroactivity of S. 1849, far from being a mere unreasonable embellishment, is necessary in the Congressional scheme for the same reasons which motivated retroactivity of the interest equalization tax in First National Bank, supra, i.e., were the bill to become law without retroactive effect, a premium would be placed upon consummation of "covered" transactions during the hiatus. See First National Bank, supra, 420 F.2d at 730-31. In light of the factual circumstances which would surround enactment of retroactive controls by means of a late Congressional override and if adequate notice of retroactivity is on the public record prior to enactment, it would appear that unfairness to and surprise of private parties in this case would be at a minimum and that Congress' constitutional power would consequently be maximized.

PRACTICAL DIFFICULTIES POSED BY A HIATUS

The regulations under the Emergency Petroleum Allocation Act constitute a complex of allocation, pricing, and equalization mechanisms designed simultaneously to hold down economy-wide inflation, increase production, and ensure equitable individual allocation and pricing. See attached affidavit. Examples of major potential distortions which could arise as the result of interim decontrol include disposal of supplies at uncontrolled prices leaving no supplies remaining to be allocated when controls resume, (it is not a violation of the regulations not to have a product to allocate), quick sales at greatly inflated prices, particularly of products such as propane where increased price will not have a great effect on demand, and the forming of new supply relationships.

While it may be in the perceived interest of the larger oil companies to refrain from egregious practices which, if reported, could influence congressional override votes, it is unlikely that such pressures will influence small independents. Furthermore, the situation is complicated for all companies by the possibility of stockholder derivative suits should the companies fail to legally maximize profits. 6/

Given (1) the broad constitutional power of Congress both to impair contracts and to regulate present conduct and obligations on the basis of prior conduct (sales or receipts) discussed above, (2) the context in which enactment of S. 1849 would occur, indicating congressional intent to make the President's regulatory power retroactive to the full extent of its power and, (3) the extremely broad regulatory authority which has been given to the President by the Act, it is our view, based on our research in the time available, that, _in theory_, the Act if revived would probably provide power largely equal to the prior

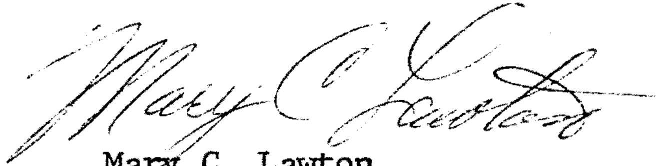
---

6/ Certain existing contractual arrangements may call for changes to be triggered by decontrol.

mischief which it would confront, i.e., wrongs occurring during the hiatus could, on a theoretical level at least, probably be set right. To the extent that new supply relationships have been acquired by contract, those contracts could be abrogated and pre-hiatus relationships could be restored by regulations. To the extent that completed transactions during the hiatus resulted in misallocations, and to the extent that these misallocations were traceable, it appears that the FEA either has present authority or could by new regulation be given authority to order the recipient to become a supplier of those who were supposed to receive the allocations. Alternatively, in theory, supplies otherwise to be allocated to the recipient of the misallocation might be able to be diverted to those to whom the original oil should have gone, future intake by the improper recipient might be restricted, or an adjustment in the inventory of the seller might be ordered. With regard to pricing violations, under the theory advanced in First National Bank, supra, and Howell Electric Motor Co., supra, the private cause of action otherwise available under the Act might retroactively become available for compensation for excessive charges during the hiatus. Alternatively a refund apparently could be ordered or a reduced price to the harmed customer could be ordered until the excessive charge is returned.

Such theoretical legal power, however, is by no means the same thing as the ability to apply that power in the myriad of complex and discrete transactions which potentially could take place during the hiatus. In fact, many transactions may not be able to be traced; marginal service stations could be irreparably injured; oil could be transferred and burned. While FEA could endeavor to resolve ad hoc individual situations, the magnitude of the problem will be simply overwhelming. Furthermore, even if every interim transaction were traced and solutions were found which fit the transaction involved, there is some danger that compliance would be litigated every step of the way. In sum, for any individual case it appears to us a solution could in time be found, but in light of the magnitude of the problem which will arise and the time lag which will be

involved in remedying it, it appears that FEA will simply not be equal to the task and that by and large harm done in the hiatus will go largely unremedied.



Mary C. Lawton
Acting Assistant Attorney General
Office of Legal Counsel

AUG 12 1975

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

United States Court of Appeals
for the District of Columbia Circuit

FILED AUG 11 1975

HUGH E. KLINE
CLERK

No. 75-1202

ALGONQUIN SNG, INC., ET AL., Petitioners

v.

FEDERAL ENGERY ADMINISTRATION, Respondent

No. 75-1206

COMMONWEALTH OF MASSACHUSETTS AND
MICHAEL S. DUKAKIS, GOVERNOR, ET AL.,
Petitioners

v.

FEDERAL ENERGY ADMINISTRATION, Respondent

Petitions for Review of an Order of the Federal Energy Administration

No. 75-1281

COMMONWEALTH OF MASSACHUSETTS, ET AL., Appellants

v.

WILLIAM E. SIMON, ET AL
(D.C. Civil 75-0129)

No. 75-1282

ALGONQUIN SNG, INC., ET AL., Appellants

v.

WILLIAM E. SIMON, ET AL
(D.C. Civil Action 75-0130)

Appeals From the United States District Court for the District of Columbia

Argued July 14, 1975

Decided August 11, 1975

Judgment entered this date

Harold B. Dondis, of the bar of the Supreme Judicial Court of Massachusetts, pro hac vice, by special leave of court, with whom William R. Connole, was on the brief for petitioners in No. 75-1202 and 75-1282. Ernest C. Baynard, III, also entered an appearance for all petitioners.

Francis X. Bellotti, Attorney General of Massachusetts, with whom James S. Hostetler, was on the brief, for petitioners in Nos. 75-1206 and 75-1281. Albert D. Sturterant entered an appearance for petitioners in No. 75-1281. William R. Connole, entered an appearance for petitioners in No. 75-1206 and 75-1281.

Irwin Goldbloom, Deputy Assistant Attorney General, with whom Rex E. Lee, Assistant Attorney General and Barrie L. Goldstein, Attorney, Department of Justice, were on the brief, for respondents.

Before: TAMM, LEVENTHAL and ROBB, Circuit Judges

Opinion for the Court filed by Circuit Judge Tamm.
Dissenting opinion filed by Circuit Judge Robb.

TAMM, Circuit Judge: In these consolidated appeals, plaintiffs-appellants Commonwealth of Massachusetts, et al. seek to overturn the imposition of license fees for importation of oil and petroleum products as required by certain Proclamations of President Ford and former President Nixon and as implemented through regulations adopted by the Federal Energy Administration (FEA). Appellants assert that the challenged presidential actions were beyond their claimed statutory authority under 19 U.S.C. § 1862(b) (1970) and that the Proclamation and regulations in question were promulgated without adherence to certain procedural prerequisites. We hold today that the executive is without substantive authority to impose license fees of the magnitude at issue here.

I. Factual Background

The operative statute, 19 U.S.C. § 1862(b) (1970), authorizes the President to

> take such action, and for such time, as he deems necessary to adjust the imports of [an] article and its derivatives so that . . . imports [of such article] will not so threaten to impair the national security.

A. The Eisenhower and Nixon Programs

The program under which the challenged fees were imposed was initiated in 1959 by President Eisenhower under his section 1862(b) authority in Presidential Proclamation 3279. See 19 U.S.C. § 1862 note. The so-called Mandatory Oil Import Program (MOIP) was based on a determination that foreign

petroleum[1] was being imported into the United States in such quantities and at such low costs as to threaten to impair national security by inhibiting the development of domestic production and refinery capacity. Proclamation 3279 required each petroleum importer to secure a license, divided the country into five districts, and established an import quota for each district. The Secretary of Interior was directed to allocate the quota among individuals with an existing refining capacity or import history. Although subsequently amended twenty-five times,[2] the MOIP quota system remained in effect from 1959 to May 1, 1973.

Proclamation 4210, effective May 1, 1973, announced by former President Nixon, inaugerated a radical change in the system. See 19 U.S.C.A. § 1862 annot.; 38 Fed. Reg. 10725 (1973). Under this new plan, the quota system was abolished. Instead, the issuance of import licenses was conditioned on a schedule of license fees to be phased in during the period May 1, 1973 through November 1, 1975.[3] The impact of the fee system was tempered by a provision that allowed fee-free imports up to a person's previous quota allocation; these fee-free allocations were to be phased out gradually until 1980, when license fees would be required on all imports covered under the Proclamation. Finally, Proclamation 4210 abolished the tariff on petroleum. Proc. 4210 § 16.

B. The Ford Plan

Section 1862(b) authorizes presidential action only after receipt of advice from the Secretary of the Treasury that an article is being imported in quantities or under circumstances as to threaten to impair the national security. The Secretary may not transmit such advice to the President under this section until he has made an appropriate investigation to determine the effects on national security, during which he must consult with the Secretaries of Defense and Commerce and other appropriate officers.[4/] Finally, the Trade Act of 1974, 88 Stat. 1978, effective January 3, 1975, amended section 1862(b) to include the provision that "[t]he Secretary shall, if it is appropriate and after reasonable notice, hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation."

On January 4, 1975, the day after the amendment became effective, Secretary of the Treasury, William E. Simon, undertook an investigation to determine whether the current level of petroleum imports threatened national security. In a letter delegating the investigation to Assistant Secretary David R. MacDonald, Secretary Simon stated:

> In my judgment, national security interests require that the procedures requiring public notice and opportunity for public comment or hearings . . .. not be followed in this case. I further find that it would be inappropriate to

> hold public hearings, or otherwise afford interested parties an opportunity to present information and advice relevant to the investigation as provided by Section 232, as amended by the Trade Act of 1974.

J.A. 66.

Thereafter, comments were solicited from the Departments of State, Defense, Interior, Commerce and Labor, the Council of Economic Advisors, and the Federal Energy Administration.[5/] On January 14, 1975, Secretary Simon reported as the result of his investigation that petroleum products were "being imported into the United States in such quantities as to threaten to impair the national security" and recommended that

> appropriate action be taken to reduce imports of crude oil, principal crude oil derivatives and products, and related products derived from natural gas and coal tar into the United States, to promote a lessened reliance upon such imports, to reduce the payments outflow and to create incentives for the use of alternative sources of energy to such imports. I understand that a Presidential Proclamation pursuant to [section 1862(b)] is being drafted by the Federal Energy Administration consistent with these recommendations.

A.44.

On January 23, 1975, President Ford signed Proclamation No. 4341 which provided for a significant increase in the license fees initially imposed by former President Nixon. First, the fee schedule announced in 1973 was accelerated to their maximum levels of $0.21 per barrel on imported crude oil and $0.63 per barrel on petroleum products. Second, Proclamation 4341 imposed supplemental fees of $3 per barrel on imported crude oil and $1.20 per barrel on petroleum

products. The supplemental fee on crude oil was to be instituted in three monthly dollar steps from February to April, while the petroleum products fee was to be added in March and April, 1975.[6/]

On January 27, 1975, plaintiffs-appellants filed suit in district court. Plaintiffs, including eight states and their governors,[7/] ten utility companies,[8/] and one member of Congress,[9/] asserted that the fees imposed by Presidents Nixon and Ford in Proclamations 4210 and 4341 exceeded their authority under 19 U.S.C. § 1862(b), that the Secretary of the Treasury failed to comply with the procedural requirements of that section, and that the government had failed to file a required environmental impact statement.

In a February 21st Order, the district court found jurisdiction under 28 U.S.C. §§ 1331 and 1340 and rejected the contention that the action was barred by the Tax Anti-Injunction Act, 26 U.S.C. § 7421 (1970). Although finding that appellants would suffer irreparable injury by the implementation of the program, the court refused to grant injunctive relief. The court found that the scope of presidential authority under section 1862(b) encompassed the power to impose license fees, "a regulatory measure enacted for the protection of national security." J.A. 290. The court also held that the Secretary of the Treasury had fulfilled the procedural requirements of section 1862(b) and that the failure to file an environmental impact statement

was excused by an "emergency situation." J.A. 293. Final judgment was entered on March 11, 1975,[10/] and this appeal followed. On February 27, 1975, appellants also filed, pursuant to 15 U.S.C. § 766(i)(2)(A), a Petition for Review of emergency regulations promulgated by the Federal Energy Administration to implement the Ford supplemental fee program. See 40 Fed. Reg. 10437 (1975). In both appeals, now consolidated, appellants renew the contentions made to the district court.[11/]

II. Merits

There is no controversy over the need for action to extricate this country from its increasingly dangerous dependence on foreign petroleum. Spending on foreign oil has increased from $2.7 billion in 1970 to about $24 billion in 1974, J.A. 187. In 1973, the United States was subjected to an oil embargo with disasterous economic consequences. As the district court stated: "The grave necessity of decreasing our dependence on foreign oil, and developing our own domestic industry and alternative sources of energy was and is a matter of primary national importance." J.A. 288-89.

Appellants do not challenge the Presidents' findings in this area but argue that the license fee program instituted by Presidents Nixon and Ford were beyond their statutory authority under section 1862(b). Pointing to the statutory directive to "adjust imports", they assert that the legislative intent behind this provision was to grant authority to

impose only direct import controls, such as quotas. Further, appellants rely heavily on the recent Supreme Court decisions in National Cable Television Association, Inc. v. United States, 415 U.S. 336 (1974) and FPC v. New England Power Co., 415 U.S. 345 (1974), arguing both that authority to impose license fees may not be implied without a clear statutory directive and that the statute should be interpreted to exclude such power to avoid constituting an unconstitutional delegation.

The Government and the President point to the statutory mandate to the President to "take such action ... as he deems necessary" as evidencing the broad grant of authority in section 1862(b). This national security authority, they opine, encompasses both indirect and direct methods of adjusting imports, and thus would include the license fee program. The district court upheld the program, finding it

> one of a number of possible actions covered in the non-defined phrase "to adjust imports" contained in [section 1862(b)] and that the program including the fee is a regulatory measure enacted for the protection of national security. Certainly, if the term includes quotas and even a complete embargo, as plaintiffs admit, it can responsibly be interpreted to include imports subject to fees, however steep.

J.A. 290.

We must disagree and instead conclude that section 1862(b) does not authorize these fees. We reach this conclusion after studying the consistently explicit, well-defined manner in which Congress has delegated control over

foreign trade and tariffs; the Government's construction of section 1862(b) would be an anomalous departure from that approach. We also find support for appellant's position in the legislative history of section 1862(b), both during its original passage in 1955 and its reenactment in 1962. Finally, recent Supreme Court pronouncements mitigate against the expansive statutory construction advanced by the Government.

A

Section 1862(b) was originally enacted in the Trade Agreements Extension Act of 1955 and is currently contained within the Trade Expansion Act of 1962. The purpose of both these bills was to assist this country's economic development through stimulation and expansion of foreign trade. See, e.g., 19 U.S.C. § 1801 (1970). The statutes represent the most recent solution to a political struggle which has continued throughout our history -- whether United States trade policy should be utilized to increase foreign markets or to protect domestic industry. The arena for this debate over trade policy, the "lifeblood of our nation", has been Congress, and the 1955 and 1962 Acts, along with the Trade Reform Act of 1974 all represent accomodations of varying interests arrayed on both sides of the issue. See generally Metzger United States Foreign Trade: Past, Present, and Future, 6 Vill.L.Rev 503 (1961).

The mechanism to effectuate the policy contained in all these statutes is the reduction of barriers through reciprocal trade agreements between the United States and its trading partners. Since, naturally, Congress could not as a body conduct barrier reduction negotiations, that authority was delegated to the President within congressionally-defined limits and made subject to well-established safeguards. See, e.g., 108 Cong. Rec. 19867 (1962)(statement of Senator Humphrey).

For example, section 201 of the 1962 Act, 19 U.S.C. § 1821 authorized the President to enter into agreements to ease restrictions which unduly burdened the foreign trade of the United States and modify existing restrictions to effectuate those agreements within specified limits.[12/] Similarly, section 122 of the Trade Reform Act of 1974, 19 U.S.C. § 2132 delegates to the President power to meet balance-of-payments emergencies with duty surcharges, quotas, or both for a 150 day period. In fact, we may generalize from our examination of the myriad of trade provisions that congressional delegations have been narrow and explicit in order to effectuate well-defined goals. See, e.g., 19 U.S.C. §§ 1901, 1981 (injuries to domestic injuries); id. §§ 2251, 2253 (import relief for threatened domestic injuries); id. § 1351 (modify duties within limitations of 50% of existing

tariff rates under reciprocal trade agreements). See also Consumers Union of United States, Inc. v. Kissinger, 506 F.2d 136, 141-43 (D.C.Cir. 1974), cert. denied, ___ U.S. ___ (1975).

Fitted against this scheme, the Government interpretation of section 1862(b) would represent an anomalous delegation of almost unbridled discretion and authority in the tariff area. The Government has invoked this section as authorizing executive abolition of a tariff, see Proc. 4210, supra, and as conveying power to impose fees which would double the revenues collected from tariffs by the United States.[13/] Moreover, the number of articles potentially covered under the umbrella of "national security" is great. Under these circumstances, such a massive assertion of executive authority in an area so thoroughly occupied by Congress requires careful scrutiny on our part to ascertain the extent of the legislative delegation.

B

The predecessor to section 1862(b) was first enacted in the Trade Agreements Extension Act of 1955, 69 Stat. 162. The problem which originally prompted the drafting of such a provision was petroleum, which was being imported in such amounts as to threaten domestic production. A voluntary program initiated by President Eisenhower in 1954 did not produce the desired reduction of imports.

Once the Senate turned to the problem, however, its inquiry was not confined to petroleum, nor was the eventual drafting of a generalized provision preordained. As the Senate Committee Report on the Trade Extension Act makes clear:

> The committee had before it several proposals dealing with specific commodities, namely petroleum, fluorspar, lead, and zinc. In lieu of specific action on each of these the committee adopted an amendment which specifies that the Director of the Office of Defense Mobilization shall report to the President when he has reason to believe that imports of a commodity are entering the United States in such quantities as to threaten to impair the national security; and that the President, if he finds a threat to the national security exists, shall take whatever action is necessary to adjust imports to a level that will not threaten to impair the national security.

S. Rep. No. 232, 84th Cong., 1st Sess. 4 (1955). Remarks on the floor bring the history of the section into clearer focus; rather than engaging in the potentially acrimonous process of selecting which commodities deserved protection under the guise of national security and establishing quotas for each, a generalized amendment was adopted. See 101 Cong. Rec. 5298 (1955) (statement of Senator Barkley); id. at 5297-98 (statements of Senators Flanders and Byrd). That the intended scope of the section was limited to direct controls is brought out in a colloquy between Senator Saltonstall and Senator Byrd, the Chairman of the Committee which produced the bill:

> MR. SALTONSTALL. This is the final question I should like to address to the Senator. The problem of oil imports is taken care of in the last section of the bill. This gives the opportunity to the President to adjust imports, under restrictive conditions or quotas, after a report by the Director of Defense Mobilization, and after a separate independent investigation by the President if he believes

> the national security is being affected.
>
> MR. BYRD. That is correct, except the amendment applies to all commodities; it applies not only to oil, but to all commodities.
>
> MR. SALTONSTALL. It applies to all commodities, does it?
>
> MR. BYRD. Yes. In other words, it puts other commodities on the same basis as agricultural commodities. It simply leaves to the President the power, in his discretion, to decide whether to impose a quota or to reduce the imports.

Id. at 5297. (emphasis supplied).

The Government points to two statements from the same 1955 Senate floor debate as establishing that the intent behind the National Security Section was to give the President broad authority, including the power to impose license fees. Senator Bennett of Utah is quoted as saying:

> As I understand the bill, the ODM will have at their command the entire scope of tariffs, quotas, restrictions, stockpiling, and any other variation of these programs in order to protect a particular industry, and to meet its particular needs.

Id. at 5588. When placed in context, however, this statement offers no support for the Government's position. It was made to point out that the Senator's home-state of Utah's protection of fluorspar would be well protected and clearly was made in reference to the entire bill and other existing laws. See, e.g., 50 U.S.C. §§ 98 et seq. (stockpiling); 19 U.S.C. §§ 1336, 1338, 1351 (tariff adjustments).

The second statement the Government offers appears more relevant. Senator Millikin, the ranking minority

member of the committee which considered the bill, stated that the provision

> grants to the President authority to take whatever action he deems necessary to adjust imports if they should threaten to impair the national security. He may use tariffs, quotas, import taxes, or other methods of import restriction.

101 Cong. Rec. at 5299. At first blush, this passage would directly support the Government's position; several factors, however, blur its probative value. First, the statement was made in the somewhat self-serving posture of a revelation by Senator Millikin, as representative of Colorado which was a major supplier of coal and petroleum, that it "was of considerable importance ... that this amendment provide an adequate vehicle for assistance to [such] industries ... [and that he was] convinced that the proposal can and will work." Id. Second is our normal reluctance to attach overriding weight to statements of individual legislators during floor debates. See, e.g., United States v. Int'l Union of United Auto., Aircraft and Agr. Implement Workers of America, 352 U.S. 567 (1957); Banco Nacional de Cuba v. Farr, 383 F.2d 166 (2d Cir. 1967), cert. denied, 390 U.S. 956 (1968); compare Portland Cement Ass'n v Ruckelshaus, 486 F.2d 375 (D.C.Cir. 1973) (statement of sponsors entitled to weight). The third factor is our recognition that the Senator's statement is inconsistent with all of the other legislative history recounted above.

Plaintiffs advance the Conference Report on the 1955 Act to counter any inference drawn from Senator Millikin's statement. Referring to the provision, the Conferees stated

> it is not intended to, and does not, diminish or impair any authority the President may have under other law.

Conf. Rep. No. 745, 84th Cong. 1st Sess. 6 (1955). Plaintiffs argue plausibly that for that conference statement to have content, section 1862(b) cannot grant the expansive authority the Government claims. They conclude by invoking the rule that committee reports are generally accorded greater weight than individual statements by legislators. See, e.g., Housing Authority of City of Omaha, Neb. v. United States Housing Authority, 468 F.2d 1 (8th Cir. 1972), cert. denied, 410 U.S. 927 (1973); American Airlines, Inc. v. CAB, 365 F.2d 939 (D.C.Cir. 1966).

We find both sides' arguments probative, neither dispositive. While recognizing that sponsors' statements must be accorded weight, see, e.g., National Woodwork Manufacturers Ass'n v. NLRB, 386 U.S. 612 (1967); City of New York v. Train, 494 F.2d 1033 (D.C.Cir. 1974), aff'd, 420 U.S. 53 (1975); Portland Cement Ass'n v. Ruckelshaus, supra, we also recognize that the statements of Senators Millikin and Byrd point in opposite directions. In light of all factors, we must conclude that the single floor statement the Government may justifiably rely upon is a woefully slender reed to support its construction of the statute.

That conclusion is buttressed by turning to the legislative history behind the Trade Expansion Act of 1962, 76 Stat. 872, the Act of which section 1862(b) is actually a part. The Government asserts that section 1862(b) was included in the revision _pro forma_. Govt. Br. at 15 n.2. While no mention is made in the Senate Committee Report of the section or its intended scope, _S. Rep. No._ 2059, 87th Cong., 2d Sess. (1962), we believe that the intent of this Congress is indeed relevant, especially in light of another provision considered and rejected.

The Senate Finance Committee had added to the 1962 bill a proposed section 353:

> Notwithstanding any other provision of law, the President may, when he finds it in the National interest, proclaim with respect to any article imported into the United States --
> (1) the increase of any existing duty on such article to such rate as he finds necessary,
> (2) the imposition of a duty on such article (if it is not otherwise subject to duty) at such rate as he finds necessary, and
> (3) the imposition of such other import restrictions as he finds necessary.

108 _Cong. Rec_. 19875 (1962). Quite simply, the proposal explicitly gave the President the same authority he claims derives implicitly from section 1862(b). Senator Holland baldly stated that section 353 "is a very great departure from anything that the Congress has ever done before by way of granting power to the Executive in the field of

trade." Id.[14/] The provision passed the Senate, but was deleted in conference. Explaining its removal, Senator Byrd, Chairman of the sponsoring Senate Finance Committee stated:

> Section 353 was a sword which would cut two ways: First, one problem was that there was no procedure prescribed for ascertaining the facts and second, the other problem was that the Congress did not retain the same opportunity for review as the other sections of the bill provide.

Id. at 22182.

Two conclusions, equally devastating to the Government' position, can be drawn. The fact that the proposal was introduced at all yields the inference that Congress believed that no other provision of the Act conferred that authority. See, e.g., United States v. Carter, 311 F.2d 934 (6th Cir.), cert. denied, 373 U.S. 915 (1963); Fisher Flouring Mills Co. v. United States, 270 F.2d 27 (9th Cir. 1958). We also must conclude that Congress' eventual rejection of the provision indicates that it did not desire to confer this authority and discretion upon the President.

This reading of the intent of the 1962 Congress, couple with the lack of strong evidence to the contrary concerning the 1955 Congress, mandate the conclusion that the President does not currently possess the authority to impose indirect controls. We note that recently the Customs Court reached the same conclusion regarding the legislative history behind section 1862(b). Yoshida International, Inc. v. United

States, 378 F. Supp. 1155, 1166 (Cust. Ct. 1974).

We have examined the cases the Government has cited to us interpreting section 1862(b) and find that none dictate an opposite conclusion. Both Texas American Asphalt Corp. v. Walker, 177 F. Supp. 315, 326 (S.D. Tex. 1959) and Pancoastal Petroleum, Ltd. v. Udall, 348 F.2d 805 (D.C. Cir. 1965) dealt with challenges to particular quota allocations under MOIP; both upheld the President's discretion in establishing the mechanism by which direct controls were to be administered. Neither provides any support for the proposition that section 1862(b) conveys power to impose indirect controls. In this regard, Judge McGowan's description of section 1862(b) in Consumers Union of United States, Inc. v. Kissinger, supra, 506 F.2d at 142 (emphasis supplied, footnote omitted), is particularly apropos:

> action shall be taken "to adjust the imports" of the article in question, which means that the article may by regulation be excluded from entry or withdrawal from warehouse.

Finally, we have examined the present Congress' response to the President's actions. Congress passed a bill suspending for a ninety day period the imposition of the supplemental fees, which President Ford vetoed. However, we cannot interpret this conduct, obviously meant to preserve the status quo, as acquiescence to the presidential assertion of authority. Cf. Federal Maritime

Commission v. DeSmedt, 366 F.2d 464 (2d Cir.), cert. denied, 385 U.S. 974 (1966); Brennan v. Midwestern United Life Insurance Co., 259 F. Supp. 673 (N.D. Ind. 1966). As the Committee Report makes clear:

> The Committee has been informed that a suit has been instituted to test the validity of the President's action . . . . The Committee does not intend that its action in reporting out H.R. 1767 ... should affect in one way or another the determination in this suit ... on the merits of issues relating to the scope of Presidential authority or the validity of any particular exercise of that authority under section 232(b) of the Trade Expansion Act of 1962 or any other provision of law.
>
> Furthermore, it is not the purpose of this Act to limit, expand or otherwise alter the authority delegated to the President under Section 232 of the Trade Expansion Act of 1962, as amended. Nor is it the purpose of this Act to confirm or ratify that the President, purportedly acting under the authority of the national security provision of Section 232 of the Trade Expansion Act, as amended, either with or without public hearings, has lawfully imposed, or may lawfully impose, monetary charges, however denominated, on imports whether by Proclamation or otherwise.

S. Rep. No. 94-11, 94th Cong., 1st Sess. 7 (1975). See also H. Rep. No. 94-1, 94th Cong., 1st Sess. 14-15 (1975). Similarly, we do not find acquiescence in the lack of an immediate challenge to the Nixon Proclamation in light of the cushioning of its impact by the fee-free provision and the virtually immediate undercutting of the rationale behind the program before its "bite" was felt by the economic events of 1973 and 1974.

C

The conclusion that section 1862(b) only authorizes the President to adjust imports through direct methods does

not in itself necessitate invalidation of the challenged license fee program. The President has wide discretion in establishing the mechanism and administrative framework for controls. Within that framework, it would be logical and consistent with Congress' intent to permit the President to impose license fees of a magnitude to off-set the administrative costs of the allocation program. We must therefore inquire whether we may sustain the challenged program on that ground.

The President, in the material accompanying his 1975 State of Union Address, has set forth his interpretation of the distinction between a tax, tariff, and a fee:

> All three are charges which can be used to produce revenue and all three have the effect of reducing demand. The differences lie in the source of authority to levy the change. A tax must be levied by Congress for the purpose of raising domestic revenue. A tariff is a charge against imports and must also be authorized by the Congress. A fee is also levied on imported material but may be set for non-revenue purposes and need not be legislated.

J.A. 213 (emphasis supplied). We cannot concur in that expansive assessment of the scope of a fee and in fact find it inconsistent with recent Supreme Court holdings in the area.

In National Cable Television Association, Inc. v. United States, supra, the Supreme Court rejected a fee purportedly justifiable on the rationale, as the face of the relevant statute 31 U.S.C. § 483a apparently authorized, that its assessment was in the public interest. The Court distinguished between a tax, which could be imposed arbitrarily and without

regard for benefits bestowed, and a fee, which "is incident to a voluntary act, e.g., a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station." 366 U.S. at 340. The Court found that fees must be related to the benefits they conferred, and that allowing an agency to use a public policy mandate to go beyond this limitation "carries an agency far from its customary orbit and puts it in search of revenue in the manner of an Appropriations Committee of the House."[15/] Id. at 341; accord, FPC v. New England Power Co., supra.

We believe that this approach is dispositive, although the character of the "fee" is different, of the claim of the legitimacy of charges imposed on imported petroleum under section 1862(b). We have already acknowledged that there could be an administrative "fee" to cover the costs of administration. What we have here, however, is a regulatory charge, laid down by the Executive for policy reasons, carried far from the "customary orbit" of a fee into broad domains of revenue. Indeed, the oil charges here involved are expected eventually to generate $4.8 billion annually, more than the entire 1974 United States Customs revenue. Although a new terminology was devised by President Nixon, and continued by President Ford, we see no logical or realistic basis of disputing the Tariff Commission's comment that "the new program is substantively a duty system."[16/]

Similarly we find no merit in the President's 1975 statement that any charge on imports is a fee, as distinguished from a tariff, if it is "set for non-revenue purposes." From earliest days, the tariff authority given Congress by the Constitution has been understood to apply to the "protective tariff" sponsored by Alexander Hamilton, a measure focused not on obtaining tariff revenues but on the "non-revenue purpose" of protecting domestic industry against foreign competition. With some change in meaning, the oil import charge can also be termed a "protective tariff," protective of national security in conditions of enormous domestic demand, but it is a measure for imposition only by the legislature or on delegation plainly authorized by the legislature. As for the concept of an administrative fee based on "benefit," that has nothing to do with the kind of charge before us.[17/] The history of the kind of charge involved has much to do with Congressional intent to authorize executive modification, and we are clear that a charge for the privilege of importing is a tariff or duty that Congress has historically and steadfastly kept for its own determination, and that none of these carefully limited authorizations for executive change applies to the case at hand.

In sum, the President's expansive definition of a legitimate fee cannot be accepted. We must also conclude that the program instituted by Presidents Nixon and Ford

cannot be upheld as a proper license fee. To consider it as such would make a travesty of the term. It is, as the district court found, a "regulatory measure"-- an indirect control on imports -- and thus outside the scope of section 1862(b).

III. Conclusion

We think it important to describe precisely the breadth of our holding. We find that in 19 U.S.C. § 1862(b) Congress only delegated authority to the President to adjust imports to protect national security through direct mechanisms. Consequently, the two-tier program of license fees initiated by Presidents Nixon and Ford are beyond the scope of their section 1862(b) authority and cannot stand.[18/] By this conclusion, we do not say that Congress cannot constitutionally delegate, accompanied by an intelligible standard, such authority to the President; we merely find that they have not done so by this statute. We reach no conclusion on any delegation issue raised by the parties. Similarly, we do not reach the procedural challenges that appellants have raised to the section 1862 investigation by defendant Simon, to the imposition of the program or to the FEA regulations.

We recognize that we are overturning an honest attempt by the President to find a solution to a difficult crisis; at stake is nothing less than our country's economic freedom

and survival. We also realize that the judicial branch was accused of straightjacketing the coordinate branches of Government in their attempt to alleviate the massive economic dislocation created by another grave crisis, the Great Depression. We do not believe that any such criticism would be justifiable here. The President could have moved against this problem on a unilateral basis through direct controls. Alternatively, he could have sought, as he has, additional measures from Congress.

More fundamentally, this case raises a question about the way Government should operate when responding to crisis. Neither the term "national security" nor "emergency" is a talisman, the thaumaturgic invocation of which should, *ipso facto*, suspend the normal checks and balances on each branch of Government. Our laws were not established merely to be followed only when times are tranquil. If our system is to survive, we must respond to even the most difficult of problems in a manner consistent with the limitations placed upon the Congress, the President, and the Courts by our Constitution and our laws. We believe we reaffirm that basic principle today.

The judgments appealed from in Nos. 75-1281 and 75-1282 are reversed and remanded with instructions to enter appropriate relief for appellants. The regulations challenged in Nos. 75-1202 and 75-1206 are set aside.

So ordered.

FOOTNOTES

1/ The term "petroleum" as used herein refers to both crude oil, unfinished oils (which encompasses a variety of refined petroleum products) and finished products.

2/ See United States Tariff Commission, World Oil Developments and U.S. Oil Import Policies, T.C. Publication 632 at 46-48 (1973) (hereinafter Tariff Commission Report). Many of these modifications, especially in the period 1970-73, were necessary to meet the gap between domestic supply and demand. As such, MOIP failed to accomplish its stated objective of reducing dependence on foreign oil. See generally id. at 42-70.

3/ The fees were to increase during that period from 10.5 to 21 cents/bbl for crude oil, from 52 to 63 cents/bbl for motor gasoline and from 15 to 63 cents/bbl for finished products and unfinished oils. Proc. 4210 §3(a).

4/ The investigation may be commenced upon "request of the head of any department or agency, upon application of an interested party," or upon the Secretary's own motion. The Secretary must submit his recommendation for action or inaction within one year of the receipt of a request for or the start of an investigation.

5/ See 40 Fed. Reg. 4412-4465 (1975). Substantive responses were received from all departments except Labor who wrote that it could not conduct an appropriate investigation within the ten day time limit imposed by Secretary Simon.

6/ Proc. 4341 did not affect the fee-free quotas under the Nixon-imposed fees, nor the schedule for their elimination. President Ford also reinstated the tariffs on petroleum products removed in 1973, but provided that they could be offset against the supplemental fees.

On February 19, 1975, Congress passed a bill imposing a 90-day moratorum upon the implementation of Proc. 4341. H.R. 1767, 94th Cong., 1st Sess. (1975). On March 4th, President Ford vetoed the bill, but suspended the imposition of the supplemental fees for two months. See 121 Cong. Rec. H. 1403; Proc. 4355, 40 Fed. Reg. 10437 (1975). On April 30th, he continued the suspension for an additional thirty days. Proc. 4370, 40 Fed. Reg. 19421 (1975). Finally, on June 1, 1975, President Ford imposed the second dollar of the supplemental fee. Proc. 4377, 40 Fed. Reg. 23429 (1975).

7/ Commonwealth of Massachusetts and Governor Michael S. Dukakis; State of Connecticut and Governor Ella Grasso; State of Maine and Governor James B. Longley; State of New Jersey and Governor Brendan T. Byrne; State of New York and Governor Hugh Carey; Commonwealth of Pennsylvania and Governor Milton J. Shapp; State of Rhode Island and Governor Philip W. Noel; and State of Vermont and Governor Thomas P. Salmon. The State of Minnesota subsequently intervened as a plaintiff.

8/ Algonquin SNG, Inc., New England Power Co., New Bedford Gas and Edison Light Co., Cambridge Electric Light Co., Canal Electric Co., Montaup Electric Co., the Connecticut Light and Power Co., the Hartford Electric Light Co., Western Massachusetts Electric Light Co., and Holyoke Water Co.

9/ Representative Robert P. Drinan, SJ.

10/ In response a motion by appellants, consented to by the government, the district court pursuant to Fed. R.Civ. P. 65 ordered that its conclusions, with respect to preliminary relief, constitute the court's final judgment.

11/ The one additional issue raised in the appeal of the implementing regulations is appellants' contention that the FEA violated the procedural provisions of the Federal Energy Administration Act, 15 U.S.C. §§ 761 et seq. In light of our conclusion that the President does not possess substantive power to impose the challenged fees, we do not reach this question.

12/ Congress also mandated in this connection that the Tariff Commission was to have an advisory rôle in the process and that President designate an agency to conduct public hearings. 19 U.S.C. §§ 1841, 1843.

13/ Proc. 4341 was expected to generate $4.8 billion in annual revenues. In 1974 total revenues from all tariffs were $4.3 billion. See White House Fact Sheet at 13, J.A. 170. U.S. Customs Service, Activity Report, Fiscal Year 1974.

14/ Senator Holland opposed the bill. While statements of opponents normally are no authorative guide to construing the statute, see Bauers v. Heisel, 361 F.2d 581 (3rd Cir. 1966), cert. denied, 386 U.S. 1021 (1967), they may sometimes be useful, especially where proponents make no response. Arizona v. California, 373 U.S. 546 (1963). In this case, we find Senator Holland's statement relevant in light of the fact that his view eventually prevailed.

15/ The Court also noted that an assessment is made heavy if the activity in question was to be discouraged and that the levy is "slight if a bounty is to be bestowed" but concluded that "[s]uch assessments are in the nature of 'taxes' which under our constitutional regime are traditionally levied by Congress." 415 U.S. at 341. Of course, assessing fees to discourage activity is the core of the challenged program.

16/ The President has created a new mechanism for import adjustment called a license fee. The analysis, however, suggests that what Proclamation 4210 does is substitute a duty system for the quota mechanism of the Mandatory Oil Import Program, for the license fee has the incidences of a duty. The name is new and the administration has been shifted from the Department of the Treasury, (U.S.) Customs Service to the Department of the Interior. Nonetheless, the new program is substantively a duty system[.]

Tariff Commission Report at 97.

17/ While there may be a useful concept of a fee based on "benefit" the term would be grossly distorted if stretched to this case on the ground that if there were no "benefit" the importer would not pay the charge and consummate the import, for that kind of stretch would make it applicable to all tariffs and duties.

18/ Similarly, Section 1862(b) would not allow a President to suspend duly enacted tariffs such as President Nixon did in Proclamation 4210. Of course, President Ford reimposed the tariffs in Proclamation 4341, and no relief is now appropriate.

ROBB, Circuit Judge, dissenting: The majority concludes that what the President can do directly he cannot do indirectly. On the basis of this conclusion the majority overturns what it concedes to be "an honest attempt by the President to find a solution to a difficult crisis". Since I cannot agree that the President has exceeded his delegated authority I dissent.

As amended by the Trade Act of 1974, section 232(b) of the Trade Expansion Act of 1962, 19 U.S.C.A. § 1862(b) (Supp. 1, Feb. 1975), provides that if the Secretary of the Treasury finds that an article of commerce is being imported into the United States so as to threaten to impair the national security he shall so advise the President, and

> the President shall take such action, and for such time, as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security, unless the President determines that the article is not being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.

The majority holds that under this statute Congress delegated to the President only the authority "to adjust imports to protect national security through direct mechanisms". This means, presumably, that in the interest of national security the President can use "direct mechanisms", such as quotas, to adjust imports by placing restrictions or even a complete embargo on foreign oil imports, but he cannot achieve the same result by means of indirect mechanisms, such as import license fees. I

cannot find any such distinction in the statute. The statute authorizes the President to "take such action . . . as he deems necessary to adjust . . . imports", without purporting to limit in any way the kind of action available to the President. Admittedly, quotas have a direct effect on imports, whereas license fees have an indirect effect. But both affect imports, and I cannot see how the plain and broad language of section 232(b) can be read to limit the President to the use of one or the other.

The majority rests its holding on three grounds: (1) that the broad Presidential power exercised here is unprecedented in the history of foreign trade regulation; (2) that the legislative history of section 232 does not support the government's position; and (3) that two recent Supreme Court decisions militate against the government's position. As to the first ground: however guarded Congress may have been in the past in delegating to the President the power to regulate foreign commerce, section 232 is a plain delegation of broad power where national security interests are involved. As to the second, the legislative history of section 232 is hopelessly ambiguous and inconclusive. In my opinion the floor debates do not provide an adequate foundation for a restrictive reading of section 232. Finally, the two Supreme Court decisions cited by the majority deal with license fees charged by administrative agencies to recover costs incurred by them in carrying out their regulatory functions. Any similarity between such license fees and the license fees involved here is in name only. Here the license fees are imposed

for the purpose of regulating foreign commerce and not to recover governmental expenses related to such regulation.

The majority is driven to its conclusion by its concern that "[i]f our system is to survive, we must respond to even the most difficult of problems in a manner consistent with the limitations placed upon the Congress, the President, and the Courts by our Constitution and our laws." While I share this concern, I believe the court should not interfere in this dispute between the President and Congress. The power to regulate foreign commerce belongs to Congress, and it may delegate as much or as little as it chooses to the President. If it determines it has gone too far, Congress may withdraw the delegated power from the President. Here the delegated power is broad, and Congress has had repeated opportunitites to limit it or withdraw it altogether. It has not done so, and I think this court should not do so.

As for the other issues raised by the parties, they are adequately treated in the opinion of the District Court, embodied in the court's findings of fact and conclusions of law. Since this opinion is unreported, I have set it out as an appendix to this dissent.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMONWEALTH OF MASSACHUSETTS *et al.*, Plaintiffs,

v.

WILLIAM E. SIMON *et al.*, Defendants.

Civil Action No. 75-0129 *file*

FILED
FEB 21 1975
JAMES E. DAVEY, CLERK

ALGONQUIN SNG, INC. *et al.*, Plaintiffs,

v.

WILLIAM E. SIMON *et al.*, Defendants.

Civil Action No. 75-0130

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The two consolidated cases were brought by several northeastern states and their governors and several utilities against the Secretary of the Treasury and the Administrator of the Federal Energy Administration. In addition, the State of Minnesota has been granted leave to intervene. These suits challenge on various statutory and constitutional grounds Proclamation No. 4341 issued by the President on January 23, 1975. This Proclamation, among other things, imposes a supplemental [1/] license fee on the importation of oil and certain petroleum products into the United States.

1/ The fee is supplemental because it is imposed in addition to certain license fees provided by Presidential Proclamation 4210 issued by President Nixon on April 18, 1973.

The thrust of the two complaints rests on several underpinnings:

(1) The Proclamation 4341 issued by the President pursuant to Section 232(b) of the Trade Expansion Act, 19 U.S.C. §1862(b) is an unconstitutional delegation by Congress of legislative power;

(2) The statutory provisions relied upon, even if constitutional, do not give the authority to enact this particular program or plan;

(3) In taking the action he did, pursuant to Section 232(b) the President did not meet the procedural requirements set forth in the statute; and

(4) The program is being implemented without compliance with the requirements of National Environmental Policy Act, 42 U.S.C. §4331 et seq. in that an EIS should have been prepared before action was taken.

There are other subsidiary grounds but the ones just recited appear to be the more important.

The case has come before the Court on plaintiffs' motions for a preliminary injunction which would restrain defendants from imposing the requirement of an import license subject to the payment of a fee as provided for in Proclamation 4341.

Secondly, defendants oppose the granting of the relief sought on the grounds that plaintiffs cannot meet the criteria for granting a preliminary injunction. More specifically, defendants contend that the relief sought is barred by the Anti-Injunction Act, 26 U.S.C. 7421, that the President's action is in accord with constitutional and statutory requirements and that the public interest would be seriously affected by even a brief delay in the implementation of the President's program. So much for a brief description of the contentions of the parties and the present posture of the litigation.

Memoranda of points and authorities of great length together with hundreds of pages of supporting affidavits, have been filed in support of the respective positions as well as two supplemental submissions requested

by the Court on the possible issue that this controversy is a "political question" which the doctrine of separation of powers as well as prudence and good sense would cause us to avoid. These, in addition to the arguments of counsel, have been most helpful.

Since plaintiffs have conceded that the President's determination that his program is required in the interests of national security is a finding which is not subject to judicial review, it appears that objections to our jurisdiction on "political question" grounds have been obviated and that the case is ready for disposition.

By way of a brief summary of the historical background, it is common knowledge that foreign oil importations have been a serious problem for many years. In 1959, President Eisenhower in Proclamation 3729 set up a Mandatory Oil Import Program which established a system of oil import quotas, the reason being that foreign oil was being imported in such large quantities and at such low prices as to threaten the development of the domestic petroleum industry. The use of quotas was continued with several amendments from time to time, when President Nixon issued Proclamation 4210 on April 18, 1973, which eliminated the quota restrictions on oil imports, permitted importations up to the previous quota on a fee free basis, and substituted a fee system for all importations in excess of old quota levels Because of rapidly increasing domestic demand for oil, U. S. domestic production was not keeping pace; greater levels of imports but at a slightl higher cost were permitted under this Proclamation.

The basic seriousness of this problem became indelibly underlined as a result of the embargo of last winter which caused a sharp drop in our gross national product, threw a half million persons out of work, increased the cost of foreign oil from $3 billion in 1970 to $24 billion in 1974, thereby contributing to our unfavorable balance of trade and triggering the price inflation which, along with rising unemployment, is perhaps the most important problem facing the leadership of this country. The grave

necessity of decreasing our dependence on foreign oil, and developing our own domestic industry and alternative sources of energy was and is a matter of primary national importance. This set of conditions provides the background for the President's action in issuing Proclamation 4341 on January 23, 1975. He acted in response to a report submitted to him on January 14, 1975 by Secretary Simon. In this report purportedly made pursuant to Section 232 of the Trade Expansion Act of 1962, as amended, and resulting from an investigation under that section, the Secretary found in substance that foreign oil was being imported into the U.S. in such quantitirs and under such circumstances as to threaten to impair the national security. On the basis of this finding, the Secretary recommended to the President "that appropriate action be taken to reduce imports." The President, accepting the Secretary's report, finding and recommendation, issued the Proclamation. It is stated to be an important part of the President's energy program, consisting of several elements, which admittedly will increase energy costs over the whole country. The New England states will be hardest hit because oil supplies 86% of the energy needs of that region as contrasted with 46% for the country as a whole. The affidavits on behalf of the several states confirm the particularly serious impact which the measure will have on them.

In acting as he did, the President took action "to adjust the imports of such article and its derivatives so that such imports will not so threaten to impair the national security." 19 U.S.C. §1862(b) The license fee system was the device he used.

It is necessary to identify as best we can the precise category into which this program falls. If it is a tariff or duty as plaintiffs might, but expressly do not, contend, jurisdiction to hear this case would lie in the Customs Court under 28 U.S.C. §1582. The Customs Court could provide no relief because it lacks equity jurisdiction and these suits see injunctive relief. If it is a tax, the delegation of which power by Congress is improper, the plaintiffs are met with the Anti-Injunction Act

which, except for certain limited exceptions, is a bar to suits for the purpose of restraining the assessment or collection of a tax. 26 U.S.C. §7421(a).

It is our judgment that the license fee program is one of a number of possible actions covered in the non-defined phrase "to adjust imports" contained in Section 232(b) and that the program including the fee is a regulatory measure enacted for the protection of national security. Certainly, if the term includes quotas and even a complete embargo, as plaintiffs admit, it can responsibly be interpreted to include imports subject to fees, however steep. The statements of Senators Milliken and Bennett, the former quoted in both memoranda, indicate that the President was given a broad panoply of powers in Section 232. As such, we believe our jurisdiction to decide the validity of the fee is predicated on 28 U.S.C. §§1331 or 1340.

Passing to the specific objections, plaintiffs contend at the outset that Section 232 is an undue delegation of legislative authority. A corollary to this argument is that the delegation lacks adequate standards, and, if upheld, would confer unbridled discretion on the President. We have heard and been impressed with Mr. Connole's argument that delegations of power by the Congress to the President to adjust tariffs have always been accompanied by rather strict limitations and conditions. However, we disagree with his conclusion that this delegation particularly is defective. The non-delegation doctrine is almost a complete failure. As Professor Davis has put it:

> "Lawyers who try to win cases by arguing that delegations are unconstitutional amost invariably do more harm than good to their clients' interests." Davis - Administrative Law Treatise, Vol. 1, §2.01 p. 75 (1958).

The vaguest of standards have been held adequate and various delegations without any standards have been upheld. U.S. v. Southwestern Cable Co., 392 U.S. 157 (1968); Arizona v. California, 373 U.S. 546 (1963).

Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) and A.L.A. Schechter Poultry Corp. v. U.S., 295 U.S. 495 (1935), the only two cases in American history holding invalid congressional delegations of authority, are now 40 years old and have been consistently undermined. Furthermore, Section 232 provides certain standards, even though general and somewhat imprecise. The President can only act when imports "threaten to impair the national security" and the section sets forth in detail a number of factors which the President must consider when acting pursuant to Section 232. In the tariff analogy previously referred to, it is not there required that a prior determination of the actual impairment to the national security be made before the President exercised the tariff powers delegated to him. Accordingly, we hold that Section 232 is a valid delegation of authority by Congress to the President and confers upon him the power to impose import license fees on oil imports once he determines the fact of threatened impairment of the national security.

Next, plaintiffs charge that, even if a valid delegation of authority, the President in promulgating Proclamation 4341 did not meet the procedural requirements of the statute. The procedural conditions set forth in Section 232(b) consist of five separate steps:

(1) The Secretary of the Treasury must undertake an appropriate investigation. While the chronological time was only 10 days (January 4 to January 14, 1975), it must be recalled that since January, 1973, this particular individual, Mr. Simon, had been living with this problem and was deeply involved in the formulation of oil import policy, first as chairman of the Oil Import Policy Committee, then as Administrator of the Federal Energy Commission, and finally as Secretary of the Treasury.

(2) In addition to appointing David Macdonald, Assistant Secretary of the Treasury for Enforcement, Operations and Tariff, to conduct the investigation, consultation was had with numerous high officials of departments and agencies to determine the effects on national security. Extensive affidavits from these gentlemen are a part of the record.

(3) Secretary Simon on January 14, 1975, made a report of his findings and recommendation for action within one year after beginning his investigation. Having concluded that the continued level of importations threatened to impair the national security,

(4) he advised the President,

(5) who agreed with the Secretary's findings and recommendation, and took the action he deemed necessary to adjust imports "so that such imports will not so threaten to impair the national security."

It is perfectly true, as Mr. Bellotti has noted, the relative speed of this entire process may auger against its thoroughness and completeness. However, this ignores the fact that the problem of our dependence on foreign oil has been with us for months and years, has been extensively debated in and out of government, and that the President's finding of national security implications was but a restatement of what all knowledgable people knew to be the fact.

It is also recognized that the statute by recent amendment provides for the holding of a public hearing "if it is appropriate." The Secretary in his discretion decided it was not appropriate to hold public hearings and, in view of the importance of prompt action in what the President, in effect, found to be an emergency, we will not question his exercise of discretion. There is no constitutional or statutory right to a hearing. The procedural steps in our judgment were all taken.

Finally, plaintiffs allege that defendants violated the National Environmental Policy Act, 42 U.S.C. §4321 et seq. by failing to prepare an EIS before implementing the Proclamation.

Defendants concede their duty to comply with Section 102(2)(c) of NEPA, but argue that the Act does not, under all circumstances, require an environmental impact statement before the implementation of the government action. Defendants argue that when, as here, the government action is in response to an emergency or for reasons of national security,

strict compliance with the procedural requirements of NEPA is not mandated. This is especially true, defendants argue, when the initial environmental assessment discloses no short term environmental impact. Defendants therefore maintain that, for the present, the abbreviated environmental report issued January 21, 1975, will suffice. An environmental impact statement will be published May 15.

The case law is clear that NEPA must be complied with to the fullest extent possible, unless there is a clear conflict with a statutory duty or some other impediment that makes full compliance excusable. If defendants can show that drafting an impact statement will prevent its performance in meeting an emergency situation, then it will be excused from strict compliance. Calvert Cliffs' Coordinating Committee v. A.E.C., 449 F.2d 1109 (D.D.C. 1971).

Defendants' reasons for not complying with NEPA involve considerations of national security. When he issued the Proclamation on January 23, the President stated: "Whereas, I find and declare that adjustments must be made in imports of crude oil . . . so that such imports will not so threaten to impair the national security." The President went on to state: "Whereas, I judge it necessary and consistent with the national security to further discourage importation . . ."

In addition, as the affidavits of Mr. Woodcock, Associate Assistant Administrator of FEA for Environment Programs, and Russell Peterson, Chairman of Council on Environmental Quality, show (1) the filing of a preliminary report analyzing the potential short and long term environmental imports of the revised oil import program. This was made public the day Proclamation 4341 was issued. And (2) the commencement of a full EIS to be filed on May 15, 1975.

Under all the circumstances, we conclude that full compliance with the EIS requirements of NEPA will take place in the near future and

that to have delayed issuance of the President's Proclamation until an EIS has been filed would not have been justified in view of the emergency nature of the problem and the need for prompt action.

Finally, turning to the relief requested, namely a preliminary injunction, it is recognized that our jurisdiction to grant equitable relief is limited and is subject to certain criteria. They are:

(1) A strong showing by petitioner that it is likely to prevail on the merits;

(2) Irreparable injury;

(3) Possibility of harm to others interested in the proceeding;

(4) The public interest.

The Court has at all times recognized the irreparable injury to plaintiffs, both the states and the private utility companies. The record is silent on possible injury to others interested in this proceeding and we will therefore assume that there is no such injury or possibility which should otherwise militate against the grant of injunctive relief.

However, it is our judgment that plaintiffs have not made a strong showing that it is likely that they will prevail on the merits. Further, we must accept the President's determination of national security upon wich his action was predicated. Certainly, our continued dependence on imports of foreign oil threatens our national security, the economy, the posture of our defense and the conduct of our foreign affairs. We cannot predict or pass upon the effectiveness of the Presidential program. We must accept it as it is and hold that any interference by way of injunctive relief would be inconsistent with the public interest.

Accordingly, it is by the Court this 21st day of February, 1975,

ORDERED, that plaintiffs' motions for preliminary injunctions be and they are hereby denied.

The foregoing constitutes the Court's Findings of Fact and Conclusions of Law pursuant to Rule 52(a) of FRCP.

John H. Pratt
United States District Judge

August 15, 1975

MEMORANDUM TO: JACK MARSH

FROM: BILL KENDALL

Each of the following offices were pre-notified of the President's energy message:

Senator Bob Griffin (R-Mich)

He had a very positive reaction to the President's proposed message.

Senator Bob Byrd (D-WVa)

Had no reaction one way or another. Stated "I expect all of it".

Senator Hugh Scott (R-Pa)

Not available (Scott is in Hawaii). Staff advised of details of President's plan.

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THE WHITE HOUSE

WASHINGTON

August 15, 1975

MEMORANDUM FOR: JACK MARSH

THRU: VERN LOEN VL

FROM: CHARLES LEPPERT, JR. CL Jr

SUBJECT: House Members' Reaction to President's Statement on Energy, August 15, 1975 Vail, Colorado

On pre-notice calls to House Members on the President's message on energy in Vail, Colorado, I received the following reactions:

Rep. Al Ullman (D-Ore)

Questioned if the President would wait to lift the oil import fees until after the Congress acts on the motion to override the veto of the six month extension. Ullman was told yes, that the President would wait to see if Congress sustained the veto, if so he'd remove the $2 import fees and if not he'd continue the fees.

Ullman stated he could not accept immediate decontrol. Ullman stated he could support fully the President's 39 month decontrol plan with the $11.50 cap and removal of the $2 import fees.

Ullman stated that he will have to work vigorously to override the veto and support the objectives of phased decontrol.

Rep. John Dingell (D-Mich)

This veto is something that he has been trying to avoid. "Frankly, this means that I have to fight and will work to override the veto. I want you to know and your people at the White House to know this. I have always tried to let you people know what my position is so you don't ask why I am changing my position. But you should know that I intend to attack this veto as a careless disregard of the public interest and a shameful contest to buy votes. I will immediately when the Congress comes back in September, begin extensive hearings which will provide the basis to obtain the votes to override the veto and show the evils of immediate decontrol. This veto is going to wreck the economy and more importantly the back of the petroleum industry, the jobbers, distributors and independent refiners and not the big majors like Exxon, Texaco, etc.

"If I would have had some clearer signals from the White House on some of the things I was trying to do up here, I think we could have avoided this veto. The only thing I can do now is fight and you may as well know it and for a while we are just going to have to fight on this one."

Rep. Barber Conable (R-NY)

Doesn't think the President is in a position of strength and has played this thing wrong. The President should have called Congress back into session on this issue and made Congress the issue and kept Congress out front on this issue.

Thinks the President is in a position of weakness on the issue now and will be looked upon as the one trying to drive energy prices up. He has handed the Democrats control of the situation now and they can hold hearings and do all kinds of things to make the President the issue. Considers that the President has made himself the issue by not agreeing to call the Congress back to face up to this issue. Recognizes that the President is trying to live with a Democratic Congress, considers many of them his friends and wants to make it look like he is working with the Congress, but at the same time he's giving the Democrats the opportunity to cut out his guts publicly through hearings and demagoguery making the President the issue.

The President does not seem to want to take Al Cederberg and my advice on this because we are tough on this issue and want him to play some hard politics with these people who are playing pure and simple politics with the President. Thinks the President has got himself in a bad position but will continue to support him.

Rep. Herman Schneebeli (R-Pa.)

Expected the President to veto the extension and agrees with his position on the import fees. Feels the Circuit Court of Appeals didn't understand that Congress in passing the Trade Act intended to give the President the authority to levy import duties and says the record of the legislation should bear this out.

Rep. Harley Staggers (D-W. Va.)

Could not be reached - travelling in his Congressional District. Left message with his Washington office.

THE WHITE HOUSE

WASHINGTON

August 15, 1975

MEMORANDUM FOR: JACK MARSH

FROM: VERN LOEN VL

SUBJECT: The results of Vern Loen's notifications on the President's energy actions on August 15.

To Cheney

1.	Rep. John Rhodes:	Unavailable, preparing for his daughter's wedding tomorrow. Left word with Dennis Taylor who indicated Mr. Rhodes would approve.
2.	Rep. Tip O'Neill:	On vacation. Left word with Emily who will relate message.
3.	Rep. Jack McFall:	Attempted to reach him at his District office in California; however, he was not in yet. Left word with his assistant there.
4.	Rep. Joe Waggonner:	Unavailable due to speaking engagement in Florida. Left word with Denise in his office.
5.	Rep. Clarance (Bud) Brown	Talked personally to Mr. Brown in his District office in Springfield, Ohio. "I approve of the action even though the promised lifting of the two dollar import fee is sort of a throw-away in view of the Court decision, notwithstanding the appeal. Much will depend on what the Members pick up back in their Districts. I am finding no great enthusiasm for the Congress, the President or the prospect of higher gasoline prices, which is understandable. But I believe the public is far ahead of the Congress in its perception of the issue."

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THE WHITE HOUSE

WASHINGTON

August 22, 1975

MEMORANDUM FOR: JACK MARSH
BOB WOLTHUIS

FROM: PATRICK O'DONNELL POD

SUBJECT: S. 1849

In addition to those voting against S. 1849, we now have: Goldwater, Pearson, Cotton, Johnston and Bentsen. This makes a total of 34 if we hold the original 29.

Will make calls next week. Perhaps we should divide up some targets.

The following Senators voted against S. 1849

Republicans	Democrats
Bartlett	Gravel
Bellmon	Long
Brock	McGee
Dole	
Domenici	
Fong	
Garn	
Griffin	
Hansen	
Helms	
Laxalt	
McClure	
Tower	
Young	
Fannin	
Hruska	
Scott (Pa.)	
Scott (Va.)	
Stevens	
Thurmond	
Baker	
Curtis	
Buckley	
Taft	
Hatfield	
Packwood	

Senator Goldwater was absent, but would have voted nay. Newly appointed Senator Cotton (N. H.) and Senator Pearson have indicated that they will vote to sustain the veto. This means we will need two additional votes from the target list below.

REPUBLICANS	DEMOCRATS	
Percy	Johnston	Allen
Beall	McClellan	Eastland
Weicker	Nunn	Morgan
Roth	Montoya	Sparkman
Mathias	Stennis	

we have now picked up:
Johnston
Bentsen

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WASHINGTON

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Brock	McGee
Dole	
Domenici	
Fong	
Garn	
Griffin	
Hansen	
Helms	
Laxalt	
McClure	
Tower	
Young	
Fannin	
Hruska	
Scott (Pa.)	
Scott (Va.)	
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