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III. THE ORIGINS AND CREATION OF THE BOARD OF GENERAL APPRAISERS: THE 125TH ANNIVERSARY OF THE CUSTOMS ADMINISTRATIVE ACT OF 1890

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INTRODUCTION

This article commemorates the 125th anniversary of the Act of June 10, 1890,¹ commonly known as the Customs Administrative Act of 1890 (hereinafter the “1890 Act”). Section 12 of the 1890 Act provided for the appointment of nine “general appraisers,” collectively known as the Board of General Appraisers, in the Treasury Department. Their responsibilities included adjudication as an administrative tribunal of disputes over customs valuation of imported goods, tariff classification of the goods, and the rate and amount of duties. In 1926, the Board of General Appraisers was renamed the U.S. Customs Court; in 1930, it was removed from the Treasury Department; in 1956, it was designated a court established under Article III of the U.S. Constitution; and in 1980, it was renamed the U.S. Court of International Trade and given expanded jurisdiction, with status and powers equal to those of federal district courts.² In short, the Board of General Appraisers, a Treasury Department customs administrative tribunal, was the precursor of the U.S. Court of International Trade. The Board is also part of the historical extended family of the U.S. Court of Appeals for the Federal Circuit: the Federal Circuit’s predecessor, the U.S. Court of Customs Appeals, was created in 1909 to review the Board’s decisions,³ and today appeals from the Court of International Trade go to the Federal Circuit.⁴

At the same time, the 1890 Act represents a milestone in the history of administrative law. Sections 12 to 15 of the 1890 Act established a new administrative law system for adjudication of disputes over customs valuation, tariff classification, and rate and amount of duty. The new system featured an administrative tribunal to decide cases in a formal adjudication, followed by non-jury judicial review in federal courts of general jurisdiction. In the previous administrative law system, customs officials’ decisions on tariff classification and rate and amount of duty were subject to *de novo* judicial review with trial by jury. In the 1890 Act, as a Chief Judge of the Court of International Trade later wrote, “Congress consciously, deliberately, and with full awareness of its constitutional implications” enacted a new system that “removed the right to

a trial by jury before the courts and ‘substituted’ a trial before the general appraisers.”⁵

The 1890 Act provides a case study of the power of Congress to establish administrative institutions for federal taxation and economic regulation. Justice Joseph Story had already written in an 1822 decision that “as congress has the constitutional power ‘to lay and collect taxes and duties,’ and ‘to regulate commerce with foreign nations,’ it possesses the incidental right to prescribe the manner, in which the duties shall be levied, and the value of the goods shall be ascertained, and the conditions upon which the importation shall be permitted.”⁶ The debate on the 1890 Act highlighted the interaction of Congress’s power to establish institutions and procedures for tax collection with the guarantee of trial by jury under the Seventh Amendment.⁷ The 1890 Act also foreshadowed later jurisprudence on the interaction between administrative adjudication and the requirement under Article III of the Constitution to exercise the “judicial Power of the United States” in Article III federal courts, as well as the guarantee of due process of law under the Fifth Amendment.⁸ And while the 1890 Act was enacted three years after Congress created the Interstate Commerce Commission,⁹ the Board of General Appraisers represents a markedly different example of an administrative adjudicatory tribunal.¹⁰

The most controversial issue in the congressional debate leading to the 1890 Act was not the creation of the Board of General Appraisers in itself, but the scope and standard of judicial review of Board decisions under section 15 of the 1890 Act. The debate presented three alternatives. First, the House bill introduced by Representative (and future President) William McKinley provided that the Board’s findings of fact would be certified to and binding on the court, and then the court would only decide questions of law. Second, opponents of the McKinley bill urged that Board decisions should be subject to *de novo* judicial review with questions of fact decided through trial by jury. Third, the Senate bill introduced a compromise in which the court would review questions of fact and questions of law, but without trial by jury, and instead with a general appraiser acting as an adjunct to the

court for the purpose of receiving additional evidence. The Senate compromise was enacted in the 1890 Act.

The House debate was particularly interesting because it included the main constitutional law argument offered in support of the proposed legislation. Representative Sereno Payne (Republican of New York) provided an instructive example of zealous legal advocacy. He offered an interpretation of Supreme Court decisions that, according to him, gave Congress supreme power in taxation and would allow Congress to preclude judicial review in customs cases entirely. The narrow holdings of the cases he quoted do not go anywhere near as far as he urged, but do support the power to preclude jury trials. And Representative Payne ultimately observed that the McKinley bill provided for judicial review without jury trials. Therefore, it easily satisfied the broad interpretation of Congress's power he advocated.

Part I of this paper discusses the antecedents of the 1890 Act in nineteenth century customs litigation and the problems emerging in the 1880s that created a need for reform. Then, in Part II, the paper turns to the 1890 congressional debates: Part II(A) of the paper describes the initial House bill and debate, including Representative Payne's legal argument, Part II(B) a sample of adverse public reaction, and Part II(C) the Senate bill and the conference report. Part II(D) describes the new administrative law system created in the 1890 Act.

Part III of the paper examines legacies of the 1890 Act, with part III(A) summarizing the subsequent evolution of the Board of General Appraisers until it was renamed the United States Customs Court in 1926. Part III(B) explores a reappearance in the late 1980s of the debate on trial by jury: whether the Seventh Amendment guarantees trial by jury in customs litigation in the U.S. Court of International Trade. The discussion will show that Supreme Court decisions since 1890 validate Representative Payne's argument that the 1890 Act was fully consistent with the requirements of the Constitution.

I. HISTORICAL ANTECEDENTS

A. Customs Litigation from the 1830s to 1890.

Between the 1830s and 1890, the principal way for an importer to obtain judicial review of the assessment of customs duties was to pay the duty and then bring a lawsuit against the collector of customs at the port of entry seeking a refund of excess duties paid.¹¹ In the nineteenth century customs administrative laws, the collector was the senior official at each port of entry responsible for duty assessment, including determining the tariff classification of imported goods and the applicable rate and amount of duties, and collecting the importer's payments.¹²

The importer's right of action against the collector became established after a decade of turmoil in the law between 1836 and 1845. First, in 1836 in *Elliott v. Swartwout*,¹³ the Supreme Court confirmed that the common law action in assumpsit gave importers a right of action against a collector for recovery of excess duties paid under protest. The writ of assumpsit had been used in England in customs litigation before U.S. independence.¹⁴ As succinctly explained later, the "common law right to recover money illegally exacted upon imported merchandise rested upon an implied promise of the collector to refund money which he had received as agent of the Government, but which the law did not authorize him to collect."¹⁵

In 1839 Congress enacted a statute requiring collectors to remit all money collected as duties to the Treasury, instead of retaining it to reimburse themselves against potential personal liability to importers.¹⁶ In 1845 the Supreme Court ruled in *Cary v. Curtis*¹⁷ that the 1839 statute extinguished the common law action in assumpsit. The Court reasoned that the obligation to transfer the money to the Treasury negated the premise underlying the action in assumpsit that the collector had an implied promise to refund the money to the importer. The 1839 statute also authorized the Treasury Secretary to refund any duty overpayment, thereby making the Secretary, in the Court's words, "the tribunal for the examination of claims for duties said to have been improperly paid."¹⁸ Justices Story and McLean dissented strongly, arguing that

precluding judicial review of a duty refund was unconstitutional. Nevertheless, at a minimum, the majority opinion in *Cary* upholds the power of Congress to amend customs administrative procedures in such a way that executive or administrative decisions are no longer actionable at common law with trial by jury.

Congress immediately overruled *Cary* in an 1845 statute that reestablished the importer's right of action at law against the collector for refund of overpayments.¹⁹ The 1845 statute codified procedural prerequisites underlying the action in assumpsit of paying the duty and protesting against the duty assessment, but now the protest was required to be in writing.²⁰ The statute provided expressly for trial by jury.²¹ This was consistent with the guarantee under the U.S. Constitution of trial by jury in any action at common law in which the amount in controversy exceeds \$20.²²

In 1868, in *Nichols v. United States*,²³ the Supreme Court dismissed an action for a customs refund where the importer did not follow the procedure in the 1845 statute and, instead, tried to bring an action in the Court of Claims. *Nichols* upholds the power of Congress to establish procedural requirements at the administrative level that differ from those at common law and that represent binding procedural prerequisites to judicial review. It also shows that where Congress has established a statutory procedure for contesting tax collection, the taxpayer cannot circumvent that procedure by attempting to invoke an alternative procedure or forum.

Meanwhile, Congress revised the statutory procedure in 1864.²⁴ Now the importer was required to file a protest within ten days after the collector's decision on the rate and amount of duties to be paid on imported goods.²⁵ In addition, the importer was required to appeal to the Treasury Secretary before bringing a lawsuit for refund.²⁶ In *Arson v. Murphy*,²⁷ the Supreme Court ruled that the 1864 statute extinguished the common law right of action and replaced it with a statutory remedy. *Arnsion* relied on an analogous income tax decision, *Cheatham v. United States*,²⁸ with both cases sustaining the power of Congress to establish a statutory procedure that

included administrative prerequisites to judicial review, instead of a common law remedy.

Customs law before 1890 featured an entirely separate procedure for appraisement (valuation) of imported goods. This procedure used specialized personnel and a two-tiered administrative process. After 1851, the personnel involved in appraisement included two levels of government officials: government appraisers who served at each of the principal ports of entry,²⁹ and general appraisers who traveled to various ports of entry around the country and exercised supervisory functions. The Act of March 3, 1851 created four general appraisers within the Treasury Department.³⁰ They visited ports of entry to "afford such aid and assistance in the appraisement of merchandise ... as may be deemed necessary by the Secretary of the Treasury to protect and insure uniformity in the collection of the revenue from customs."³¹

In addition to the government appraisers and general appraisers, a distinctive feature of appraisement was the use of private citizens known as "merchant appraisers," that is, "discreet and experienced merchants ... familiar with the character and value of the goods in question"³² Merchant appraisers had been used to value imported merchandise in U.S. customs law since the earliest tariff acts and, indeed, in English customs law as far back 1684, as well as in the customs laws of several colonies before U.S. independence.³³

The two-tiered administrative process for appraisement was established in 1842.³⁴ The government appraiser at the port of entry was responsible for making the initial appraisement. Then, if the importer objected, an administrative appeal to a two-person panel was available. After 1851, if a general appraiser was available at the port, the general appraiser and one merchant appraiser selected by the collector heard the appeal.³⁵ If no general appraiser was available, the collector selected two merchant appraisers for the appeal. If the two members of the panel agreed on the value, their decision was accepted as the dutiable value. If they did not agree, the collector decided between them.

The law had no provision for direct judicial review of the appraisal.³⁶ Instead, judicial review could be obtained indirectly in the lawsuit against the collector, based on the idea that the duty assessment would be unlawful if it was based on an illegal or erroneous appraisal.³⁷ But the law featured a limited scope of judicial review of the appraisal under which the appraisers' findings of fact were not reviewable. Under the statute governing appraisal, "the appraisal ... determined [in the decision of the two-person panel] shall be final and be deemed to be the true value [of the goods]."³⁸ Based on "shall be final" language, case law held that the law precluded the court from reviewing the appraisers' decisions on questions of fact about the value of the goods.³⁹

B. Emergence of Shortcomings by the 1880s.

By the 1880s, the system of customs administration based on the 1842, 1845, 1851, and 1864 statutes had been in existence for nearly forty years without fundamental change. The system no longer met the needs of the times, however. It faced weaknesses "both with classification cases in the circuit courts and appraisal disputes handled by panels of appraisers."⁴⁰ "The problems facing the institutions of customs litigation in the 1880s were manifold," and ultimately they "led to the extinction of the unsystematic institutional framework of judicial review under the customs laws that had evolved during the nineteenth century."⁴¹

In classification cases, a basic problem was that the circuit court for the southern district of New York was overcrowded with customs litigation. In a report presented to Congress in 1882 on problems in customs litigation, the Treasury Secretary wrote that "[t]he dockets of the New York courts, where seven-tenths of the tariff cases arise, are so crowded that trials cannot usually be obtained in less than two or three years, and some cases ... have remained undecided for nearly twenty years."⁴² In 1887, the Secretary reported that "[t]he calendar of customs suits in the southern district of New York has grown so large there is no reasonable prospect of disposing of them in this generation."⁴³ As a result, "[a] merchant who has suffered an illegal exaction of

duties cannot hope for a speedy trial of his cause, and justice is practically denied him."⁴⁴

A second problem in classification cases was, ironically, that "[c]ases were heard in almost every district across the country, since jurisdiction ... depended on the port of entry through which the merchandise had been imported."⁴⁵ This led to frequent conflicts among decisions in different courts, which meant that "in many cases [the issues] are not finally determined except on appeal to the [Supreme Court] involving great delay and uncertainties as to the duties payable."⁴⁶

A third problem was "the complexity of the factual and legal issues presented to the courts and juries in customs litigation."⁴⁷ As one author explained, "[t]here were many ambiguities and conflicting provisions in the tariff schedules which had been for many years constant subjects of dispute and litigation."⁴⁸ The Treasury Secretary's 1882 report to Congress on problems in customs litigation declared that neither the court nor the jury had the expert skill necessary to interpret the tariff provisions and make satisfactory decisions.⁴⁹

Separate and perhaps more serious shortcomings afflicted the procedure for handling appraisal disputes using the panel of either a general appraiser and a merchant appraiser or two merchant appraisers. With only four general appraisers to serve the entire country, their "duties were too numerous and the number of officers too limited ..."⁵⁰ Furthermore, "appraisal had become more difficult because foreign manufacturers developed the practice of shipping goods on consignment to U.S.-based agents."⁵¹ Consignment sales were widely believed to involve undervaluation and fraudulent invoicing, while at the same time importers "even claimed that [consigned] goods had no market value."⁵² The valuation law was amended to permit appraisal based on cost of production, but that change actually made appraisal more difficult because many appraisers did not have the necessary skill or experience to estimate the cost of production. As a result, consignment shipments made it "practically impossible, or difficult at least, to determine the actual value of goods imported into this country."⁵³

Fundamentally, it was becoming apparent that merchant appraisers could not be relied on to render impartial decisions: “[t]he system of appointing merchants to act as members of reappraising boards ... has become under present conditions not only ineffective, but productive of serious abuses, scandal, and confusion, and is injurious alike to the revenue and legitimate trade.”⁵⁴ Specifically, “[s]ince the merchant appraiser was required to have special knowledge of the imported merchandise, the merchants chosen for reappraisal panels were invariably actual or potential competitors of the importer.”⁵⁵ This gave merchant appraisers “the power ... to fix the dutiable value on the goods of a competitor.”⁵⁶ A triangular rivalry arose, in which the reappraisal decision “usually depended on whether the merchant appraiser selected is identified with the consignment, regular importing or domestic manufacturing interest”⁵⁷ As a result, the reappraisal hearings had become “more or less partisan in nature, and did not afford a just or equitable settlement of any disputed question of market value.”⁵⁸

As Felix Frankfurter and James Landis wrote later, “[u]ndue delay, doubts and defeat in the collection of the country’s revenue, due to inapt legal machinery, became a matter of first concern.”⁵⁹ The perceived shortcomings in the system led to a series of proposals for reform, including a report of an ad hoc Tariff Commission created by Congress to study customs issues in 1882 and a decade-long series of messages from Treasury Secretaries to Congress.⁶⁰ A customs reform bill passed the Senate in 1888 but not the Democratic-controlled House of Representatives.⁶¹ A temporary solution to overcrowding in New York was the appointment of an additional circuit judge in 1887, making it the only circuit court at the time with two judges.⁶²

II. DEVELOPMENT OF THE 1890 ACT.

The proposals for reforming customs administrative procedures led to renewed legislative efforts in the first session of the fifty-first Congress. Republicans, who had won the presidency (Benjamin Harrison) and majorities in both houses of Congress in the 1888 election, had campaigned on high tariffs and “viewed [the]

election ... as a mandate to increase protection.”⁶³ Reform of customs administrative procedures to strengthen enforcement was an integral part of the Republican protectionist strategy.⁶⁴

In January 1890, the House Ways and Means Committee, chaired by Representative William McKinley (Republican of Ohio), reported H.R. 4970, a bill “to simplify the laws in relation to the collection of revenue.”⁶⁵ The McKinley bill addressed several matters of stronger customs enforcement, including procedures for addressing undervaluation and fraudulent invoicing. Sections 12 through 15 proposed a new procedure for customs adjudication.⁶⁶ It involved, in essence, increasing the number of general appraisers serving in the Treasury Department from four to nine and expanding their powers to include classification as well as appraisal. The same proposal had already been included in an 1888 bill in the previous Congress.⁶⁷

Representative McKinley introduced the proposal during House debate on January 23, 1890. One of “the leading features of the bill on which there may be contention,” he explained, “provides for the appointment of a board of nine general appraisers.”⁶⁸ The “increase in the number of general appraisers has been made necessary by the increase of the importing business” and is “necessary to the proper and expeditious conduct of public business in the interest of the Government and the importer.”⁶⁹ The House Report added that “[t]he purpose is to do away with the unsatisfactory system long prevailing under which importers participate in re-appraisements [as merchant appraisers] and in many cases nullify the efforts of the Government to collect the duties on foreign merchandise contemplated by law.”⁷⁰

The plan to increase the number and expand the powers of the general appraisers was not especially controversial in itself. Rather, what made McKinley’s bill controversial were its provisions on judicial review of the general appraisers’ decisions.

A. Judicial Review: The House Bill.

1. The McKinley Bill and Its Legal Foundation. The McKinley bill continued existing law under which general appraisers’ decisions

in appraisal cases would not be directly reviewable in court, and this provision incurred only limited controversy.⁷¹ The highly controversial provision was section 15, governing judicial review in cases involving tariff classification and the rate and amount of duty.⁷² The McKinley bill provided that questions of law in the general appraisers' decisions would be subject to judicial review, but decisions on questions of fact would not be reviewable.⁷³ Instead, section 15 provided that the board of general appraisers would "transmit to [the] circuit court a certified statement of their findings of the facts involved in the case and their decision thereon; and the facts so found and certified shall be final and conclusive upon the court [and] shall constitute the record in the circuit court."⁷⁴ The board's decision would then be subject to judicial review only on "the questions of law involved in such decision."⁷⁵ The plan would, therefore, replace the jury as finder of fact with the decisions of an administrative tribunal and would make its findings of fact unreviewable in court.

In the House debate, Representative Sereno Payne (Republican of New York) offered the principal legal argument supporting the constitutionality of the McKinley proposal.⁷⁶ This article reprints the full text of Representative Payne's speech as an Appendix. His presentation rested on three decisions of the Supreme Court discussed earlier in this article⁷⁷: the 1845 decision in *Cary v. Curtis*,⁷⁸ the 1868 decision in *Nichols v. United States*⁷⁹, and the 1875 decision in *Cheatham v. United States*.⁸⁰ He argued under these decisions that the Constitution does not simply allow Congress to eliminate trial by jury, but more broadly to give an executive branch official or tribunal the power to make final decisions in tax collection:

... Congress, the legislative branch of the Government, [is] supreme in its power of levying and collecting taxes, and that if they allowed a suit in any case it was only an act of clemency and beneficence on the part of the Government; that they need not allow any claim for redress, but they might make the Secretary of the Treasury the supreme tribunal in the case, both as

to the law and the facts, and take away entirely the right of trial by jury.⁸¹

In conclusion, based on his broad interpretation of the Supreme Court decisions he quoted, Representative Payne urged that "this provision of law, which simply refers to the board of arbitration [sic: appraisers] the questions of fact, either to report upon the facts and present them to the court or [sic: so] that they may further litigate upon the law in the courts, goes further even than the Constitution requires."⁸²

Representative Payne's speech is an instructive example of zealous legal advocacy. The narrow holdings of the three cases he cited do not support his broad proposition that Congress may make an executive branch official the "supreme tribunal" to adjudicate tax disputes, presumably meaning without any judicial review at all. The narrow holdings of all three cases are only that Congress may replace common law remedies with statutory ones, require exhaustion of statutory administrative remedies before judicial review, and set a limitations period for suing. A narrow reading of *Cary v. Curtis* also supports the conclusion that Congress may eliminate trial by jury in tax cases by revising administrative procedures in such a way that decisions are no longer actionable at common law. The *Cary* majority said, however, that an importer could still obtain judicial review of duty collection using alternative common law writs before paying of the duty, meaning that Congress could preclude post-deprivation judicial review if pre-deprivation review is available.⁸³ Subsequent cases have offered competing interpretations of the decision, with one interpretation allowing Congress to preclude judicial review entirely, but another interpretation preserving judicial review.⁸⁴

Regardless of the narrow holdings of the cases, Representative Payne relied on a broad interpretation of *Cary* and dicta in *Nichols* and *Cheatham* to advocate that the Constitution allows Congress to preclude judicial review completely in customs disputes. Representative Payne's advocacy of the broad major premise made it easier for him to establish his minor premise that since the McKinley bill provided for judicial review,

it satisfied the requirements of the Constitution even though it eliminated trial by jury.⁸⁵

2. *The Proposal to Keep Jury Trials and the Outcome of the House Debate.* Opposition to the McKinley bill coalesced around an amendment to section 15 offered by Representative John Carlisle (Democrat of Kentucky), ex-Speaker of the House from 1883 to 1889.⁸⁶ The Carlisle amendment omitted the language making the facts found and certified by the board final and conclusive on the court, allowed judicial review on the questions of fact and questions of law involved in the decision, and provided for trial by jury unless waived by the parties. The opponents largely conceded that the McKinley bill was constitutional and, therefore, based their opposition on policy arguments.⁸⁷ A speech by Representative Newton Blanchard (Democrat of Louisiana) captures the flavor of the debate against the McKinley bill:

... Mr. Chairman, ... this section ... takes away from the citizen his right to trial by jury Mr. Chairman, the right of trial by jury is a right so sacred and time-honored that it ought not to be interfered with in any way as is proposed in this bill. Magna Charta, the petition of rights, habeas corpus, trial by jury, are the very bulwarks of liberty, and were wrested from the mailed hand of despotism by the English-speaking race only after centuries of effort and sacrifice and bloodshed. Sir, the history of civil liberty teaches us that every step leading up to the establishment of trial by jury was a step in battle and in blood. It is a right so dearly bought that any proposition for its relinquishment, even in trivial matters, involves of a question of much moment.⁸⁸

Other opponents of the McKinley proposal urged that trial by jury was the best “mode to ascertain facts and rights ... in a proceeding between ... the sovereign ... and the individual citizen.”⁸⁹ They urged, further, that the McKinley proposal was ultimately a protectionist idea: “If ... the protective system is incompatible with ... trial by jury, if ... the people must choose between the protective system or giving up jury trial, let us make that the issue ... and see whether they

will overthrow the protective system or the right of trial by jury which they have inherited from their fathers. [Applause.]”⁹⁰

Finally, Representative McKinley spoke in support of his proposal:

... I understand ... that no gentleman now seriously questions the constitutional right of Congress to enact the legislation proposed in the bill under consideration. The question, therefore, has rather drifted to one of public policy—whether it is fair, just, and necessary to create a board of general appraisers, with the powers granted in the section under debate, and to deprive, as it is said, the importer of the right of trial by jury.

Now it is important that the [House] should fully understand the necessity for this system—for it is a system. It gives to the nine general appraisers the power that the Secretary of the Treasury has heretofore possessed [to decide appeals from decisions of local collectors]. ... We have given them no greater power than was confided to him.

Now, what has led to this proposed legislation? Why, sir, frauds committed upon the revenue, undervaluations of imported goods, differing and conflicting decisions at different ports, a crowded docket of the United States courts, making it almost impossible to reach a decision to these questions within a reasonable time Prompt and uniform decisions are as essential and important to the importers [as they are] to the Government, and it is believed that this machinery will insure both and do no injustice to either.

... I wish the [House] distinctly to know that we do not take away any right from the importer This gives him rights and privileges greater, broader, and more beneficial than he has under the existing law. ... He has the right ... to go ... to the board of three general appraisers, ... and when that board has given its decision we give them the right ... to go to the circuit courts of the United States and have the ques-

tions of classification and law determined ... What more can in reason be asked? What other or different tribunal can the honest importer want?⁹¹

Representative McKinley's speech finished the debate on the Carlisle amendment. Then the House voted, and the amendment was defeated by a margin of only two votes, 112 to 114.⁹² Subsequently, after debate on the remainder of the bill, the House passed H.R. 4970 on January 25, 1890, by a vote of 138 to 121, with 69 not voting.⁹³

B. Public Reaction: The Example of the *New York Times*

At least some of the public reaction to the McKinley customs administrative bill is reflected in editorials in the *New York Times*. The newspaper strongly opposed the provision allowing the Board of General Appraisers to make final and conclusive findings of fact. An editorial on January 28, 1890, argued that:

... [The bill's] cardinal point is the withdrawal of the right of citizens to have facts in any dispute with the Government determined by a jury. The facts are to be determined by the Appraisers, and only those that these officers choose to submit may go to the Judges for decision. It is not the abolition of the jury in these cases that constitutes the wrong. On the contrary, it is quite possible that the decision of a Judge as to what the facts really are may be more correct than that of a jury. ... But in the McKinley bill it is not within the power of the Judge to ascertain the facts. He must take them as the officials give them.

This is outrageous Fortunately [the bill cannot be forced through] the Senate, and there the wrong done by this offensive measure must be made plain. Its enactment would be the greatest piece of despotism to which narrow and corrupt protectionism has yet given rise.⁹⁴

The theme was reiterated and amplified in an editorial on February 4, 1890:

[T]his law ... is in plain reality enacted by the little cabal of protected manufacturers who have purchased the power to legislate

from the Republican Party. It does not relate so much to the collection of revenues as to the prevention of importation. Its object is not so much to get the lawful collection of duties on imports—which are high enough, in all conscience—as to set up a tribunal of selected subordinates who shall declare at their own discretion what duties may be collected, and from whose exactions there is practically no appeal.

We do not exaggerate. ... [The new onerous invoice requirements] are not the worst feature of the act. That consists ... in setting up a tribunal of subordinates in whose hands is lodged substantially despotic power with reference to property. There is to be a board of general appraisers, nine in number [F]rom their decision [in valuation cases] there is no appeal as to the facts of valuation.

This of itself is sufficiently arbitrary But it is not the worst. [In classification cases] the importer may take the case to the Circuit Court But he can only ask the court to decide on the questions of law. The court must take the facts from the report of the appraisers, which constitutes in this case “the record” of the court. We imagine that few lawyers would doubt the result of any suit ... in which one side had the privilege of furnishing all the evidence If such a trial, in which nothing is tried ... be the “due process of law,” ... then that guarantee can be made worthless by act of Congress. ... We confess that we cannot understand how such an act should have been permitted to pass the House without more vigorous opposition than this one received. It is to be hoped that its iniquity will be adequately exposed in the Senate.⁹⁵

C. Judicial Review: The Senate Bill and the House Conference Report.

In the Senate, the Finance Committee developed a very different version of section 15 of H.R. 4790, the section governing judicial review of a decision of the board of general appraisers

on the rate and amount of duty chargeable on imported goods. The Committee did not prepare a written report, and Senator William Allison, Republican of Iowa, did not explain the reasons for the different version when he introduced the bill as amended on the floor of the Senate.⁹⁶ But one can surmise that the amendment was developed “in response to criticisms of McKinley’s original version that judicial review would not be effective if it were limited to pure questions of law.”⁹⁷

Under the Senate version, the circuit court would review not only questions of law, but instead “the questions of law and fact involved in [the board’s] decision ...”⁹⁸ The court’s decision would be based on “all the evidence taken ... before [the] appraisers ...”⁹⁹ The court could supplement the record by “refer[ring] [the case] to one of [the] general appraisers, as an officer of the court, to take and return to the court such further evidence as may be offered by [the parties] ...”¹⁰⁰

On the Senate floor, there were renewed efforts to restore trial by jury. Senator George Gray (Democrat of Delaware) argued that trial by jury was a “right ... so highly valued by the citizens,” while the proposed alternative was “entirely an inadequate and imperfect substitute ...”¹⁰¹ But in support of the bill, Senator John Sherman (Republican of Ohio) urged that:

This does ... provide a substitute for the common-law remedy, and the best kind of substitute. It provides impartial tribunals to ascertain facts, and those facts being ascertained, they are certified to the court. ...[W]ho cannot see that the judgment of these three men on a question of fact is worth more than the judgment of fifty jurors or fifty juries? Here is an impartial verdict, you may say, of three skilled and competent men trained in their business.¹⁰²

Senator Gray’s amendment to restore jury trials was tabled by a vote of 31 to 16.¹⁰³ Proposals by Senator William Evarts (Republican of New York) to give the circuit court discretion to hold a jury trial were also defeated.¹⁰⁴ The Senate

passed the bill on May 2, 1890, by a vote of 35 for and 18 against.¹⁰⁵

In the conference between the House and the Senate, the House receded on the Senate’s amendments to section 15 of the bill.¹⁰⁶ Despite the complete departure from the idea of precluding judicial review of questions of fact in section 15, Representative McKinley now urged that “[t]here is no essential change,” “[t]he original bill as it passed this House is in substance and purpose and effect preserved,” and “[t]he House has yielded nothing which impairs the bill.”¹⁰⁷

The House approved the amended bill in a vote of 126 yeas, 13 nays, and 188 not voting.¹⁰⁸ President Benjamin Harrison signed the bill into law on June 10, 1890.¹⁰⁹

D. Sections 12 to 15 of the 1890 Act: A New Administrative Law System.

The administrative law system¹¹⁰ for adjudication of customs valuation, tariff classification, and rate and amount of duty established in sections 12 through 15 of the 1890 Act operated as follows. Under section 12 of the act, the President, with the advice and consent of the Senate, would appoint “nine general appraisers of merchandise.”¹¹¹ They would “exercise the powers, and duties devolved upon them under this act,”¹¹² hearing and deciding appraisement cases under section 13 of the act and classification cases under section 14. In addition, the general appraisers would “exercise, under the general direction of the Secretary of the Treasury, such other supervision over appraisements and classifications, for duty, of imported merchandise as may be needful to secure lawful and uniform appraisements and classifications at the several ports.”¹¹³ The statute imposed a limitation on the general appraisers’ political party affiliation, providing that “[n]ot more than five of such general appraisers shall be appointed from the same political party.”¹¹⁴ Each general appraiser would receive a salary of \$7,000 (compared to the salary of federal circuit judges of \$6,000 as of 1891), could not be engaged in any other business, avocation, or employment, and could be removed from office by the President for inefficiency, neglect of duty, or malfeasance in

office.¹¹⁵ Three general appraisers would be on duty as a board at the port of New York.

Under the appraisal procedure in section 13, a government appraiser (or a customs official acting as such at ports where no appraiser was appointed) would make the initial appraisal of imported goods.¹¹⁶ If the collector deemed the appraisal to be too low, or if the importer was dissatisfied, there would be “a reappraisal by one of the general appraisers.”¹¹⁷ If either the importer or the collector was dissatisfied with the reappraisal, the case would be transmitted to a board of three general appraisers who would “examine and decide the case thus submitted.”¹¹⁸ The decision of the three general appraisers, or a majority of them, would “be final and conclusive as to the dutiable value of such merchandise.”¹¹⁹

After the appraisal was final, the collector would under section 14 of the Act “ascertain, fix, and liquidate the rate and amount of duties to be paid on such merchandise.”¹²⁰ If the importer was dissatisfied with the collector’s decision, it could within 10 days notify the collector of its objections. The collector would then transmit the case to a board of three general appraisers who would “examine and decide the case thus submitted.”¹²¹ The decision of the three general appraisers would “be final and conclusive upon all persons interested therein,”¹²² unless an application for judicial review by the circuit court was filed as provided in section 15 of the Act.

Under section 15, a party dissatisfied with the decision of the board under section 14 could “apply to the circuit court ... for a review of the questions of law and fact involved in such decision.”¹²³ Then the board would forward to the court “the record and the evidence taken by them; together with a certified statement of the facts involved in the case, and their decisions thereon.”¹²⁴ On application by either party, the court could “refer [the case] to one of [the] general appraisers, as an officer of the court, to take and return to the court such further evidence as may be offered”¹²⁵ The circuit court, based on the record developed before the board, as supplemented by additional evidence submitted, would “proceed to hear and determine the questions of law and fact involved in [the board’s] decision,

respecting the classification of such merchandise and the rate of duty imposed thereon”¹²⁶

Finally, the 1890 Act provided that collectors of customs would now be immune from lawsuit and would not “be in any way liable to any ... importer ... or any other person, for or on account of any rulings or decisions as to the classification of [imported] merchandise or the duties charged thereon”¹²⁷

III. LEGACIES OF THE 1890 ACT.

A. Evolution of the Board of General Appraisers

The Board of General Appraisers began operations in August 1890.¹²⁸ The Board was recognized as being an autonomous tribunal within the Treasury Department, and the Customs Regulations included provisions governing Board procedures.¹²⁹ In 1894, in *Schoenfeld v. Hendricks*,¹³⁰ the Supreme Court confirmed that the procedures in the 1890 Act represented the exclusive mechanism for challenging the assessment of duty on imported goods.

Implicitly, *Schoenfeld* upheld the constitutionality of establishing the Board as an administrative tribunal to adjudicate customs disputes in the first instance.¹³¹ Its constitutionality had never really been in doubt, for the Board essentially replaced the pre-1890 appeal to the Treasury Secretary as a prerequisite to the importer’s lawsuit, but with a formal administrative adjudication. The Board’s existence in this role helped to inform the Supreme Court’s conclusion in 1929 in *Ex parte Bakelite Corp.*¹³² that adjudicating customs refunds could constitutionally be assigned to executive officials. The Supreme Court subsequently upheld the constitutionality of using administrative tribunals in income tax assessment,¹³³ and more broadly, “the constitutionality of legislative courts and administrative agencies created by Congress to adjudicate cases involving ‘public rights.’”¹³⁴ The “public rights” category unquestionably includes customs duties and government regulation of international trade.¹³⁵

The standard of judicial review of the Board’s decisions is noteworthy. The 1890 Act directed the reviewing court to decide questions of law and fact involved in the Board’s decision, but did

not specify the standard of review. Early cases decided that the court should apply a limited or deferential standard of review to the Board's findings of fact and should only reverse a finding of fact that was "wholly without evidence to support it" or was "clearly contrary to the weight of the evidence."¹³⁶ This deferential standard of reviewing factual findings represents a very early example of the "appellate review" or "non-de-novo review" model in administrative law judicial review. Professor Thomas Merrill describes this model as emerging in Interstate Commerce Commission litigation around 1910, before spreading to other areas of administrative law.¹³⁷

The method for judicial review set out in the 1890 Act, with the addition of appeals from the circuit court to one of the new circuit courts of appeal after 1891,¹³⁸ continued until 1908. Then the law was amended to limit the record for judicial review to the evidence submitted to the Board by requiring litigants "to introduce all their evidence before the ... board ... prior to its decision in the case."¹³⁹ Based on eighteen years of experience, Congress decided that too many litigants chose to delay submitting all their evidence until the case reached the reviewing court, turning too many court proceedings into trials de novo.¹⁴⁰

In 1909, Congress created the U.S. Court of Customs Appeals, transferring jurisdiction for judicial review of the Board of General Appraisers from federal courts of general jurisdiction to a court of specialized jurisdiction.¹⁴¹ By the 1920s, the Board of General Appraisers gradually evolved into practically a judicial tribunal, while its title as a "Board" was causing confusion on matters such as obtaining evidence in foreign countries.¹⁴² In 1926, Congress gave the Board the new name of the United States Customs Court¹⁴³ and, in 1930, removed it from the Treasury Department.¹⁴⁴ But from 1890 to 1926 (or 1930),¹⁴⁵ it existed and operated as an administrative adjudicatory tribunal in customs cases.

B. Jury Trial in the Court of International Trade: Revisiting The 1890 Debate

As discussed in the introduction to this article, the key issue of legal theory in the 1890 debate

reappeared much later: whether the guarantee of trial by jury under the Seventh Amendment to the Constitution prevents Congress from eliminating trial by jury in customs lawsuits against the federal government. The issue of whether the Seventh Amendment guaranteed jury trials in customs litigation lay dormant until the 1980s, when the plaintiff demanded a jury trial in the Court of International Trade in *Washington International Insurance Co. v. United States*.¹⁴⁶

Prior to *Washington International*, the Supreme Court had held in *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*¹⁴⁷ that Congress may create statutory rights and obligations enforceable in an administrative agency with no jury trial. In *Atlas*, the newly created cause of action before the administrative tribunal provided for imposition of civil penalties, arguably going beyond earlier cases that permitted administrative adjudication of non-penalty statutory rights.¹⁴⁸ In any event, *Atlas* plainly answered the specific question debated in 1890, confirming that Congress can remove a right to trial by jury before courts and replace it with an adjudication before an administrative tribunal.

Congress's ability to substitute administrative adjudication for a jury trial in a court did not resolve the question in *Washington International*. This is because the Supreme Court had also ruled that where Congress has a choice of assigning a cause of action to an administrative tribunal or a court, but chooses to assign it to a court, the Seventh Amendment preserves trial by jury where the action involves rights and remedies recognized at common law.¹⁴⁹ As a result, it was possible that the right to trial by jury might reappear in the Court of International Trade even though it had been in abeyance since 1890.

In *Washington International*, the majority opinion by Judge Aquilino, joined by Judge Watson, ruled that the Seventh Amendment guaranteed a right to a jury trial in customs litigation. The majority relied on the Supreme Court's then-recent decision in *Tull v. United States*, which ruled that the Seventh Amendment "require[s] a jury trial on the merits in those actions that are analogous to 'Suits at common law.'"¹⁵⁰ Applying *Tull* the majority held that "the

conclusion it leads to is the right to a jury trial, for the nature of this action has remained essentially unchanged since the 18th century.¹⁵¹ In the majority's view, the fundamental nature of the action was a dispute over the imposition of customs duties and the remedy sought remained an action in debt for the recovery of money.¹⁵²

Chief Judge Re dissented, citing the general principle that "the Seventh Amendment right to trial by jury does not apply to actions against the Federal Government,"¹⁵³ and therefore a right to trial by jury only exists against the government "if Congress 'has affirmatively and unambiguously granted that right by statute.'"¹⁵⁴ He distinguished *Tull v. United States* because it "was an action brought by the United States to recovery potential civil [monetary] penalties," and therefore "does not support a claim for a jury trial in a monetary action against the United States to recover customs duties alleged illegally exacted."¹⁵⁵

Chief Judge Re then reviewed the history of nineteenth century customs litigation leading to the Customs Administrative Act of 1890. He concluded that "Congress consciously, deliberately, and with full awareness of its constitutional implications, repealed the [1864] statute allowing an action against a collector, with its concomitant statutory right to trial by jury before the courts."¹⁵⁶ The 1890 Act introduced "a 'radically' new statutory system" that "intentionally removed the right to a jury trial before the courts and 'substituted' a trial before the general appraisers."¹⁵⁷ In sum, in Chief Judge Re's view, "[t]he fact that the existing [statutory] remedy [for contesting customs duties] does not include, and has not included since 1890, a provision for trial by jury, does not render the existing remedy and its procedures unconstitutional."¹⁵⁸

On appeal, the Federal Circuit reversed the majority decision and held that the Seventh Amendment does not guarantee the right to a jury trial in an action against the federal government to recover customs duties.¹⁵⁹ The Federal Circuit did not consider the history of customs litigation or the Customs Administrative Act of 1890, simply ruling instead that "[t]he Seventh Amendment preserves the right to a jury trial in those actions in which the right existed at com-

mon law when the amendment was adopted in 1791," but "[a]n action against the government ... is not a suit at common law within the purview of the Seventh Amendment."¹⁶⁰ The Federal Circuit distinguished *Tull v. United States* "because actions *against* the government are not analogous to actions *by* the government ...," in that "[s]overeign immunity shields the United States from suit unless immunity is waived," and a right to a jury trial only exists where it is included in the government's consent to be sued.¹⁶¹

CONCLUSION

The Board of General Appraisers and the 1890 Act are historically significant for two reasons. First, the Board was a direct ancestor of the U.S. Court of International Trade. It was the first step in an institutional evolution that began with an administrative adjudicatory body and culminated in a federal court established under Article III of the Constitution. The individuals the *New York Times* had derided as "selected subordinates who shall declare at their own discretion what duties may be collected" and "in whose hands is lodged substantially despotic power with reference to property"¹⁶² have been transformed into life-tenured federal judges. But in this evolutionary process, Congress decided to replace the administrative tribunal embedded in the Treasury Department with what it saw as a better administrative system for customs duties, using an independent specialized court instead. The Board finished its leg of the relay and passed the torch to the U.S. Customs Court. Thus, the history of the U.S. administrative law system for customs duties has followed three basic models: first, from 1789 to 1890, customs officials made informal adjudications that were judicially reviewed in *de novo* litigation in federal courts of general jurisdiction with jury trials, except in appraisement cases; second, from 1890 to 1926 (or 1930), after initial decisions by customs officials, an administrative tribunal in the Treasury Department made formal adjudications that were judicially reviewed in federal courts of general jurisdiction (1890-1909) or a specialized federal appellate court (1910-1926 or 1930); third, since 1926 (or 1930), customs officials make informal adjudications that are judicially reviewed in *de novo* litigation in a specialized federal trial court.

A second reason for the Board's historical significance is to serve as a case study in the history of administrative law. The 1890 Act was enacted when the Government was starting to create administrative adjudicatory tribunals at the inception of the modern U.S. administrative state. In this respect, the Board has perhaps been overlooked.¹⁶³ This is partly because customs law and administration is an arcane area of law, and partly because the creation of the Board was undoubtedly constitutional in itself.¹⁶⁴ Perhaps another reason is that the Board disappeared from the historical path of administrative law when it ceased to be an administrative tribunal and joined the federal judiciary. Nevertheless, the Supreme Court's decisions on administrative law and trial by jury since 1890 have upheld Representative Payne's argument that the 1890 Act did not test, let alone exceed, the limits of Congress's constitutional power to establish administrative tribunals and eliminate trial by jury.

ENDNOTES

- ¹ Act of June 10, 1890, ch. 407, 26 Stat. 131.
- ² See PATRICK C. REED, *THE ROLE OF FEDERAL COURTS IN U.S. CUSTOMS & INTERNATIONAL TRADE LAW passim* (1997); see also Leo M. Gordon, *A Look Forward into History: A Personal Reflection on the United States Court of International Trade From 1980 to Present*, 5 J. Fed. Cir. Hist. Soc. 37 (2011). On the history of U.S. customs administration and litigation, see generally WEBSTER ELMES, *A TREATISE ON THE LAW OF CUSTOMS* (1887) (providing a snapshot of customs law in the mid-1880s); JOHN DEAN GOSS, *THE HISTORY OF TARIFF ADMINISTRATION IN THE UNITED STATES: FROM COLONIAL TIMES TO THE MCKINLEY ADMINISTRATIVE BILL* (1897); REED, *supra*; Joseph E. Lombardi, *The United States Customs Court: A History of its Origin and Evolution* (1976) (typescript).
- ³ Act of August 5, 1909, ch. 6, § 28, 36 Stat. 11, 105 (adding new section 29 to the 1890 Act, as amended). In 1929, Congress added jurisdiction over appeals from the U.S. Patent Office to the Court of Customs Appeals, and the court was renamed the U.S. Court of Customs and Patent Appeals. Act of March 2, 1929, ch. 488, 45 Stat. 1475.
- ⁴ 28 U.S.C. § 1295(a)(5).
- ⁵ *Washington Int'l Ins. Co. v. United States*, 678 F. Supp. 902, 920 (Ct. Int'l Trade) (Re, C.J., dissenting), *rev'd* 863 F.2d 877 (Fed. Cir 1988) (sustaining Chief Judge Re's position in dissent); see *infra* notes 146-161 and accompanying text (discussing the case in more detail).
- ⁶ *Tappan v. United States*, 23 F. Cas. 690, No. 13,749 (C.C.D. Mass. 1822) (per Story, Cir. J.) (referring to U.S. CONST., art. I, § 8, cl. 1 & 3) (also noting that the conditions on which importation is permitted could include appraisalment by a specified tribunal).
- ⁷ U.S. CONST., 7th Amend.
- ⁸ U.S. CONST., art. III; *id.*, 5th Amend; see *infra* notes 131-135 and accompanying text.
- ⁹ Interstate Commerce Act, Act of Feb. 4, 1887, ch. 104, 24 Stat. 379. See generally Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 Stan. L. Rev. 1189 (1985-1986).
- ¹⁰ See *infra* notes 122 and 136.
- ¹¹ Before the 1830s, the most common method of customs judicial review was an action by the Government to recover money due on customs bonds that importers were allowed to post to secure potential duty liability. See REED, *supra* note 2, at 45-48. Customs bond litigation represented the statutory mechanism for contesting customs duties in the earliest customs administrative acts. See, e.g., Act of July 31, 1789 [Customs Administrative Act of 1789], ch. 5, §§ 19 & 21, 1 Stat. 29, 42.
- ¹² Rev. Stat. § 2621 (1875) ("it shall be the duty of the collector ... [t]o receive the entries of goods, wares, and merchandise ..., ... [t]o estimate ... the amount of the duties payable thereupon [and] ... [t]o receive all moneys paid for duties") (codifying provisions of the Act of Mar. 2, 1799, ch. 22, § 21, 1 Stat. 627, 642).
- ¹³ 35 U.S. (10 Pet.) 137 (1836).
- ¹⁴ See, e.g., *Campbell v. Hall*, 98 Eng. Rep. 1045 (King's Bench 1774) (per Lord Mansfield, C.J.); see also REED, *supra* note 2, at 48-50 & 52-53.
- ¹⁵ Paul P. Rao, *A Primer on Customs Court Practice*, 40 Brooklyn L. Rev. 581, 585 (1974).
- ¹⁶ Act of Mar. 3, 1839, ch. 82, § 2, 5 Stat. 339, 348-49.
- ¹⁷ 44 U.S. (3 How.) 236 (1845).
- ¹⁸ *Id.* at 243; *cf. id.* at 242 ("it is the secretary of the Treasury alone in whom the rights of the government and of the claimant are to be tested").
- ¹⁹ Act of Feb. 26, 1845, ch. 22, 5 Stat. 727.
- ²⁰ *Id.* In *Nichols v. United States*, 74 U.S. 122 (1868), the Court emphasized that "[t]his act altered the rule previously in force, and required the [importer] to protest in writing, with a specific statement of the grounds of objection." *Id.* at 126. In the common law action in assumpsit,

- “it could make no difference ... whether [the importer’s notice of objection] was written or verbal.” *Swartwout v. Gihon*, 44 U.S. (3 How.) 110 (1845).
- ²¹ Act of Feb. 26, 1845, ch. 22, 5 Stat. 727.
- ²² U.S. CONST., 7th Amendment.
- ²³ 74 U.S. 122 (1868). The U.S. attorney general who argued *Nichols* before the Supreme Court, William Everts, would later participate in the debates on the 1890 Act as senator from New York. See *infra* note 104 and accompanying text.
- ²⁴ Act of June 30, 1864, ch. 171, § 14, 13 Stat. 202, 214-15; see also Rev. Stat. § 2931 (1874) (codifying the Act of June 30, 1864, § 14). The Act of Mar. 3, 1857, ch. 98, § 5, 11 Stat. 192, 195, required the filing of a protest and an appeal to the Treasury Secretary to contest a decision that imported goods were subject to duty at all. This procedure did not, however, apply to the decision on the rate and amount of duties. See *Barney v. Watson*, 92 U.S. 449 (1875) (holding that the 1845 Act remained in force for contesting the rate and amount of duty until passage of the 1864 Act).
- ²⁵ Act of June 30, 1864, ch. 171, § 14, 13 Stat. 202, 214-15.
- ²⁶ *Id.*
- ²⁷ 109 U.S. 238 (1883) (reversing and remanding), *later opinion aff’g decision on remand*, 115 U.S. 579 (1885); see *ELMES*, *supra* note 2, at 320 (citing *Arnson* for the proposition that “although the right of the importer to sue was once a common law right of action, yet the same had by legislation become converted into an action based on ... statutory liability”).
- ²⁸ 92 U.S. 85 (1875); see *Arnson v. Murphy*, 115 U.S. 579, 585 (1885) (“[t]he question involved is analogous to the one presented in *Cheatham v. United States*”).
- ²⁹ See Act of April 20, 1818, ch. 79, § 9, 3 Stat. 433, 435 (providing for the appointment of two government appraisers at each of the six principal ports of entry).
- ³⁰ Act of Mar. 3, 1851, § 3, ch. 38, 9 Stat. 629; see also Rev. Stat. § 2930 (1874) (codifying the Act of Mar. 3, 1851).
- ³¹ *Id.* Under the Treasury Regulations, the ports of entry were organized into four general appraisal divisions, with one general appraiser assigned to each division, and the general appraisers met four times a year in New York to compare their activities and report to the Treasury Secretary. See *ELMES*, *supra* note 2, at 119.
- ³² Act of Aug. 30, 1842, § 17, 5 Stat. 548, 564.
- ³³ Act of July 31, 1789 [Customs Administrative Act of 1789], ch. 5, § 22, 1 Stat. 29, 42; R. ELBERTON SMITH, *CUSTOMS VALUATION IN THE UNITED STATES: A STUDY IN TARIFF ADMINISTRATION* 35 (1948).
- ³⁴ Act of Aug. 30, 1842, § 17, 5 Stat. 548, 564.
- ³⁵ Rev. Stat. § 2930 (1874) (codifying the Act of Mar. 3, 1851, § 3, and the Act of Aug. 30, 1842, § 17, with minor wording variation).
- ³⁶ See *REED*, *supra* note 2, at 60-61 (explaining that the decision of appraisers was not actionable under assumption or any other common law form of action).
- ³⁷ *Id.* at 61.
- ³⁸ Rev. Stat. § 2930 (1874) (codifying the Act of Mar. 3, 1851, § 3, and the Act of Aug. 30, 1842, § 17, with minor wording variation).
- ³⁹ See *Hilton v. Merritt*, 110 U.S. 97, 104 (1884) (disallowing a proffer of evidence of the actual value of imported goods and holding that “the appraisement of the customs officials shall be final, but all other questions relating to the rate and amount of duties ... may be reviewed in an action at law to recover duties unlawfully exacted.”); *Belcher v. Linn*, 65 U.S. 508 (1860) (holding that, in the absence of fraud, the decision of the appraisers on the character of the article and its dutiable value were final and conclusive); *Stairs v. Peaslee*, 59 U.S. (18 How.) 521, 527 (1855) (allowing judicial review in valuation on a question of statutory interpretation but ruling that “a question of fact ... [is] to be decided by the appraisers, and not by the court.”); *Greely v. Thompson*, 51 U.S. (10 How.) 225 (1850) (allowing judicial review of procedural irregularities in an appraisement); *Tappan v. United States*, 23 F. Cas. 690 (C.C.D. Mass. 1822) (per Story, Cir. J.) (originating the principle that the customs statutes precluded judicial review of appraisers’ findings of fact); cf. *ELMES*, *supra* note 2, at 300 (stating that “in case of appeal [from the appraiser], the merchant appraisers[’] ... decision ... establishes conclusively the valuation of the merchandise” and “[b]eyond this appeal the importer has no remedy against ... the finding of the appraisers.”).
- ⁴⁰ *REED*, *supra* note 2, at 70.
- ⁴¹ *Id.* at 75.
- ⁴² S. Exec. Doc. No. 48, 47th Cong., 1st Sess., at 2 (1882).
- ⁴³ U.S. Treasury Dep’t, Annual Report of the Secretary of the Treasury on the State of the Finances for the Year 1887, at xxxiii (1887).
- ⁴⁴ *Id.*
- ⁴⁵ *REED*, *supra* note 2, at 71.

- ⁴⁶ Report of the Tariff Commission appointed under the Act of Congress, approved May 15, 1882, H.R. Misc. Doc. No. 6, 47th Cong., 2d Sess. 10 (1882).
- ⁴⁷ REED, *supra* note 2, at 71.
- ⁴⁸ GOSS, *supra* note 2, at 70.
- ⁴⁹ S. Exec. Doc. No. 48, *supra* note 42, at 2 (citing multiple examples of specialized industrial knowledge needed to interpret the tariff provisions for various products).
- ⁵⁰ GOSS, *supra* note 2, at 81.
- ⁵¹ REED, *supra* note 2, at 72.
- ⁵² GOSS, *supra* note 2, at 72.
- ⁵³ 21 Cong. Rec. 4073 (1890) (statement of Sen. Hiscock).
- ⁵⁴ U.S. Treasury Dep't, Annual Report for the Year 1889, at xxxvii-xxxviii. Despite these perceived shortcomings, the Supreme Court later upheld the constitutionality of the merchant appraiser system. *Auffmordt v. Hedden*, 137 U.S. 310 (1890) (describing merchant appraisers as experts with specialized knowledge of particular goods, analogous to surgeons advising courts in pension cases, *id.* at 326-28).
- ⁵⁵ REED, *supra* note 2, at 73.
- ⁵⁶ SAMUEL STOCKVIS, *THE GATEWAY TO THE CONTINENT: THE CUSTOMS SERVICE OF THE PORT OF NEW YORK* [no page numbering] (1900).
- ⁵⁷ *Id.* (citing a letter from Treasury Secretary Fairchild to the House Ways and Means Committee).
- ⁵⁸ *Id.*
- ⁵⁹ FELIX FRANKFURTER & JAMES LANDIS, *BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 148 (1928).
- ⁶⁰ *See generally* REED, *supra* note 2, at 73-75.
- ⁶¹ S. 977, 50th Cong., 1st Sess. (Feb. 16, 1888) (reported by Senate Finance Committee); S. 977, 50th Cong., 1st Sess. (Mar. 21 & 22, 1888) (bill referred to House of Representatives).
- ⁶² Act of Mar. 3, 1887, ch. 347, 24 Stat. 492.
- ⁶³ JUDITH GOLDSTEIN, *IDEAS, INTERESTS, AND AMERICAN TRADE POLICY* 103 (1993); *see also* CHARLES A. BEARD, *CONTEMPORARY AMERICAN HISTORY, 1877-1913*, at 90, 109 & 111 (1914) (explaining that the Republican party held "the support of the manufacturing interests which had flourished under the high tariffs," "remained consistently a protectionist party" from 1860 onward, and made the protectionist tariff a leading issue of the 1888 election); GOLDSTEIN, *supra*, at 101-107 (discussing 1890 tariff politics).
- ⁶⁴ GOLDSTEIN, *supra* note 63, at 103 ("Following Harrison's call [for protectionist measures], Congress moved first on administrative reform"; discussing creation of the Board of General Appraisers). Later in 1890 Congress enacted the McKinley Tariff, the Act of Oct. 1, 1890, ch. 1244, 26 Stat. 567.
- ⁶⁵ H.R. 4970, 51st Cong., 1st Sess. (Jan. 14, 1890); *see also* H.R. Rep. No. 6, 51st Cong., 1st Sess. (1890) (report to accompany H.R. 4970).
- ⁶⁶ H.R. 4970, 51st Cong., 1st Sess. §§ 12-15 (Jan 15, 1890). In addition, the bill included provisions governing procedures in general appraisers' adjudications, including administration of oaths and issuance of subpoenas. *Id.* §§ 16-18.
- ⁶⁷ S. 977, 50th Cong., 1st Sess. §§ 11-14 (Mar. 21 & 22, 1888) (bill referred to House of Representatives).
- ⁶⁸ 21 Cong. Rec. 810 (1890) (statement of Rep. McKinley). The other provision mentioned as potentially controversial provided that the value of imported goods would include the value of their packaging. *Id.*
- ⁶⁹ *Id.*
- ⁷⁰ H.R. Rep. No. 6, *supra* note 65, at 6; *see also* S. Rep. No. 295, 50th Cong., 1st Sess. 16-28 (1888) (setting out the history of U.S. appraisal and classification procedures as well as explaining the proposed changes); H.R. Rep. No. 6, *supra*, at 7-8 (quoting a lengthy passage from the 1888 Senate Report).
- ⁷¹ H.R. 4970, 51st Cong., 1st Sess. § 13 (Jan 15, 1890) (providing that general appraisers' decisions would be final, that is, not be subject to direct judicial review at all). This was consistent with existing law. *See supra* notes 38-39 and accompanying text. Representative William Breckinridge (Democrat of Kentucky) proposed an amendment to strike out the sentence in section 13 making the appraisers' decision final, 21 Cong. Rec. 818 (Jan. 23, 1890), but later withdrew this amendment in favor of proposing an amendment to section 15. *Id.* at 819.
- ⁷² H.R. 4970, 51st Cong., 1st Sess. § 15 (Jan 15, 1890). These cases encompassed the decision of the collector as to the rate and amount of duties under section 14 of the bill, including tariff classification. *Id.* § 14.
- ⁷³ *Id.* § 15.
- ⁷⁴ *Id.* § 15, lines 17-22 (Jan 15, 1890).
- ⁷⁵ *Id.* § 15, lines 23-24; *see also id.* lines 9-11 (allowing the importer or other adversely affected party to "apply to the circuit court ... for a review of the questions of law involved in such decision.").
- ⁷⁶ 21 Cong. Rec. 818-819 (Jan. 23, 1890) (statement of Rep. Payne). Representative Payne's speech was delivered in opposition to the proposed Breckinridge amendment to section 13.

See *supra* note 71. Representative Payne later became chairman of the House Ways and Means Committee and, as such, was co-sponsor of the Tariff Act of 1909, commonly known as the Payne-Aldrich Tariff. Act of Aug. 5, 1909, ch. 6, 36 Stat. 11. The Tariff Act of 1909 created the Court of Customs Appeals to review decisions of the Board of General Appraisers, replacing judicial review in federal courts of general jurisdiction. *Id.* § 28, 36 Stat. at 105 (adding a new section 29 to the Act of June 10, 1890).

⁷⁷ See *supra* notes 17-18, 23 & 28 and accompanying text.

⁷⁸ 44 U.S. 236 (1845).

⁷⁹ 74 U.S. 122 (1868).

⁸⁰ 92 U.S. 85 (1875).

⁸¹ 21 Cong. Rec. 818-819 (Jan. 23, 1890) (statement of Rep. Payne).

⁸² *Id.* at 819. Representative Payne also urged that the bill satisfied the due process of law because “[w]henever Congress has made the legislative acts levying the taxes and proceeded by the administrative officers charged by the law with the power of levying and collecting the taxes, they have taken the man’s money by due process of law.” *Id.* Thus, he urged, the issue was not due process but “whether he is entitled to a trial by jury to get his money back.” *Id.* In current law, the availability of meaningful judicial review is regarded at least partly as an issue of due process. See *McKesson Corp. v. Florida Alcohol & Tobacco Div.*, 496 U.S. 18, 36-39 (1990).

⁸³ *Cary v. Curtis*, 44 U.S. at 250 (“The claimant had his option to refuse payment,” which would probably result in “the detention of the goods,” after which the importer “might have asserted his right to the possession of the goods, or his exemption from the duties demanded, either by replevin, or in an action of detinue, or perhaps by an action of trover, upon his tendering the amount of duties admitted by him to be legally due.”).

⁸⁴ Compare *Ex parte Bakelite Corp.*, 279 U.S. 438, 458 (1929) (citing *Cary* for the proposition that the final determination of duty refunds may constitutionally be “confided to the Secretary of the Treasury, with no recourse to judicial proceedings”) and *Nichols v. United States*, 74 U.S. 122, 126 (1868) (“The allowing a suit at all, was an act of beneficence on the part of the government. As it had confided to the Secretary of the Treasury the power of deciding in the first instance on the amount of duties demandable on any specific importation, so it could have made him the final arbiter in all disputes concerning the same.”) with *Glidden Co. v. Zdanok*, 370 U.S. 530, 541 n.29 (1962) (plurality opinion) (cautioning that

the “reliance [in *Bakelite*] ... on *Cary v. Curtis* for the proposition that disputes over customs duties may be adjudged summarily without recourse to judicial proceedings, appears to have overlooked the care with which that decision specifically declined to rule whether all right of action might be taken away from a protestant, even going so far as to suggest several judicial remedies that might have been available.”); see also *McKesson Corp. v. Florida Alcohol & Tobacco Div.*, 496 U.S. 18, 36-39 (1990) (holding in state taxation that due process requires either predeprivation or postdeprivation judicial review, and not discussing *Cary*); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 51, 69-70 n.23 (1982) (plurality opinion) (“when Congress assigns these matters to administrative agencies, or to legislative courts, it has generally provided, and we have suggested that it may be required to provide, for Art. III judicial review”; discussing *Bakelite* but not *Cary*); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1369 (1952-53) (offering the narrow interpretation that “a remedy after payment may be denied if the taxpayer had a remedy before, as *Cary v. Curtis* shows”).

⁸⁵ See *supra* text accompanying note 82. Representative Payne did not cite any case law specifically supporting the constitutionality of precluding judicial review of the Board’s findings of fact. If the Constitution allowed Congress to preclude judicial review entirely, it plainly would allow Congress to preclude judicial review of findings of fact. Furthermore, the existing case law that precluded judicial review of findings of fact in appraisal cases supported precluding this review in cases on tariff classification and the rate and amount of duty. See *supra* notes 38-39 and accompanying text.

An issue not addressed in the 1890 debate was whether the McKinley bill was consistent with the constitutional requirement under article III that the “judicial Power of the United States” must be exercised in a federal court meeting the criteria of article III, but later jurisprudence shows that the bill was consistent with this requirement. See *infra* notes 131-135 and accompanying text.

⁸⁶ 21 Cong. Rec. 819-820 (Jan. 23, 1890) (the Clerk reading the proposed Carlisle amendment).

⁸⁷ See *id.* at 819 (statement of Rep. Breckinridge of Kentucky) (stating that he “only expressed a doubt upon [the constitutionality] with very great diffidence” and that “I base my opposition not simply on my doubt of their constitutionality, but also for other reasons.”). The Congressional Record identifies Representative Breckinridge

- by his state because the 1890 House included two members named Breckinridge, William C.P. Breckinridge (Democrat of Kentucky) and Clifton R. Breckinridge (Democrat of Arkansas).
- ⁸⁸ *Id.* at 825 (statement of Rep. Blanchard).
- ⁸⁹ *Id.* at 831 (statement of Rep. Breckinridge of Kentucky).
- ⁹⁰ *Id.* (statement of Rep. Breckinridge of Kentucky).
- ⁹¹ *Id.* at 833-834 (statement of Rep. McKinley).
- ⁹² *Id.* at 834.
- ⁹³ *Id.* at 848.
- ⁹⁴ The M'Kinley Customs Bill, *NEW YORK TIMES*, Jan. 28, 1890, at 4, col. 4-5 (also stating that "MR. MCKINLEY is shut up to the idea that all trade outside of our own borders is bad trade and ought to be hindered in every possible way," which the editorial calls "a petty Ohio village idea.").
- ⁹⁵ A "Simplifying" Law, *NEW YORK TIMES*, Feb. 4, 1890, at 4, col. 3-4. One may note that the *New York Times* criticized the lack of any "appeal as to the facts of valuation" even though this had been the law since the 1820s. *See supra* notes 38-39 and accompanying text. As for "the little cabal of protected manufacturers who have purchased the power to legislate from the Republican Party," compare MAUREEN A. FLANAGAN, *AMERICA REFORMED: PROGRESSIVES AND PROGRESSIVISMS, 1890s-1920s*, 99 (2007) ("Americans ... were discovering that on every level of government 'business corrupts politics.' The 'corrupt bargain' was the modus operandi of national government and the Republicans had become particularly adept at it. They had become the leading party of the country in great measure from the money pouring into it from big business.").
- ⁹⁶ 21 Cong. Rec. 3974 (Apr. 29, 1890) (statement of Sen. Allison); *see also id.* (statement of the Presiding Officer, and reading of the amendment by the Chief Clerk).
- ⁹⁷ REED, *supra* note 2, at 81.
- ⁹⁸ H.R. 4970, 51st Cong., 1st Sess. § 15, lines 39-41 (Mar. 19, 1890) (reported by Sen. Allison with amendments); H.R. 4970, 51st Cong., 1st Sess. § 15, lines 39-41, amendments nos. 50 & 51 (May 7, 1890) (printed with amendments numbered).
- ⁹⁹ *Id.* § 15, lines 24-27, amendment no. 48.
- ¹⁰⁰ *Id.*
- ¹⁰¹ 21 Cong. Rec. 4017 (1890).
- ¹⁰² *Id.* at 4021. Senator Sherman, younger brother of General William T. Sherman, also served as Secretary of the Treasury from 1877 to 1881 and authored the Sherman Antitrust Act. Act of July 2, 1890, ch. 647, 26 Stat. 209.
- ¹⁰³ 21 Cong. Rec. 4082 (1890).
- ¹⁰⁴ *Id.* at 4121 & 4128. Ultimately Senator Evarts voted for the bill without his amendments. Senator Evarts, Attorney General from 1868 to 1869 and Secretary of State from 1877 to 1881, was author of the Judiciary Act of 1891, commonly known as the Evarts Act, which restructured the federal judiciary by creating the circuit courts of appeal. Act of March 3, 1891, ch. 517, 26 Stat. 826.
- ¹⁰⁵ 21 Cong. Rec. at 4132.
- ¹⁰⁶ Compare H.R. 4970, 51st Cong. 1st Sess. § 15 (May 7, 1890) (printed in Senate with amendments numbered) (identifying amendments to section 15 as numbers 46 through 55) with 21 Cong. Rec. 5340 (May 27, 1890) (reporting House receding on amendments 46 through 55).
- ¹⁰⁷ 21 Cong. Rec. 5342 (May 27, 1890).
- ¹⁰⁸ *Id.*
- ¹⁰⁹ Act of June 10, 1890, ch. 407, 26 Stat. 131.
- ¹¹⁰ Compare 21 Cong. Rec. 833 (1890) (statement of Rep. McKinley) ("it is important that the [House] should fully understand the necessity for this system—for it is a system") and 21 Cong. Rec. 818 (1890) (statement of Rep. Breckinridge of Kentucky) (referring to "the system created by the thirteenth, fourteenth, and fifteenth sections of this bill (for there is an entirely new system created by them)") with Bernard Schwartz, *Fashioning an Administrative Law System*, 40 *ADMIN. L. REV.* 415 (1988) (identifying the essential elements of an administrative law system as the principles of (i) illegality of actions not within delegated powers, (ii) fairness in dealing between the citizen and agency, and (iii) availability of independent review of agency decisions).
- ¹¹¹ Act of June 10, 1890, § 12, ch. 407, 26 Stat. 131.
- ¹¹² *Id.* § 12.
- ¹¹³ *Id.*
- ¹¹⁴ *Id.*
- ¹¹⁵ *Id.*
- ¹¹⁶ *Id.* § 13.
- ¹¹⁷ *Id.*
- ¹¹⁸ *Id.*
- ¹¹⁹ *Id.*
- ¹²⁰ *Id.* § 14.
- ¹²¹ *Id.*
- ¹²² *Id.* In making self-executing final administrative decisions, the Board was substantially different from the Interstate Commerce Commission, whose decisions were not self-executing and, instead, needed to be enforced through a lawsuit commenced by the Commission. *See* Interstate Commerce Act, Act of Feb. 4, 1887, § 16, ch.

- 104, 24 Stat. 379, 384-85 (providing that if a common carrier fails to comply with an ICC order, the ICC shall apply to the circuit court for an injunction).
- ¹²³ Act of June 10, 1890, § 15.
- ¹²⁴ *Id.*
- ¹²⁵ *Id.*
- ¹²⁶ *Id.*
- ¹²⁷ Act of June 10, 1890, § 25.
- ¹²⁸ REED, *supra* note 2, at 85.
- ¹²⁹ 21 Op. Att’y Gen. 85 (opining that the general appraisers are officers of the Treasury Department); U.S. Customs Regulations, art. 1130-1150 (1892). On the early operation of the Board of General Appraisers, see Lombardi, *supra* note 2, at 27-37; Reed, *supra* note 2, at 85-86.
- ¹³⁰ 152 U.S. 691 (1894).
- ¹³¹ See *Washington Int’l Ins. Co. v. United States*, 678 F. Supp. 902, 913 (Ct. Int’l Trade 1988) (per Aquilino, J.) (concluding that *Schoenfeld* “essentially disposed of” the constitutionality of the 1890 Act), *rev’d on other grounds*, 863 F.2d 877 (Fed. Cir. 1988).
- ¹³² 279 U.S. 438 (1929) (holding that the U.S. Court of Customs Appeals, which reviewed the Board’s decisions, was a legislative court and not a constitutional court under Article III). Although the Supreme Court overruled the holding of *Bakelite* in *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962) (sustaining legislation designating the U.S. Court of Customs and Patent Appeals a constitutional court under Article III), *Glidden* did not alter the conclusion in *Bakelite* that monetary claims against the Government, such as for customs duty refunds, could be adjudicated in an administrative tribunal or legislative court. On the constitutional status of these courts, see also GILES S. RICH, A BRIEF HISTORY OF THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS (1980); Herbert H. Mintz et al., *A History of the Article III Status of the U.S. Court of Appeals for the Federal Circuit*, 2 J. Fed. Cir. Hist. Soc. 151, 154-160 (2008).
- ¹³³ *Phillips v. Commissioner*, 283 U.S. 589 (1931) (sustaining the constitutionality of income tax assessment using an administrative adjudication followed by judicial review with the scope of review of factual issues limited to adjudicating the legal sufficiency of the evidence before the administrative tribunal).
- ¹³⁴ *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 51, 67 (1982) (plurality opinion of Brennan J., joined by Marshall, Blackmun, and Stevens, JJ.). The four-Justice plurality in *Northern Pipeline* concluded that non-Article-III tribunals must be limited to the three categories of courts martial, territorial courts, and tribunals adjudicating public rights. *Id.*, at 63-70. But two concurring Justices did not accept this broad proposition, instead concurring in the judgment that Article III did not allow bankruptcy courts to decide state-law private-rights counterclaims. *Id.* at 89-92 (Rehnquist, J., joined by O’Connor, J., concurring).
- ¹³⁵ *Id.* at 69 (plurality opinion) (citing *Bakelite* for the proposition that administration and application of the customs laws are within what the *Northern Pipeline* plurality described as the “public rights” category). The “public rights” category has been unclear at the margins. It is beyond the scope of this article to review the multiple Supreme Court decisions and scholarship since *Northern Pipeline* on what kinds of cases are and are not permitted to be adjudicated outside of courts established under article III of the Constitution. In *Stern v. Marshall*, ___ U.S. ___, 131 S. Ct. 2594 (2011), the Court sought to synthesize *Northern Pipeline* and its progeny by defining public rights cases as not only disputes between the Government and a private party, but also as “cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency’s authority.” *Id.* at 2613. In addition to the majority and dissenting opinions in *Stern v. Marshall*, see the majority and dissenting opinions in *Wellness Int’l Network, Ltd. v. Sharif*, ___ U.S. ___, No. 13-935 (May 26, 2015); see also Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 Ind. L. Rev. 233 (1989); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915 (1988); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 Harv. L. Rev. 643 (2004); Gordon G. Young, *Public Rights and Federal Judicial Power: From Murray’s Lessee Through Crowell to Schor*, 35 Buff. L. Rev. 765 (1986).
- ¹³⁶ *In re Van Blankensteyn*, 56 F. 474 (2d Cir. 1892) (affirming the lower court’s reversal of the Board of General Appraisers where the Board’s decision was found to be not sustained by the evidence of record), *aff’g*, 49 F. 220 (C.C.S.D.N.Y.) (stating that “[a]ll the force of the evidence” supports the opposite of the Board’s decision); *accord* *United States v. Reibe*, 1 Ct. Cust. App. 19, T.D. 30776 (1910) (adopting the standard in the CCA); *Vandiver v. United States*, 156 F. 961 (3d Cir. 1907); *Apgar v. United States*, 78 F. 332 (7th Cir. 1896); *Marine v. Lyon*, 65 F. 992 (4th Cir. 1895); *In re Herrman*, 56 F. 477 (2d Cir. 1893).

- The use of the Board's administrative record in judicial review and deference to the Board's findings of fact represented significant differences from the original model of Interstate Commerce Commission litigation, in which the court decided all issues of law and fact de novo, based on a record created before the court. *See Kentucky & I. Bridge Co. v. Louisville & N.R. Co.*, 37 F. 567, 614 (C.C.D. Ken. 1889) ("The suit in this court ... is an original and independent proceeding, in which the commission's report is made *prima facie* evidence of the matters or facts therein stated. It is clear that this court is not confined to a mere re-examination of the case as heard and reported by the commission, but hears and determines the cause de novo, upon proper pleadings and proof, the latter including not only the *prima facie* facts reported by the commission, but all such other and further testimony as the parties may introduce, bearing on the matters in controversy.").
- ¹³⁷ *See* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 Colum. L. Rev. 939, 942-43 (2011).
- ¹³⁸ Act of March 3, 1891, ch. 517, 26 Stat. 826 (creating circuit courts of appeal).
- ¹³⁹ Act of May 27, 1908, ch. 205, § 2, 35 Stat. 403, 404 (amending § 15 of the 1890 Act).
- ¹⁴⁰ FRANKFURTER & LANDIS, *supra* note 59, at 149-150; REED, *supra* note 2, at 85-86.
- ¹⁴¹ Act of August 5, 1909, ch. 6, § 28, 36 Stat. 11, 105 (adding new section 29 to the 1890 Act, as amended). For a history of the U.S. Court of Customs Appeals from its creation in 1909, see RICH, *supra* note 132; Terence P. Stewart et al., *Origin of the Trade Jurisdiction of the U.S. Court of Appeals for the Federal Circuit*, 2 J. Fed. Cir. Hist. Soc. 131-150 (2008).
- ¹⁴² *See* REED, *supra* note 2, at 105-110.
- ¹⁴³ Act of May 28, 1926, ch. 411, 44 Stat. 669.
- ¹⁴⁴ Act of June 17, 1930 (Tariff Act of 1930), ch. 497, § 518, 46 Stat. 590, 737-739 (transferring the fiscal and administrative responsibilities for the Customs Court from the Treasury Department to the Justice Department).
- ¹⁴⁵ One may debate whether Congress replaced the administrative adjudicatory tribunal in 1926, when the Board was renamed the Customs Court, or perhaps in 1930, when administrative responsibility for the Customs Court was transferred from the Treasury Department to the Justice Department. As the Supreme Court observed in 1929, the renamed Customs Court after 1926 carried on exactly the same functions as the Board. *Ex parte Bakelite Corp.*, 279 U.S. 438, 457 (1929) ("Congress assumed to make the board a court by changing its name. There was no change in powers, duties or personnel.").
- ¹⁴⁶ 678 F. Supp. 902 (Ct. Int'l Trade) (denying, in a two-to-one decision, defendant's motion to strike a demand for jury trial), *rev'd*, 863 F.2d 877 (Fed. Cir. 1988); *see also* *Washington Int'l Ins. Co. v. United States*, 659 F. Supp. 235 (Ct. Int'l Trade 1987) (assigning the case to a three-judge panel).
- ¹⁴⁷ 430 U.S. 442 (1977) (citing among other cases *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49 (1937), which held that the right of Seventh Amendment right of trial by jury does not prevent Congress from committing factfinding under a new federal statutory program to an administrative tribunal).
- ¹⁴⁸ Professor Roger Kirst criticized the *Atlas* decision, arguing that Supreme Court precedents did not support replacing a jury trial in court with a non-jury administrative adjudication of civil penalties. Roger W. Kirst, *Administrative Penalties and the Civil Jury: The Supreme Court's Assault on the Seventh Amendment*, 126 Pa. L. Rev. 1281 (1978). Professor Kirst acknowledged, however, that the Seventh Amendment allowed administrative adjudication with no jury trial for matters such as tax collection, *e.g.*, *id.* at 1340, although he also noted that nineteenth century law used jury trials in customs litigation.
- ¹⁴⁹ *Pernell v. Southall Realty*, 416 U.S. 363, 383 (1974).
- ¹⁵⁰ *Tull v. United States*, 481 U.S. 412, 417 (1987).
- ¹⁵¹ *Washington Int'l Ins. Co. v. United States*, 678 F. Supp. at 917.
- ¹⁵² *Id.*
- ¹⁵³ *Id.* at 917 (Re, C.J., dissenting) (citing *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981)).
- ¹⁵⁴ *Id.* (Re, C.J., dissenting) (citing *Lehman v. Nakshian*, 453 U.S. 156, 168 (1981)).
- ¹⁵⁵ *Id.* at 918 (Re, C.J., dissenting).
- ¹⁵⁶ *Id.* at 920 (Re, C.J., dissenting).
- ¹⁵⁷ *Id.* (Re, C.J., dissenting).
- ¹⁵⁸ *Id.* at 922 (Re, C.J., dissenting).
- ¹⁵⁹ *Washington Int'l Ins. Co. v. United States*, 863 F.2d 877 (Fed. Cir. 1988).
- ¹⁶⁰ *Id.* at 878 (citations omitted).
- ¹⁶¹ *Id.* at 879 (citations omitted).
- ¹⁶² A "Simplifying" Law, *NEW YORK TIMES*, Feb. 4, 1890, at 4, col. 3-4.
- ¹⁶³ *See, e.g.*, Merrill, *supra* note 137, at 942-43 (overlooking judicial review of the Board of General Appraisers in the 1890s in describing the emergence of the "appellate review" model in better known areas of administrative law around 1910).
- ¹⁶⁴ *See supra* notes 131-135 and accompanying text.

APPENDIX

**STATEMENT OF REPRESENTATIVE SERENO
PAYNE, REPUBLICAN OF NEW YORK**

21 CONG. REC. 818-819 (JAN 23, 1890)

Mr. PAYNE. Mr. Chairman, if I understood the position of the gentleman from Kentucky [Rep. Breckinridge], it is that these provisions contained in this law are unconstitutional because they deprive the party of the right of trial by jury. That I understand to be his position. Now, this is not a new question. As stated here, it was argued two years ago in the Senate, was fully discussed by Senators on both sides of the house, and after the hearing in the Senate it was decided these provisions were constitutional, only three Senators voting the other way.

The question of how far the legislative branch might go in levying taxes is not a new question, but has repeatedly come up before the Supreme Court of the United States. And the question whether the laws levying taxes and restricting the common-law right of trial by jury were constitutional laws has repeatedly been decided in the Supreme Court. Let me read [from *Cheatham v. United States*, 92 U.S. 85, 88-89 (1875)]:

All governments in all times have found it necessary to adopt stringent measures for the collection of taxes and to be rigid in the enforcement of them.

These measures are not judicial; nor does the government resort, except in extraordinary cases, to the courts for that purpose. The revenue measures of every civilized government constitute a system which provides for its enforcement by officers commissioned for that purpose.

In these respects, the United States have, as was said by this court in *Nichols v. United States*, 7 Wall. 122, enacted a system of corrective justice, as well as a system of taxation, in both its customs and internal-revenue branches.

It will be readily conceded, from what we have here stated, that the government has the right to prescribe the conditions on which it will subject itself to the judg-

ment of the courts in the collection of its revenues:

If there existed in the courts, State or national, any general power of impeding or controlling the collection of taxes, or relieving the hardship incident to taxation, the very existence of the government might be placed in the power of a hostile judiciary.

The court say further on [in *Nichols v. United States*, 74 U.S. 122, 126 (1868)]:

We regard this [i.e., the requirement of filing a written protest] as a condition on which the Government consents to litigate the lawfulness of the original tax. It is not a hard condition. Few governments have conceded such a right on any condition.

The written protest, signed by the party, with the definite grounds of objection, were conditions precedent to the right to sue, and if omitted, all right of action was gone. These conditions were necessary for the protection of the government, as they informed the officers charged with the collection of the revenue from imports, of the merchant's reasons for claiming exemption, and enabled the Treasury Department to judge of their soundness, and to decide on the risk of taking the duties in the face of the objections. There was no hardship in the case, because the law was notice equally to the collector and importer, and was a rule to guide their conduct in case differences should arise in relation to the laws for the imposition of duties. The allowing a suit at all, was an act of beneficence on the part of the government. As it had confided to the Secretary of the Treasury the power of deciding in the first instance on the amount of duties demandable on any specific importation, so it could have made him the final arbiter in all disputes concerning the same.

That was the language of the Supreme Court in that case.

In the case of *Cheatham et al. vs. The United States*, reported in 92d United States Reports,

the court say [quoting the same excerpt from *Cheatham* again, plus additional language in the second paragraph]:

All Governments in all times have found if necessary to adopt stringent measures for the collection of taxes and to be rigid in the enforcement of them.

These measures are not judicial; nor does the government resort, except in extraordinary cases, to the courts for that purpose. The revenue measures of every civilized government constitute a system which provides for its enforcement by officers commissioned for that purpose. In this country, this system for each State, or for the Federal government, provides safeguards of its own against mistake, injustice, or oppression, in the administration of its revenue laws. Such appeals are allowed to specified tribunals as the law-makers deem expedient. Such remedies, also, for recovering back taxes illegally exacted, as may seem wise, are provided. In these respects, the United States have, as was said by this court in *Nichols v. United States*, 7 Wall. 122, enacted a system of corrective justice, as well as a system of taxation, in both its customs and internal-revenue branches. * * *

It will be readily conceded, from what we have here stated, that the Government has the right to prescribe the conditions on which it will subject itself to the judgment of the courts in the collection of its revenues.

If there existed in the courts, State or National, any general power of impeding or controlling the collection of taxes, or relieving the hardship incident to taxation, the very existence of the government might be placed in the power of a hostile judiciary.

Further on they say [quoting part of the same excerpt from *Nichols* again]:

We regard this as a condition on which the Government consents to litigate the lawfulness of the original tax. It is not a hard

condition. Few governments have conceded such a right on any condition.

[Here the hammer fell.]

Mr. McKINLEY was recognized and yielded his time to Mr. PAYNE.

Mr. PAYNE. Now, in the case of *Cary vs. Curtis*, in 3d Howard [44 U.S. (3 How.) 236 (1845)], in a decision upon a case which arose under the law passed in 1839, the court quote the law as follows [*id.* at 249]:

The second section of the act of Congress declares, first, that from its passage, all money paid to any collector of the customs for unascertained duties, or duties paid under protest against the rate or amount of duties charged, shall be placed to the credit of the Treasurer, to be kept and applied as all other money paid for duties required by law. Second, that they shall not be held by the collector to await any ascertainment of duties, or the result of any litigation concerning the rate or amount of duty legally chargeable or collectable. And third, that in all cases of dispute as to the rate of duties, application shall be made to the secretary of the Treasury, who shall direct the repayment of any money improperly charged.

Now these sections of this act took away the right of trial by jury because they provide that the collector as agent of the Government should pay money over to the Treasurer, and of course, if an action was brought against the agent, he had the full defense that he had paid it over to the Treasurer—the principal—and hence no suit could be maintained against him. That act also provided that in all cases the Secretary of the Treasury should decide as between the owner and the Government. It gave the importer no redress in court, and the court decided on the question raised that the act was constitutional, although Justice Story, in his dissenting opinion, held strongly to the view that the act was unconstitutional, and he put his dissent on the express ground that it seemed to be conceded all through the case that it took away the right to trial by jury in these cases.

The majority of the court, however, on the other hand, held that Congress, the legislative branch of the Government, was supreme in its power of levying and collecting taxes, and that if they allowed a suit in any case it was only an act of clemency and beneficence on the part of the Government; that they need not allow any claim for redress, but they might make the Secretary of the Treasury the supreme tribunal in the case, both as to the law and the facts, and take away entirely the right of trial by jury.

The right of trial by jury depends always on the question whether the person interested or insisting on the right has a common-law right of action.

And so I say that this provision of law, which simply refers to the board of arbitration [sic: appraisers] the questions of fact, either to report upon the facts and present them to the court or [sic: so] that they may further litigate upon the law in the courts, goes further even than the Constitution requires.

Mr. BRECKINRIDGE, of Kentucky. Will it interrupt the gentleman to answer a question there?

Mr. PAYNE. Certainly not.

Mr. BRECKINRIDGE, of Kentucky. If I understand him, unless the statute gave him the right of action the citizen had no right of action. Now, the proposition I was going to submit was that if anybody takes my money illegally at common law I have a right to go into a court and ascertain the question, first, as to whether he took it; and, if so, to ask for redress.

Mr. PAYNE. That was the argument in this case that I have just quoted; that the collector

had taken money wrongfully from him. Now, the statute provided that when the money was paid to the collector it should be turned over to the Treasury and that the Secretary of the Treasury should be the arbiter between the importer and the Government. The Supreme Court held that he had no right of action—among other grounds, because it was a payment to an agent, that the agent had paid the money over into the Treasury and was no longer liable, and that there could be no action maintained against the Government because there could be no action against the United States unless the United States conceded it by statute.

Mr. KERR, of Iowa. Will the gentleman answer this question? Article 5 of the amendments to the Constitution provides “that no person shall be deprived of life, liberty, or property without due process of law.” I would like to know if there is any provision in this bill that amounts to due process of law?

Mr. PAYNE. Our Constitution also gives to Congress power to levy taxes, duties, and imposts. Whenever Congress has made the legislative acts levying the taxes and proceeded by the administrative officers charged by the law with the power of levying and collecting the taxes, they have taken the man’s money by due process of law. Now, the question is whether he is entitled to a trial by jury to get his money back. They have proceeded according to the forms of law; they have carried out the customs law. The question is whether they shall have a trial by jury to recover it back.

The CHAIRMAN. The time of the gentleman has expired.