



PROTESTS, REFUNDS, AND THE POWER OF THE FEDERAL COURTS

by Charlotte Crane

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Crane reports that the shippers who paid the Harbor Maintenance Tax, declared an unconstitutional tax on exports last term by the Supreme Court, have begun to receive refunds. But many questions regarding these refunds remain unresolved in the litigation pending in the Court of International Trade. In this report, the author explores some procedural questions surrounding the litigation, several of which — including the possibility that many taxpayers clearly have no statutory right to refund and may under longstanding precedents also have no right to a judicially fashioned remedy that includes a refund — have not been directly addressed by the parties.

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using. In *Reich v. Collins*,¹ the Court held that an unexpected interpretation of the Georgia refund statute, making it inapplicable to payments of illegal taxes and applicable only to overpayments of legal taxes, could not be applied to deny federal retirees in Georgia a post-payment remedy for the extraction of unconstitutional taxes, when the post-payment remedy appeared to be available at the time payment was made. Similarly, in *Newsweek v. Florida Department of Revenue*,² the Court in a *per curiam* opinion held that a prepayment remedy was not adequate if the taxpayer was likely to have relied on the existence of a postpayment remedy when it passed up the opportunity to pursue the prepayment remedy. According to the Court, such tac-

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Twice in the last five years, the Supreme Court of the United States has soundly scolded a state for taking litigating positions that would have unexpectedly changed the procedures by which taxpayers could challenge taxes and recover refunds therefor. Due process, the Court concluded, requires that the taxpayers receive better treatment than the "bait-and-switch" tactics the Court concluded the states were

¹513 U.S. 106, 94 TNT 238-8 (1994). *Reich* involved a challenge to the exemption from Georgia income tax of the retirement benefits paid to state, without a similar exemption of retirement benefits paid to federal retirees; a similar exemption had been held unconstitutional in *Davis v. Michigan Department of Treasury*, 489 U.S. 803, 89 TNT 70-2 (1989). The Georgia Supreme Court had interpreted the Georgia refund statute to apply only to claims for taxes collected illegally or erroneously under valid tax statutes, not for taxes collected under invalid taxes. Presumably the appropriate route for challenging taxes as invalid (whether under the federal constitution or otherwise) was through a prepayment challenge.

²522 U.S. 442, Doc 98-7059 (3 pages), 98 TNT 36-17 (1998). In *Newsweek*, a sales tax had been imposed on magazines but not newspapers, a distinction found to be violative of the first amendment in *Leathers v. Medlock*, 499 U.S. 439, 91 TNT 84-1 (1991). The State of Florida had successfully argued in Florida courts, 869 So. 2d 361 (1997), that the decision in an earlier case, *Department of Revenue v. Magazine Publishers of America*, 565 So. 2d 1304 (1990), should not apply retroactively and that therefore no refund was allowed for taxes paid before the ruling on unconstitutionality. The possibility of limited retroactivity in such cases, however, was rejected by the Supreme Court in *Harper v. Virginia*, 509 U.S. 86, 93 TNT 131-6 (1993). The Florida Supreme Court held that because *Newsweek* could have used the clearly available prepayment challenge, it was not entitled to a refund. The Supreme Court, in an opinion that conflates the retroactivity aspects of the situation with the due process requirements for refunds for taxes illegally collected, simply held that its decision in *Reich* mandated that Florida could not deny these taxpayers the statutory refund remedies admittedly generally available for tax overpayments.

tics amount to "bait-and-switch," and the resulting frustration of refund claims would deny due process.

The Court's view of these situations seems clear: The bully state has tricked the weakling taxpayer into giving up his marbles with threats of greater harms if he doesn't. On being caught and brought before the grownups, the bully admitted the weakling's claims, but then refused to give the marbles back once the grownups weren't watching. From the reported decisions, it is difficult to determine the accuracy of this view of the states' litigation tactics. But it seems clear that the Court does not look kindly on the use of the adversary process to refine refund procedures when that process results in unanticipated restrictions on the remedies available to those who have paid unconstitutional taxes.

It seems clear that the Court does not look kindly on the use of the common law process when that process results in unanticipated restrictions on the remedies available to those who have paid unconstitutional taxes.

There is no small amount of irony, then, in the fact that a similar situation may be currently brewing in the federal courts as a result of the Court's own decision in *United States Shoe v. United States*.³ In that case, the Court found that a federal tax, the Harbor Maintenance Tax (the HMT), had been imposed in violation of the limits on the federal government's taxing power. The case was remanded to allow further litigation, in that case and its several thousand companion cases, over the remedy to be afforded.⁴ As this report will outline, the typical HMT taxpayer may have no right to a court-ordered refund despite the illegality of the tax as it was paid and despite the taxpayers' successes so far.

³118 S. Ct. 1290, *Doc 98-10958* (7 pages), 98 *TNT* 62-12 (1998), *aff'g* 114 F.3d 1564, *Doc 97-16419* (45 pages), 97 *TNT* 108-25 (Fed. Cir. 1997), *aff'g*, 907 F. Supp. 408 (1995).

⁴Although several collateral issues remain to be litigated, the process of mailing refund checks has begun. See Order issued August 28, 1998, and reported at 1998 Ct. Intl. Trade LEXIS 121. Estimates of the total amount potentially subject to be refunded approach \$1 billion, without interest. See Sallie Gaines and Michael Arndt, "An Improper Tax, Yes, But Try Getting It Back," *Chicago Tribune*, October 8, 1998; Jack Lucentini, "Customs Lags in Processing Harbor Tax Refunds," *Journal of Commerce*, January 7, 1999; "A Courtroom Defeat Proves Costly for Government," *Wall Street Journal*, June 2, 1999, p.1.

The collateral issues include the applicable statute of limitations, and the availability of interest. In *Stone Container v. United States*, 27 F.Supp. 2d. 195, *Doc 98-28947* (9 pages), 98 *TNT* 191-10 (October 5, 1998), the CIT held that section 2636 provided a two-year from the date of payment statute of limitations, but that this statute of limitations was tolled for about 18 months by the pendency of a motion to certify a class.

Whether this lack of a right to a refund will bar the receipt of such refunds remains to be seen.

Granted, the federal government (unlike the representatives of the states chastised by the Court in *Reich* and *Newsweek*) has not asserted that the HMT taxpayers have no right to refund. But a good argument could be made that it should have resisted making refunds, even after the tax was held invalid. Perhaps the government fears the reception that such arguments might get on a return trip to the Supreme Court. (As will be shown below, some of the obstacles to refund were created by *dicta* in the Court's own opinion in *United States Shoe*, the import of which the government may not have adequately advised the Court.) There is almost a billion dollars at stake, so it seems worth exploring the government's possible strategy in the remedy phase of the litigation.

The substantive issue faced by the Supreme Court last spring was straightforward enough: did the Harbor Maintenance Tax⁵ violate the Constitution because it was a forbidden tax on exports?⁶ The Court said yes. The tax could not stand as a fee on the use of harbors (despite the fact that the funds collected were dedicated to harbor improvement) because the measure of the tax simply was not sufficiently related to the use of harbors or the benefits received by the taxpayers from the improvements to harbors. The substantive question was probably a bit closer than the Supreme Court's opinion suggests. After all, there is no question that a fee on harbor use would be constitutional, and the nexus between burden and benefit necessary to characterize a charge as a permissible fee rather than an impermissible tax is not easily justiciable. But the result was not particularly surprising given the Court's handling of another case under the export clause two terms ago, when the Court indicated that it was unlikely to grant Congress much deference when interpreting the Export Clause.⁷

In last term's case, the Court was not asked by the parties to consider any of the procedural aspects of the case. It had before it only the question of the constitutionality of the tax as imposed on one particular taxpayer, who had paid the tax, filed a protest with the Customs Service, and sued in the Court of International Trade for a refund. The parties had briefed the CIT on several of the auxiliary procedural issues (including the propriety of a class action and the appropriate

⁵The tax was enacted as part of the Comprehensive Water Resources Development Act of 1986, Pub. L. No. 96-622, 100 Stat. 4082. The tax provisions are codified at 26 U.S.C. 4461.

⁶Although under the Constitution the federal government may freely tax imports, it may not tax exports. U.S. Const., Art. I, section 9, cl. 5, contains the unambiguous prohibition: "No Tax or Duty shall be laid on Articles exported from any State."

⁷In *United States Shoe*, the Court summarized its opinion in *United States v. International Business Machines*, 517 U.S. 843, *Doc 96-17159* (42 pages), 96 *TNT* 114-12 (1996), as concluding that "the Export Clause allows no room for any federal tax, however generally applicable or nondiscriminatory, on goods in export transit."

statute of limitations), but both parties had declined to delve into the more dense issues relating to authority under which refunds could be sought, and the underlying questions regarding the waiver of sovereign immunity by the federal government.

The Explicit Issues in the HMT Litigation

Perhaps neither side thinks these procedural issues remain, given some of the language in the Supreme Court's decision. The Court of Appeals for the Federal Circuit affirmed the CIT holding that jurisdiction lay under section 1581(i) of title 28, and the government did not seek Supreme Court review of the question. Nevertheless, in *dicta* responding to an argument presented only in an *amicus* brief, the Supreme Court opined not only that the CIT had properly exercised jurisdiction in the case, but that the courts below had both properly held that jurisdiction lay under section 1581(i). This position is probably now the law of the case with respect to some taxpayers, and binding precedent as to others. The problems the position raises may be unavoidable.⁸

Why did the Court reach out to address the unbrieffed jurisdictional question? The Court probably thought that it would save considerable time and energy if it ruled on the jurisdictional issues while the case was before it. Congress had clearly made a mess of the procedural aspects of the HMT when it simply provided that for procedural purposes, the HMT "shall be treated as if such tax were a customs duty."⁹ The Court probably further assumed that endorsing the decision of the court below was the safest and quickest way to clean up the jurisdictional questions. After all, to hold otherwise would require an awkward request for additional briefing on the question, and, an even more awkward consideration of whether the questions regarding the basis for bringing the action was sufficiently germane to the Supreme Court's own jurisdiction to be raised *sua sponte*.

Before the Supreme Court's decision in *United States Shoe*, there appeared to be two possible statutory bases for jurisdiction in the CIT over HMT claims in title 28. Section 1581(a) grants exclusive jurisdiction to the CIT in "any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930." This provision is surrounded by a lot of cumbersome historical baggage. Most of the precedents glossing it came from an era when the predecessors of the CIT had no equitable power,¹⁰ and,

one might conclude from reading some of the cases prompting the reform, operated with a very constrained view of its power. Section 1581(i), on the other hand, is more in the nature of a remedial statute. It was enacted in 1980 on the reorganization of the Customs Court into the CIT to allow residual jurisdiction for those cases involving not just customs matters but also issues and claims that might not otherwise be allowed in the CIT. Before these reforms, those paying customs duties that were contingent on determinations of other government agencies were frequently bounced from court to court in search of a forum in which all aspects of their claim could be heard.¹¹ Customs cases could be heard only in the Customs Court, but that court had only limited remedial powers and no general power of judicial review over administrative agencies. Section 1581(i)'s role in the allocation of federal jurisdiction in cases involving international trade is still evolving,¹² but it clearly allows more flexible responses to the claims of litigants able to invoke it.

In rejecting section 1581(a) as a basis for jurisdiction, the Federal Circuit essentially relied on the argument that that section did not fit the HMT context well. It reasoned that section 1581(a) could not apply because it anticipates a protest, a protest anticipates a decision by Customs, and Customs makes no decisions when the HMT is paid. Therefore section 1581(a) cannot apply. Q.E.D. The Supreme Court repeated the essence of this reasoning when it observed that, "[a]s to the HMT, . . . protests are not pivotal, for Customs 'performs no active role,' it undertakes 'no analysis or ad-

to provide limited administrative review. Not all of these procedural peculiarities had been easy to resolve with the court's gradual drift toward Article III status and a more sophisticated docket.

¹¹See generally Edward Re, "Litigation before the United States Court of International Trade," 26 *New York L. Rev.* 437 (1981); Peter M. Gerhart, "Judicial Review of Customs Service Actions," 9 *Law & Pol'y Int'l. Bus.* 1101 (1977); Note, "Customs Court Jurisdiction in International Trade Cases," 12 *U. Mich. J.L. Reform* 558 (1979). This purpose does not, however, appear to have been accomplished. See generally Remarks of the Honorable Gregory W. Carman at the Conference on International Business Practice, February 27-28, 1992, 13 *Northw. J. Inter. Law & Bus.* 245 (1992).

¹²The general rule has been that jurisdiction is appropriate under section 1581(i) only if the plaintiff can show that no other path to an adequate remedy is available. E.g., *Shakeproof Indus. Prods. v. United States*, 104 F.3d 1309, 1312 (Fed. Cir. 1997); Scott H. Segal, Stephen J. Orava, "Playing the Zone and Controlling the Board: the Emerging Jurisdictional Consensus and the Court of International Trade," 44 *Am. U.L. Rev.* 2393; "The Residual Jurisdiction Controversy of the United States Court of International Trade," 16 *Brook. L. J.* 341 (1990).

It is not clear how committed the current Federal Circuit is to upholding this limited approach to section 1581(i). See, e.g., *NEC Corp. v. United States*, 151 F. 3d 1361 (1998); *Pac Fung Feather Co. v. United States*, 111 F.3d 114 (1997) CIT's *Conoco v. United States Foreign Trade Zones Board*, 18 F.2d 1581 (1994) See also Lynn S. Baker and Michael E. Roll, "Securing Judicial Review in the United States Court of International Trade: Has *Conoco, Inc v. United States* Broadened the Jurisdictional Boundaries?" 18 *Ford. L. Rev.* 726 (1995)

⁸See text at notes 18-21 *infra*.

⁹26 U.S.C. 4462(f)(2).

¹⁰The Customs Court Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727, made many substantial changes in the powers and status of the old Customs Court when it transformed it into the Court of International Trade. One of the more significant changes was the grant of general equitable power, 28 USC section 1585. Before 1980, the court charged with reviewing customs matters had only very limited powers. See generally *Alberta Gas Chemicals, Inc. v. Blumenthal*, 82 Cust. Ct. 77, 88; 467 F. Supp. 1245, 1254 (1979). Some of these limitations strongly reflected the origins of that court as a body designed

(Footnote 10 continued in next column.)

judication,' 'issues no directives,' 'imposes no liabilities'; instead, Customs 'merely passively collects' HMT payments." There is some logic to this view of section 1581(a) if one looks only at relatively modern customs litigation. To forestall litigation challenging the actions of Customs prior to a final decision, the government in other contexts has successfully limited the nature of actions by Customs that are considered "protestable."¹³ The bulk of this precedent essentially introduces a finality requirement as a predicate to making a protest to Customs. This precedent could have remained intact even if HMT payments were held to be protestable, however, since finality would not be a problem in situations when no further action by Customs or any other government agency is anticipated in the matter.

Why does anyone care whether jurisdiction is based on section 1581(a) or section 1581(h)?

The problem with fitting the HMT into the language relating to customs procedures comes from the fact that in general, the HMT, like the federal income tax, is "self-assessing." No bill is sent to the taxpayer outlining precisely what must be paid before an HMT payment is due. Agents of Customs need take no action until the taxpayer files and pays, and if no adjustment is made in the original filing, no action is taken by Customs. Customs duties, by contrast, traditionally are

¹³The CIT relied on other cases in which the question whether a protestable decision had been made by Customs arose in substantially different contexts, and which related primarily to the appropriateness of judicial review at that particular point in the proceedings. These cases involved the general administrative law doctrine that judicial review is available only from an "agency action," and that such agency action must involve a deliberative decision, not a ministerial act or inaction. In *Dart Export Corp v. United States*, 43 CCPA 64 (1956), the issue was essentially one of finality of the Collector's actions. The importer had paid estimated duties and then participated in additional procedures which resulted in an increase of duties finally determined to be owed. The importer objected to the raising of the amount of duties owed after the collector accepted estimated duties. The importer argued that the initial collection of estimated duties was the time at which the protest was appropriate, and therefore the time at which the collector's decision would be final if not protested. Similarly, in *Mitsubishi Elec. Am. v. United States*, 44 F.3d 973 (Fed. Cir. 1994), the issue was one of the propriety of the use of the protest provisions to seek review of determinations by administrative agencies other than Customs. The court held that the protest route was not available because the decision to which the taxpayer was objecting had been made by the Department of Commerce. At least one CIT decision, however, more clearly foreshadowed the CIT's view of the applicability of section 1581(a) to the HMT litigation. *Norcal/Crosetti Foods Inc. v. United States Customs Service*, 731 F. Supp. 510 (1990) (refusal of Customs to issue ruling regarding adequacy of importer's markings as to country of origin was not protestable, since decision was not one of those listed in section 1514), *rev'd* 963 F.2d 356 (Fed. Cir. 1992)) (holding that the section 1516 remedy is applicable and adequate).

not "self-assessing." A customs agent takes actions before any duty is technically due. This difference makes Congress' instruction to use customs procedures difficult but not impossible to implement. Section 1581(a) provides for judicial review of denials under section 1515 of Title 19 of protests made by taxpayers under section 1514, which refers to situations in which protests may be made. While section 1514 does not list payments of taxes or denials of claims for refunds of allegedly unconstitutional taxes among those actions that are specifically protestable, it does include the catch-all language "decisions of the appropriate customs officer." Surely this language could have been read to encompass the acceptance of payment of the HMT given the open-endedness of the congressional insistence that it be administered according to the procedures applicable to customs duties, at least in those situations in which receipt by Customs is the first and only action Customs must take unless a refund is requested later.

This broad view of the role of section 1581 in refund actions is bolstered by a look at the history of the various provisions relating to challenges made to customs obligations. Sections 1514 and 1515 of Title 19, and section 1581(a) of Title 28 are the direct descendants of statutes that in much simpler times laid out first the judicial and later the administrative remedies for overpayment of customs duties.¹⁴ (As such they are

¹⁴See text at notes 33-47 *infra* for the history of these procedures. The language can be traced back to Chapter 22 of Act of February 26, 1845, 5 Stat. 727. Lest there be any doubt about this lineage, it was noted and relied on as recently as 1975, when, in *United States v. Wedemann & Godknecht*, 515 F.2d 1145 (Cust. & Pat. App. 1975), the Court of Customs and Patent Appeals relied on the discussion of the specificity with which customs protests must be made by Justice Taney in *Mason v. Kane*, 16 F. Cas. 1044 (No. 9,241) (C.C.D.Md. 1851). See also *United States v. Cherry Hill Textiles*, 112 F.3d 155 (Fed. Cir. 1997)(reviewing the history of section 1514).

The time at which the protest was to be made, and the procedures to be invoked after the protest have changed considerably over time, as the issues relating to the proper role of administrative agencies and judicial review thereof have evolved. This language was first amended by the Act of March 3, 1857, 11 Stat. 195, which required an appeal to the Treasury before filing suit. In 1864, it was incorporated into sections 14 and 15 of the Act of June 30, 1864, ch. 171, 13 Stat. 214. The 1864 provisions were first codified in the 1874 Revised Statutes as sections 2931, 3011, and 3012 Stat. This direct lineage is recognized in the margin notes in the 1874 revision of the statutes at large: "Nothing [in the earlier legislation limiting the collectors' ability to reserve for refunds] shall take away, or be construed to take away or impair, the right of any person or persons who had paid or shall hereafter pay money, as and for duties, under protest, to any collector of the customs, or other person acting as such, . . . which duties are not authorized or payable in part or in whole by law, to maintain any action at law against such collector, . . . and try the legality and validity of such demand and payment of duties, . . . according to the due course of law. [included in the omitted text is reference to a right to jury trial] . . . nor shall any action be maintained against any col-

(Footnote 14 continued on next page.)

also the direct descendants of the judicially created cause of action from which, in one way or another, all federal tax refund litigation derives.) As will be developed further below, in light of this history, the idea that the "protest" language in section 1581(a) could not apply to the simple act of payment seems absurd. But the Supreme Court never heard arguments on the question, and simply accepted the rulings of the CIT and Federal Circuit, perhaps without ever having a chance to focus on the difference.

Why does anyone care whether jurisdiction is based on section 1581(a) or section 1581(h)? There are some obvious differences that the parties have openly acknowledged: section 1581(a) clearly requires that an administrative protest be made as a condition of further challenge to a possible tax liability. If this language applies, anyone who did not make a timely protest of their HMT obligation could be foreclosed from recovery. Other procedural issues, including the

lector, to recover the amount of duties so paid under protest, unless the said protest was made in writing, and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof."

These provisions were substantially revised in 1890 and in the succeeding revisions of the tariff acts. Customs Administrative Act of 1890, ch. 407, 26 Stat. 131. The 1890 act appears to have eliminated the action in the federal courts of general jurisdiction against the collector for customs refunds. In place of this remedy, Congress established one through the Board of General Appraisers, the administrative tribunal that evolved into the Customs Court and eventually into the present-day Court of International Trade, with a right of review in the circuit courts. See generally Judge Re's dissent in *Washington International Insurance Co. v. United States*, 678 F. Supp. 902, 12 C.I.T. 11 (outlining the history of the CIT in dissent to the court's conclusion that a right to jury trial existed in the CIT), *rev'd* 863 F.2d 877, *cert. denied* 490 U.S. 110 (1988).

The variations on the procedures required in these statutes are too intricate to reproduce in detail here, but the continuity of the original protest — whether at the time of payment or at some subsequent point in the importer's dealings with Customs — is still clearly traceable. The basic provision appeared in the 1890 and 1909 legislation again as section 14, and in the 1913 legislation as section N (the fourteenth section). The 1909 version simply made reference to "notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for the objections thereto" and did not include the word "protest." The word reappeared as section 514 in the Act of Sept. 21, 1922, c. 356, Title IV, and 1930 Act of June 17, 1930, c. 497, Title IV, sec., 514, 46 Stat. 734. The provisions took their modern form in 1970, Customs Court Act of 1970, P.L. 91-21, 84 Stat. 274, 284-85, when the time in which a protest could be made was increased to 90 days.

The amendments made to the provisions of Title 28 by the Customs Court Act of 1980, P.L. 96-417, 94 Stat. 1727, on the reforming of the Customs Court into the CIT were not intended to change the relationship under prior law between the administrative protest procedures and the initiation of suit in the CIT. H.R. Rep. No. 96-1235 44, 96th Cong., 2nd Sess. (1980).

availability of a class action and other time limitations may also depend on the source of jurisdiction.¹⁵

The Lurking Procedural Issues in the HMT Litigation

There is one less obvious and more problematic difference that has only been hinted at in the briefs of the parties. Suits for refunds of the HMT are suits for money against the federal government, and as such, may be brought only when there has been a clear waiver of sovereign immunity by the federal government.¹⁶ Section 1581(a), together with sections 1514 and 1515 of Title 19, clearly provides not only a basis for jurisdiction, but also a cause of action and an express waiver of sovereign immunity. Section 1581(i), however, just as clearly provides only the basis for jurisdiction. Section 1581(i) cannot suffice on its own to provide a claim for money relief against the federal government. The legislative history of section 1581(i) unambiguously states that section 1581(i) "is intended only to confer subject matter jurisdiction upon the court, and not to create any new causes of action not founded on other provision of law."¹⁷ The right to

¹⁵The CIT held in *Stone Container v. United States*, 27 F. Supp. 2d 195 (October 5, 1998), that the two-year limitation of 28 U.S.C. 2636(i) applies, but that this provision was tolled during the pendency of a motion for certification of a class action in the related case, *Baxter Healthcare Corp. v. United States*, 925 F. Supp. 794 (1996).

¹⁶The HMT payments over which repayment is sought are subject to the restriction implicit in the maintenance of the HMT Fund. 26 U.S.C. section 9505. It is not clear whether the fact that the HMT was to be paid into such a trust fund should make a difference in the application of notions of sovereign immunity. Most of the judicial statements regarding the question have been *dicta*, unnecessary to the courts' ultimate conclusions, unless one assumes that the question is a jurisdictional one that must always be resolved before other issues can be determined. In *Schlafly v. Volpe*, 495 F.2d 273, 279-80 (7th Cir. 1974), the Seventh Circuit determined that sovereign immunity was properly at issue in a suit against Department of Transportation officials to compel highway construction even though a successful suit would require payment only out of funds in the Highway Trust Fund, but the court nevertheless concluded that the Administrative Procedure Act amounted to a waiver of sovereign immunity and, alternatively, that because a favorable judgment would require the mere expenditure of funds that had already been specifically appropriated, sovereign immunity would not bar the suit. In *Bethlehem Steel Corp. v. Bush*, 918 F.2d 13231, n.5 (7th Cir. 1990), the Seventh Circuit rejected the idea that the fact that payment would be made out of the Superfund rendered the application of sovereign immunity (and related doctrines involving statutory construction to avoid sovereign immunity problems) any different than if no such fund were involved.

¹⁷House Report No. 1235, 96th Cong., 2d Sess., at 47, reprinted in 1980 U.S. Code Cong. & Admin. News 3729, 3758. This aspect of the jurisdictional provisions included in the 1980 legislation was affirmed by the Federal Circuit in *National Corn Growers Ass'n v. Baker*, 840 F.2d 1547 (Fed. Cir. 1988) (holding that domestic producers could not avoid the procedures and limited relief provided through proceedings under section 1516

monetary relief, and the waiver of sovereign immunity implicit in that right to relief, must come from some other source.¹⁸

What might that source be in the HMT litigation? In looking for possible sources of substantive claims, it must be remembered that sovereign immunity for the federal government is still the general rule in the federal courts. No decided case appears ever to have allowed a cause of action directly against the federal government when the repayment of money held in the federal treasury is the sole remedy sought without some clear indication of congressional assent to such recovery. The modern federal courts have repeatedly honored the notion that Congress has complete discretion over the terms of the remedies afforded to unhappy taxpayers.¹⁹ In fact, sovereign immunity seems most

unhesitatingly invoked when the particular remedies Congress has provided have left some taxpayers dissatisfied.²⁰ But the modern federal courts have never had to deal with (or perhaps they have never admitted that they were dealing with) the situation in which Congress has simply failed to allow any refund at all.

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by seeking judicial review of a customs ruling under the APA, with jurisdiction supported by section 1581(i)).

Even without taking into account this express legislative history, the inadequacy of section 1581(i) as an explicit waiver of sovereign immunity and a source of a claim to monetary relief is apparent.

¹⁸28 U.S.C. 2643, the provision that includes the power to issue monetary judgments among the remedial powers granted to the Court of International Trade does not seem any more likely to provide an independent basis for a suit for a tax refund in the CIT. It was enacted in 1980, and provides that: "(a) The Court of International Trade may enter a money judgment— (1) for or against the United States in any civil action commenced under section 1581 or 1582 of this title." The legislative history suggests that this provision was intended to allow the CIT to simply "enter a judgment for the amount to be refunded to the importer" so that the "judgment would be paid in the same manner as any other judgment against the United States," rather than requiring the "return [of] the appropriate papers to the Customs Service with an order that the entry be reliquidated in accordance with the decision of the court...which ha[d] the effect of requiring a refund of customs duties to the importer." H.R. Rep. 1235, 96th Cong., 2d Sess., p. 60.

This description suggests that Congress did not intend to create any new liabilities, but instead intended to streamline the procedures on which existing liabilities, once acknowledged by the court, would be paid. This amendment may have been addressing some of the issues raised by the fact that historically many of the decisions of the predecessors of the CIT were "advisory opinions" in the sense that they were subject to reconsideration in the Executive Branch. See Peter W. Rodino, "The Customs Courts Act of 1980," *N. Y. L. Sch. L. Rev.* 459, 467 (1981).

¹⁹Congressional provision of a remedy allowing tax refunds has always been held to preclude judicially designed remedies. See, e.g., *Schoenfeld v. Hendricks*, 152 U.S. 691 (1894) (holding the remedy for customs overpayments provided through the Board of General Appraisers in the 1890 act was exclusive, and that no action could be brought directly against collector without compliance with the statutory procedure); *Collector v. Hubbard*, 79 U.S. (12 Wall.) 1 (1870) (holding that suit against collector did not survive remedial provisions in Civil War taxes, even for taxes paid before enactment, and taxpayer's failure to pursue designated administrative remedies bars suit); *Nichols v. United States*, 74 U.S. (7 Wall.) 122 (1868), (holding that the established scheme for challenging customs decisions preempts the possibility

No modern federal court has attempted to reconcile this conflict between federal sovereign immunity and the due process implications of a total failure of Congress to provide any refund remedy for an unconstitutional federal tax.²¹ The reason is simple: Modern Congresses have rarely imposed taxes with procedural schemes quite so precarious as the HMT legislation. The standard remedial scheme for disputed internal revenue taxes, the choice between protest of a deficiency assessment with the right to pre-payment judicial review in the tax court and appeal to the circuit courts of appeal or payment followed by a claim for refund and a suit in the federal courts, seems so clearly adequate that courts have found it easy to turn away taxpayers seeking to raise challenges by other means. At

of further challenge in the court of claims); *Lyashenko v. United States*, No. 98-136T, *Doc 98-26289* (12 pages), 98 TNT 166-8 (Fed. Cl. Aug. 14, 1998) (no subject matter jurisdiction under 28 U.S.C. 1346 for refund of taxes withheld in violation of treaty rights except after meeting conditions laid out in section 7422); *New Consumers Bread Co. v. Internal Revenue*, 115 F.2d 162 (3d Cir. 1940) (affirming determination of the United States Processing Tax Board of Review denying a processor's action for refund of the agricultural processing taxes previously held unconstitutional and noting that "the recovery of illegally paid taxes is solely a matter of governmental grace"); *Bartley v. United States*, 123 F.3d 466, *Doc 97-21675* (12 pages), 97 TNT 143-15 (7th Cir. 1997), cert. denied 118 S. Ct. 723, 1998 U.S. LEXIS 272 (1998) (no jurisdiction of tax protester's attempt to bring a class suit for refund without compliance with statutory conditions). For a more complete history of these judicially designed remedies, see text at notes 33 to 42 *infra*.

²⁰E.g., *Flora v. United States*, 357 U.S. 63, *aff'd*, 362 U.S. 145 (1960) (requiring full payment of deficiency before claim for refund can be pursued); *United States v. Mitchel*, 282 U.S. 656 (1931) (invoking "the rule of strict construction to be applied to waivers by the United States of its sovereign immunity from suit to interpret a statute of limitations provision against the taxpayer despite the government's role in the timing of the suit); but see *United States v. Williams*, 514 U.S. 527, 95 TNT 81-13 (1995) (28 U.S.C. section 1346 relatively loosely construed to allow suit by other than the individual against whom tax assessed).

²¹The problem may be starkest in relation to illegal taxes, but surely is not so limited. See generally Richard Fallon, "United States Claims Court Symposium: Claims Court at the Crossroads," 40 *Cath. L. Rev.* 517 (1991).

(Footnote 19 continued in next column.)

least in suits involving claims for tax refunds, sovereign immunity has been invoked only to honor the choices made by Congress in setting the terms on which such claims shall be allowed. Thus the stark issue of the power of the federal courts to create new remedies that would result in an obligation of the federal government to refund taxes in the absence of congressional action has simply not been raised.

The fact that the CIT ignored possible sovereign immunity problems and overlooked the need for such a cause of action is understandable, since most of its caseload involves cases for which there is clearly a statutory basis for suit.²² As noted above, sections 1514 and 1515 clearly provide a basis for refund suits in ordinary customs cases brought under section 1581(a), and most of the cases brought under section 1581(i) are in the nature of judicial review of administrative actions, for which a cause of action is clearly provided in section 10 of the Administrative Procedure Act.²³ (This section provides at best an incomplete basis on which to rest the plaintiff's action in the HMT litigation because, although it provides that a "person suffering legal wrong because of agency action . . . is entitled to judicial review thereof," it expressly limits the relief available to nonmonetary damages.²⁴) More interesting

is why the government has failed to address these questions in its briefs.²⁵ Before the Supreme Court's decision, the basis for the suit under section 1581(a) probably seemed clear, and any due process issues related to the obstacles it presented to HMT litigants seemed better raised after the substantive validity of the tax had been resolved.²⁶

The Supreme Court has indicated that section 702 can in at least some circumstances permit judicial review even though the requested determination will result in monies being paid out of the federal treasury. *Bowen v. Massachusetts*, 487 U.S. 879 (1988) (allowing state judicial review when the ultimate result is likely to be money, since not meaning [sic] of APA's limitation on "money damages"). The *Bowen* case involved a situation, relatively common but distinguishable from that at issue here, in which the plaintiff ultimately sought the distribution of funds according to a congressional appropriation. In this respect, it could be viewed as little different from the conclusion in *Kendall v. United States*, 37 U.S. (12 Pet.) 524 (1838), that *mandamus* would lie in the federal courts to order payment of a claim acknowledged in a private bill. In *Department of the Army v. Blue Fox*, 119 S. Ct. 687 (1999), the Court further retreated from some more expansive readings of *Bowen*, and noted that section 702 provided no access to the Treasury for creditors of the federal government. In *Blue Fox*, however, the Court relied on a distinction between "money damages," which it viewed as compensatory relief to substitute for a suffered loss, as opposed to "a specific remedy that attempts to give the plaintiff the very thing to which he was entitled." It remains to be seen how this distinction might be applied in cases in which a refund of an unconstitutional tax is sought.

There may be other impediments to the invocation of section 702 as well. Some courts have held that the Tax Anti-Injunction Act, 26 U.S.C. 7421, acts as bar to review under the APA, either as a specific statute precluding jurisdiction within the meaning of 5 U.S.C. 701(a) or precluding relief under 702(2). *Lonsdale v. United States*, 919 F.2d 1440 (9th Cir. 1990) (plaintiffs sought to avoid IRS enforcement activity, including wage garnishment); *Neary v. Internal Revenue Service*, 91 TNT 158-57 (N.D.Ga. July 1, 1991).

²⁵It is unclear whether anything but an explicit holding that Congress has waived sovereign immunity can bar the issue from being raised, even on collateral attack. *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940) (collateral attack allowed on judgment in case in which sovereign immunity should have been raised); *Minnesota v. United States*, 305 U.S. 382 (1939) (even where attorney general had asserted jurisdiction of federal court in petition for removal, no jurisdiction because no waiver of sovereign immunity other than by act of Congress possible); *Munro v. United States*, 303 U.S. 36 (1938) (no authority to waive statute of limitations for benefits for disabled war veteran); *Finn v. United States*, 123 U.S. 227 (1887) (no officer of the government may waive statute of limitations to allow claim brought in court of claims for goods provided federal government). Compare *Tucker v. Alexander*, 275 U.S. 228 (1928) (holding that government has the power to waive objections to sufficiency of stated grounds for refund in claim for refund).

²⁶The government seems similarly to have made a strategic choice not to raise issues regarding the propriety of suits seeking to enjoin collection of federal taxes or declare them invalid, as some of the HMT cases were styled, under the Anti-Injunction Act. The Anti-Injunction Act, 26 U.S.C.

²²Interestingly, the CIT has acknowledged that sovereign immunity may be at issue in the litigation, but disposed of the question by "assum[ing] arguendo that sovereign immunity may not be imposed as a defense to this action." *Stone Container v. United States*, 27 F. Supp. 2d 195, (October 5, 1998). This is hardly the typical response to a potential defense that could undercut the court's jurisdiction so completely. In defense of the court, however, the parties in *Stone* only presented arguments regarding sovereign immunity in an attempt to avoid the doctrine that waivers of sovereign immunity must be strictly construed.

²³5 U.S.C. 702. See, e.g., *Norcal/Crosetti Foods Inc. v. United States Customs Service*, 731 F. Supp. 510 (1990) (allowing domestic producers to seek judicial review of a customs determination regarding marking of country of origin without exhaustion of the remedy arguably provided under section 1516, noting reliance on the APA).

²⁴Section 10, 5 U.S.C. 702, provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." [emphasis added]

(Footnote 24 continued in next column.)

(Footnote 26 continued on next page.)

But now that section 1581(a) seems no longer available and the availability of a remedy under section 1581(i) so unclear, why the reluctance to raise these issues? One answer seems easy. What government attorney wants to be the one to tell the Supreme Court that the Court itself has created the very situation within the federal system — an unexpected lack of recovery for refund of an unconstitutional tax — that the Court condemned the state courts for creating in *Reich* and *Newsweek*?

Even if the sovereign immunity question is resolved in the taxpayers' favor, there remain questions about the nature of their claims that could ultimately affect their right to a refund.

There may be other reasons as well. To admit that sovereign immunity might bar the HMT taxpayer's claims is to invite the courts to explicitly find an exception to sovereign immunity that would allow at least some refund claims to go forward. The Supreme Court, after all, seemed oblivious in *Reich* and *Newsweek* to the sovereign immunity-related limitations that state courts might find on their own ability to create new remedies against the treasuries of the states. To give the Supreme Court a stark situation in which it would be forced to either deny completely a refund of the HMT or find an express exception to sovereign immunity in a suit for money against the federal government may simply have appeared too risky. The government attorneys who rely most heavily on sovereign immunity as an established obstacle to suits in other contexts may have had second thoughts about setting out a landscape that would tempt the Court to acknowledge such an open-ended exception to sovereign immunity. Perhaps it seemed more prudent to simply let the sovereign immunity question remain unasked than to provoke an unwanted answer.

But even if the sovereign immunity question is resolved in the taxpayers' favor, there remain questions about the nature of their claims that could ultimately affect their right to a refund.

An Historical Basis for the HMT Litigation

What, if the issue were raised, would the courts rely on as a source of authority for judicially ordered refunds of the HMT? There is historical precedent on

^{7421(a)}, bars suits "for the purpose of restraining the assessment or collection of any tax." Before the Act will apply, it must be established that the challenged imposition is in fact a tax. See *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976) (license fees assessed under the authority conferred on the president by the Trade Expansion Act of 1962, as amended by the Trade Act of 1974, are not "taxes" within the scope of the section). Although it is conceivable that a "tax" for the purpose of the anti-injunction act could nevertheless pass muster as a fee under the constitutional prohibition on export taxes, it is hard to imagine embracing this argument enthusiastically.

which the CIT might have relied for nonstatutory refunds of taxes. Before any federal statute provided judicial remedies for taxpayers, the courts acknowledged a suit for refund against the collector. The true nature of such suits may always remain murky, but the historical importance of nonstatutory suits for refunds against collectors of federal taxes is unmistakable. Allowing suits patterned on such actions against the collector, to be brought directly against the United States in the CIT, would only be a small deviation from at least some aspects of nineteenth century federal practice.²⁷ A conscious resurrection of the suit against the collector need not create too great a threat to sovereign immunity more generally. The CIT, after all, does have jurisdiction over some cases in which monetary relief is sought from the federal government. Allowing such suits would merely refine the time-honored notion that Congress can direct the nature of the remedy available

²⁷The expansion of the court of claims jurisdiction over tax refund suits against the collector appears to have occurred as the result of just such a deviation. Such claims for taxes unnecessarily paid have been entertained despite the lack of clear statutory authority therefor since at least the Supreme Court's decision in *United States v. Emery, Bird, Thayer Realty Co.*, 237 U.S. 28 (1915) (allowing an action in the district court acting as a court of claims directly against the federal government for the refund of corporate income taxes, where previously actions had been allowed only against the collector in the federal courts of general jurisdiction), and arguably since the Court's decision in *Dooley v. United States* 182 U.S. 222 (1901) (allowing suit in the district court sitting as a court of claims for amounts paid as tariffs on goods shipped from Puerto Rico, since such amounts could only be internal revenue taxes, not tariffs given that Puerto Rico was part of the United States).

There are several obstacles to direct reliance on this line of authority to support the HMT litigation. First, the Court's willingness to allow suits directly against the federal government is likely to be different when the underlying jurisdiction is in the court of claims than in other federal courts, since the only actions that can be brought in that court are money claims against the federal government. Indeed, *Emery, Bird* and *Dooley* were among the cases cited by the Court in *Mitchell v. United States*, 463 U.S. 206 (1983) as examples of the few cases allowing money suits against the federal government in the court of claims without explicit statutory authority.

But the one thing that Congress seems to have explicitly said about the HMT litigation is that it not be brought in the court of claims. The explicit provisions of section 4462(f)(2) direct that jurisdiction over the HMT be established "as if such tax were a customs duty." The Court of Federal Claims (and its predecessors) has not had jurisdiction over customs cases since the decision of the Supreme Court in *Nichols v. United States*, 74 U.S. (7 Wall.), 122 (1868), holding that the established scheme for challenging customs decisions preempts the possibility of further challenge in the court of claims. Thus, even under a minimalist view of sovereign immunity, granting to Congress the right to control the terms on which the federal government is to be sued for payment of money but not granting it the right to preclude such suit altogether, suit for HMT refunds in the Court of Federal Claims is not likely to be available, even if section 1491(c), removing from that court jurisdiction of matters over which the CIT has exclusive jurisdiction, were not a bar.

when unconstitutional taxes have been paid by adding that when — and only when — Congress has failed to address the situation at all, the federal courts are free, under the mandates of the due process clause, to devise such remedies. But how free should the modern courts be to improvise beyond the historically recognized constraints on a court's ability to grant such judicial created refund remedies?

As will become clear from the discussion below, many aspects of the historical action against the collector were compelled by a conscious recognition of the limits of judicial power over the federal treasury. For instance, the federal courts have consistently held that the statutory codifications of the actions against the collector were intended to provide exclusive remedies when they were available to the complaining taxpayer. But there is also historical precedent for allowing other nonstatutory actions when the codified action could not apply,²⁸ or where it was unclear whether it was intended to apply.²⁹

Assuming that sovereign immunity presents no bar to a direct suit for money against the federal government in the CIT, perhaps because of the recognition of substantive rights and waiver implicit in the traditional collector's suit, what are the contours of the

plaintiffs' suits in the HMT litigation? Both sides in the litigation seem to concede that, at least for complaints filed with the CIT within the proper time frame, an HMT taxpayer is entitled to full refunds of all the taxes that it paid on exports. But it is far from clear that this is so. And again the question of the necessity of a protest — here in its original form — is raised.

Proof of some sort of protest — whether or not of the sort contemplated by modern Customs practice or the procedures outlined by Customs for the HMT — has always been a prerequisite to a refund of taxes paid to the federal government unless the requirement has been specifically displaced by statute. The requirement of a protest had its origins in the suits brought against the collector, the origins of which, in turn, were frequently stated to be in the common law action in *assumpsit* for money paid. No such action would lie for amounts that were voluntarily paid, and the protest to the collector at the time of payment indicated the requisite degree of lack of voluntariness. Courts in other jurisdictions have complicated things a bit by sometimes allowing proof of involuntary payment without protest, or by holding that stating a pro forma protest does not prove a lack of voluntary payment. Happily, the federal precedent seems clearly to be that a protest sufficient to indicate the basis for the taxpayer's challenge is sufficient. But some indication of an intent to challenge the tax (contemporaneously with payment unless otherwise provided) has always been necessary. The idea that no tax can be refunded if it was paid without a protest being made at the time the tax was paid has, and probably remains, a well-established rule in most jurisdictions in the United States. As one author put it, "[t]he generally stated rule in the absence of statute is that illegally collected taxes may not be recovered unless they are paid under compulsion and under protest."³⁰

Protest in Nineteenth Century Refund Litigation

To demonstrate the consistency with which the federal courts have required a protest, we must return to nineteenth century practices, primarily those, ironically enough, relating to customs. The original notions of "protest" in customs suits — and in all federal tax litigation — derives from the days when the taxpayer's only remedy for an overpayment of a valid tax, or any payment at all on an invalid tax, was a suit in *assumpsit* against the collector. Courts played a very limited but significant role in the earliest customs cases. Commonly, importers (who technically other-

²⁸For instance, the suit against the collector was held to have survived for taxpayers seeking refunds of the Civil War income tax in *Philadelphia v. The Collector*, 72 U.S. (5 Wall.) 720 (1866), even after it was limited by statute by conditions that made no sense in the income tax context. In *De Lima v. Bidwell*, 182 U.S. 1 (1901) the Court faced a similarly dicey question with respect to a claim for refund of federal customs paid on bringing goods to the mainland United States from the then U.S. possessions. The Court held that since Congress had no power to impose duties on shipments within the United States, the tax was unconstitutional. But if the tax was on a shipment within the United States, the tax paid on it could not be a customs duty, and therefore the statutory remedies for customs duties could not apply. The Court held that in these circumstances, an action against the collector was still available. The earlier cases were distinguished on the ground that they dealt with cases in which goods clearly were subject to the regime of the customs laws. And in *Dooley v. United States*, 182 U.S. 222 (1901), discussed in note 27 *supra*, the Court held that although the earlier cases had correctly held that there was no remedy in the Court of Claims for those customs matters for which there was an explicit statutory remedy, a remedy directly against the United States was nevertheless available in the Court of Claims in a case involving the imposition of duties on goods imported from Puerto Rico.

²⁹In *United States v. Emery, Bird, Thayer Realty Co.*, 237 U.S. 28 (1915) discussed in note 27 *supra*, for instance, the Court merely concluded that claims involving internal revenue taxes were included in those over which the Court of Claims was granted jurisdiction in the Tucker Act, not that courts had any power to acknowledge such claims without statutory authorization. Justice Holmes's opinion cites to the opinion in *Christie-Street Commission Co. v. United States*, 136 F. 326 (8th Cir. 1905), in which Judge Sanborn suggests that such jurisdiction had for a considerable time been expressly denied, and that for a subsequent interval of at least several decades, a distinction was likely to have been made between cases involving attacks on taxes under the Constitution, and mere applications of revenue laws.

³⁰Oliver Field, "The Recovery of Illegal and Unconstitutional Taxes," 45 *Harv. L. Rev.* 501 (1930). This author was writing at a time when federal courts were demonstrably reluctant to enforce new taxes and regulatory schemes created by Congress than they have been in more recent years. He also appears to have been overly optimistic about the choices available to taxpayers who sought refunds in the era immediately preceding the New Deal. Nevertheless, he assumed that the "voluntary payment" doctrine and the requirement of payment under protest was part of the background law.

wise owed duties according to the collector's determinations made as goods were initially brought into port), would post bond toward the payment of such duties³¹ and raise their defenses against the collector's determinations in actions brought by the collector on those bonds.³² Thus the courts' jurisdiction was invoked to enforce a contract, not to order payment by the importer or a repayment by the collector.

Congress reacted swiftly to the decision in Cary, and in so doing, codified the requirement of a protest to preserve remedies relating to tax claims.

Once a duty was paid, however, the early courts seem to have had little interest in allowing a recovery simply because an inappropriate duty had been paid. There is some evidence that those seeking recovery of excessive duties understood that their best remedy lay neither through petition of the Treasury, or of the courts, but instead with Congress.³³ It clearly was thought that no suit could be brought directly against the federal government for an overpayment of tax absent a legislative waiver of sovereign immunity.

A suit against the collector, however, was eventually allowed. It was a nonstatutory action for the first 50 years of customs collections.³⁴ The reported cases are

³¹1 Stat 627, 677; Duty Act of 1799, c. 128.

³²E.g., *Bend v. Hoyt*, 38 U.S. (13 Pet.) 263, (1839); *United States v. Phelps*, 33 U.S. (8 Pet.) 700 (1834); *United States v. Rice*, 17 U.S. (4 Wheat.) 246 (1819).

³³In the first years of federal tax collection, there is more evidence of petitions to Congress for refund and chargeback of duties than of evidence of petitions to both state and federal courts. In virtually every year, the fledgling Congress passed at least one private bill providing for recovery of tariffs; e.g., Act of May 9, 1794 (goods destroyed by fire); Act of June 7, 1794 (goods destroyed by fire); Act of January 28, 1795 (duties imposed upon return of French from Nova Scotia); February 25, 1795 (drawback of duty on wine for unspecified reasons); March 3, 1797 (duties imposed upon ship in distress); January 15, 1798 (sugar duties refunded when goods not salable). It is impossible to determine, however, the degree to which such resort to Congress was accepted as a regular course of action. Cf. Christine Desan, "The Constitutional Commitment to Legislative Adjudication in the Early American Tradition," 111 *Harv. L. Rev.* 1381 (1998) (reviewing the record of legislative adjudication of claims against public fisc in early eighteenth century legislatures in New York).

³⁴There was no statutory directive allowing such suits. They were, however, acknowledged in several pieces of early legislation, including a statute that provided for their removal to federal courts enacted during the hostilities with Great Britain, Act of Feb. 14, 1815, ch. 31 sec. 8, 3 Stat. 195, 198, and similar provision enacted during the nullification crisis of the 1830s, Act of March 2, 1833, ch. 57, sec. 3, 4 Stat. 632, 633-34. They were clearly allowed as suits first brought

(Footnote 34 continued in next column.)

too few and far between to get much sense of what "normal" procedures actually looked like, and how often taxpayers may have been frustrated by a judicial ruling that they had not "protested" enough before the collector. Because importers who knew they objected to the customs assessed on their goods ordinarily posted a bond for payment with the collector, and then defended a suit on the bond to determine their liability, no payment would have been made until after final determination of liability. As a result, we have little understanding of what protests made at the time of payment involved, and how often collectors quarreled with taxpayers about whether their protests had been adequately made.

But there can be little doubt that some sort of protest was required as a condition to a claim for refund. The arguments behind the protest requirement were straightforward, based primarily on the idea that if the importer could not be held to the entries made regarding a shipment at the time of the entry of the goods, the customs system would be undermined. Importers must object, according to this logic, at the time the facts relating to liability are most easily ascertained and verified. In an early case confirming the principle in general equity terms, Justice Story observed: "Even Courts of equity will not interfere to assist a party to obtain redress for an injury which he might by ordinary diligence have avoided; and, a *fortiori*, a Court of law ought not, where the other party has, by the very acts or omissions, lost his own proper rights or advantages."³⁵

The protest requirement was further justified by the fact that the suit entertained by the courts during this period was a suit in *assumpsit* against the collector, not the federal treasury. The customs collector was at least in theory at risk of personal liability if a court should order a refund of taxes that he had already paid over to the Treasury. Out of concern for the collector, the courts refused to allow refunds — even of invalid taxes — if the payments were voluntarily made to the collector. If the payments had been voluntary, the collector would have had no reason to hold back from the taxes he paid over to the government an amount sufficient to cover his potential refund liability. To proceed against a collector, then, a taxpayer had to prove that the payment was not voluntary, and could do so either by showing that the payment was made under duress or by proving that appropriate protest had been made.

Indeed, in an early case in which the Supreme Court sitting as a whole first acknowledged such non-

in the federal courts beginning in 1838, see *Adams v. Bancroft*, 1 F. Cas. 84 (1838) (Case No. 44, Circuit Court, D. Mass.), although legislative bungling during the Reconstruction era appears to have rendered them available again only by filing in the state courts, upon which collector had an automatic right to remove, e.g., *Insurance Company v. Ritchie*, 72 U.S. (5 Wall.) 541 (1866); *Harthall v. Collector*, 76 U.S. (9 Wall.) 560 (1869); *The Assessors v. Osbornes*, 76 U.S. (9 Wall.) 567 (1869). These contorted procedures seem to have ended with the introduction of general federal question jurisdiction in the Act of March 3, 1875, ch. 137, 18 Stat. 470.

³⁵*Bend v. Hoyt*, 38 U.S. (13 Pet.) 263, 268-69 (1839).

statutory collector's actions, the government (on behalf of the collector) urged an even more extreme position in asserting its right to retain overpayments of taxes. In *Elliot v. Swarthout*,³⁶ the government asserted that a taxpayer who actually paid (rather than merely posting a bond and resisting the suit by the collector to collect on that bond) could not sue the collector, even when the importer had protested as it paid the duties. The Court rejected the government's extreme view and confirmed that payment under protest, followed by a suit against the collector, was the proper way to challenge a customs liability. The Court clearly considered the requirement of protest to be a fundamental requirement of recovery against the collector:³⁷

There can be no hardship in requiring the party to give notice to the collector that he considers the duty claimed illegal, and put him on his guard, by requiring him not to pay over the money. . . . But if a party is entirely silent, and no intimation of an intention to seek a repayment of the money; there can be no ground upon which the collector can retain the money, or call upon the government to indemnify him against a suit.

Although the same common law action against the collector also originally applied to suits involving collections of other federal taxes, the procedures in customs cases were the first to be addressed and somewhat regularized by Congress. The circumstances surrounding this legislation sheds considerable light on the nature of the action against the collector. In 1839, it appeared (especially to President Jackson's political detractors but probably also to the public at large) that the Jacksonian Collector for New York had held back from the federal treasury not only enough to cover potential refund liability, but also perhaps enough to make substantial purchases of land in his own name.³⁸

³⁶35 U.S. (10 Pet.) 137 (1836). This case may be the first in which the Court was asked to consider the appropriate means for customs refunds.

³⁷35 U.S. (10 Pet.) at 153.

³⁸The alleged embezzlement by Samuel Swartwout was among the most notorious political scandals in the Jacksonian era. In retrospect, it seems likely that this particular collector was caught having allowed importers to post bonds or use bank notes to secure payment of duties rather than pay specie as required by law, and perhaps was foolish in being overly trusting of those to whom the accounting for collections was assigned. After the panic of 1837, many banks refused to honor their own notes, and many importers, thus left without claims against the banks for specie with which to pay customs, failed.

At the tightest time in the monetary crisis of the late 1830s, the status of customs accounts was no doubt a pliable matter. A political enemy could have persuasively claimed that duty payments left unfunded as a result of the monetary crisis should have been treated as unpaid, rather than paid, on the collector's books. Since duties secured through such credit terms were entered as paid, it was probably easy to suggest they had been embezzled. See generally Bill R. Brunson, *The Adventures of Samuel Swartwout in the Age of Jefferson and Jackson* (1989), and Feris A. Bass and B.R. Brunson, *Fragile*

(Footnote 38 continued in next column.)

In response, Congress passed legislation regularizing parts of the customs collection and refund procedures. The collector was no longer supposed (if indeed he was ever actually authorized to) to withhold from deposit into the Treasury amounts paid under protest, and the Secretary of the Treasury was authorized to pay refunds on the appropriate facts.³⁹ It was apparently unclear what role Congress intended the courts to play in customs refunds after this change in collection procedures. Additional litigation, and additional legislation, proved necessary to clarify the judicial role in these procedures.

Thus, in *Cary v. Curtis*,⁴⁰ the court held that because the 1839 statute required collectors to turn funds over to the federal treasury on a relatively short time frame, the action against them could no longer be brought. The majority opinion appears based on an assumption that the appropriate remedy prescribed by Congress was now only an appeal to the Secretary of the Treasury. According to Justice Story's anxious dissent, this ruling was tantamount to a holding that an importer had no right to judicial review of a decision involving his obligation to pay duties and would be left at the mercy of a mere bureaucrat for a final determination of his liability. Despite Story's emotional dissent, the Court appeared untroubled by the possible lack of judicial review of the Secretary's determination. Perhaps in these early days, the courts were as solicitous of the due process claims of the collectors (who otherwise would be left petitioning Congress for reimbursement should they be required to pay importers unexpectedly) as they were of the claims of the importers.

Congress reacted swiftly to the decision in *Cary*,⁴¹ and in so doing, codified the requirement of a protest to preserve remedies relating to tax claims. The enacted legislation essentially undid the decision in *Cary*,

Empires: The Texas Correspondence of Samuel Swartwout and James Morgan 1836-56 (Austin Texas, 1978); but see *Tillou's Case*, 1 Ct. Cl. 220 (1865), *rev'd United States v. Eckford*, 73 U.S. (6 Wall.) 484 (1868) (in which United States was still trying to collect for embezzled funds against Swartwout's surety).

It was the alleged defalcation of Swartwout as Collector for New York that led to the invocation of the extraordinary remedies for customs collection put at issue in *Murray v. Hoboken Land and Improvement Company*, 59 U.S. (18 How.) 272 (1855) (commonly cited for the notion that certain adjudications of rights against the federal government can constitutionally be relegated to adjudication within the executive branch). These measures were adopted in an attempt to collect the duties Swartwout had allegedly allowed to remain unpaid. Mr. Swartwout appears to have contributed more than his fair share to the jurisprudence of the federal courts, having also been the second of two gentlemen seeking habeas directly from the Supreme Court in its decision in *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), on their seizure for treason in connection with the western adventures of Aaron Burr.

³⁹Act of March 3, 1839, 5 Stat. 337, 349,

⁴⁰3 How. 236 (1845)

⁴¹George Brown, "A Dissenting Opinion of Mr. Justice Story Enacted as Law Within Thirty-six Days," 26 *Va. L. Rev.* 759 (1940).

providing that "nothing [in the 1839 Act] shall . . . be construed to take away or impair, the right of any person or persons who have paid or shall hereafter pay money, as and for duties under protest, to any collector of the customs . . . which duties are not authorized . . . to maintain any action at law against the collector . . ." ⁴²

A protest requirement has frequently been imposed by the federal courts even when the applicable statutes make no mention of such a requirement.

This 1845 legislation for the first time specified a particular content to the protest requirement. From the structure of the provision and the language used, it is clear that Congress sought primarily to restore the action as it had previously existed.⁴³ It did, however, add some specificity regarding the procedure by which protests were to be made, indicating that they needed to be made in writing and furthermore that they need be made no later than the time of payment.⁴⁴

The Supreme Court continued to view the protest requirement, now explicitly required by the 1845 provisions, as a strict procedural prerequisite to any taxpayer recovery. In doing so, it made clear its view of the power in Congress to set the terms of taxpayer recovery. In *Curtis' Administratrix v. Fiedler*,⁴⁵ the Court held that a refund would not be available when the conditions in the 1845 act were not followed — even

with respect to payments made in 1842, before the taxpayer could have known that such a statutory condition might be imposed. The Court's logic essentially was that, under the reasoning of *Curtis v. Cary*, the common law action against the collector had been totally abrogated when the collector no longer was permitted to hold back the transfer of protested payments. The 1845 statute therefore provided the only available remedy, and its procedural specifications, including a protest in writing, must therefore be met. In this era, the Court had no problem denying any remedy at all to importers who had paid without protest and only learned later that their payment was unnecessary because of the prior erroneous interpretation. In several cases decided in the decade after the 1845 legislation, the Court noted that such importers simply had no remedy.⁴⁶

Beginning with the litigation after the 1845 legislation, the protest requirement in customs cases became a matter of statutory interpretation⁴⁷ rather than a judicial creation, and became divorced from the traditional judicial considerations of equity from which it had been derived.⁴⁸ It clearly did not die, and can be found

⁴⁶In *Lawrence v. Caswell*, 54 U.S. (13 How.) 488 (1851), an importer obtained a ruling from the Supreme Court that liquor should be subject to duties only on the actual contents on import, not on the volume of liquor originally shipped, as had apparently been the assumption for many years. It appears that this ruling changed the law as applied in many ports, and a number of suits for refund ensued. In the *Lawrence* case itself, the Court held that the importer could not recover because it sought to collaterally attack an earlier judicial proceeding that had been pursued to a final judgment. The Court went out of its way, however, to state that its substantive ruling would be of no avail to those (presumably many) who had paid under the old rule but had paid without protest. In *Nichols v. United States*, 74 U.S. (9 Wall.) 122 (1868), the Court reiterated its position regarding the exclusive nature of the protest and collector's suit remedy.

⁴⁷For a summary of this history, see *United States v. Lian*, 10 F.2d 41 (1925); Jed Johnson, "The United States Customs Court — Its History, Jurisdiction, and Procedure," 7 *Oklahoma L. Rev.* 393 (1954). For a succinct history of the protest in nineteenth century customs practice, see Webster Elmes, *A Treatise on the Law of the Customs* (Little Brown, Boston, 1887).

⁴⁸In the early 1850s, the newly constituted Court of Claims was clearly charged only with reporting to Congress about the merits of claims upon which it would ultimately be asked to act. Before its formation, committees of Congress reviewed claims against the United States and made awards through the legislative process. There appears to have been a brief interlude when this court entertained claims for customs refunds regardless of whether a protest had been made. Many of these cases involved the same fact pattern as the *Lawrence* case, that is, importers who had paid duties based on an understanding of the proper measure of duties on liquor that was rejected after their payment. E.g., *Fiedler v. United States*, 2 U.S. Cong. Rep. C.C. 37, (July 28, 1856); *William W. Spence & Andrew Reid v. United States*, 2 U.S. Cong. Rep. CC 39 (July 28, 1856) (involving, according to Judge Blackford's dissent, the same shipment as that involved in *Mason v. Kane*, and thus clearly involving a situation in which

⁴²Act of February 26, 1845. This legislation may have left some claimants unsatisfied, since in the second section of the act of August 8, 1846, the Secretary of the Treasury was authorized to refund to importers "such sums of money as have been illegally exacted by collectors of the customs, &c., since the 3d of March, 1833." The provisos to the section require that before the Secretary refunds he shall be satisfied, by decisions of the courts of the United States on the principle involved, that such duties were illegally exacted, and that such decisions shall be adopted or acquiesced in by the Treasury Department. Additional special refunding acts were passed June 28, 1848, and March 3, 1849 (9 Stat. 720 and 780).

⁴³In a much later case examining the details of the protest requirement in the 1845 legislation, the Court observed "[t]hus the common law right of action was restored, but the protest was required to be in writing and not oral as before allowed." *Barney v. Rickard*, 157 U.S. 352 (1895).

⁴⁴The insertion of the writing requirement is undoubtedly a response to the then recently decided case, *Swartwout v. Gihon*, 44 U.S. (3 How.) 110 (1845), in which Justice Taney had held that oral protest would be adequate and that whether such protest was in fact made was a question for the jury.

⁴⁵67 U.S. 461 (1862). Although the holding in *Fiedler* was that the 1839 statute had eliminated the judicial remedy, and that therefore the taxpayer must have strictly abided by the statutory requirement that a written protest be made in which objections were clearly specified, the holdings of the trial court are also of interest. According to the account in the Supreme Court's opinion, the trial judge had clearly thought that the judicial remedy required a protest, but that the manner in which the objections had been raised was adequate.

(Footnote 48 continued on next page.)

in federal tax refund litigation involving both non-statutory and statutory claims for the next century.

The Protest Requirement in Current Law

A protest requirement was generally imposed by the federal courts even when the applicable statutes make no mention of such a requirement.⁴⁹ (Indeed, the protest requirement may be the common ancestor of many varieties of judicially created exhaustion requirements.) There are very few instances in which federal courts come close to abandoning the protest requirement completely.⁵⁰ Many of the cases sometimes cited for the proposition that protest might be unnecessary actually involved suits based on specific statutes directing that refunds of repealed taxes be made, whether or not protest had been made.⁵¹ But such congressional action was only understood to affect the

res judicata would have barred judicial relief); *David Wood v. United States*, 2 U.S. Cong. Rep. C.C. 39, (July 28, 1856), also appearing at 3 U.S. Cong. Rep. C.C. 49 (1857); *Sturges, Bennett & Co. v. United States*, 2 U.S. Cong. Rep. C.C. 35 (July 28, 1856).

This position is clearly not inconsistent with the view that this infant tribunal was charged merely with ascertaining the amount, but not the ultimate merit, of each claim presented, as a preliminary to congressional action thereon. Indeed, in *Jim Beatty's Executor v. United States*, 2 U.S. Cong. Rep. C.C. 39, July 28, 1856, the court specifically made note of the fact that it was the heir to petitions to the legislature, not to suits against the collector: "It is obvious, therefore, as we have already shown, that the protest was not essential to the validity of the demand against the United States, and was in no respect necessary to support the petition to the legislative department of the government for a repayment of the money."

This self-perception of the Court of Claims did not last. In *Gordon v. United States*, 69 U.S. (2 Wall.) 561 (1864), the Supreme Court, as reported in a summary by the Court Reporter, refused to review a decision of this originally constituted Court of Claims because its judgments took the form of recommendations for congressional action. This procedural flaw was cured by the Act of March 17th, 1866, 14 Stat. 9.

The court as reconstituted in 1866 continued to assert jurisdiction over customs cases. But it consciously reversed its position with respect to the requirement of a protest in *Schlesinger's Case* [also known as *Barthold, Schlesinger*], 1 Ct. Cl. 16 (1863). The court in *Schlesinger* clearly was aware of the fact that claims it considered were claims against the federal treasury that were not necessarily authorized by the 1845 statutory language controlling collectors' suits. Its conclusion was that whether the act of 1845 applied or not, no recovery could be had without protest, since in *Bend v. Hoyt* the protest had been held to be a prerequisite of a common law action for refund.

The assertion by the Court of Claims of jurisdiction over customs refunds was short-lived. In *Nichols v. United States*, 74 U.S. (7 Wall.) 122 (1868) [reviewing a case frequently denominated *Nicolls*], the Court concluded that the statutes establishing the Court of Claims had not been intended to displace, or even duplicate, the suit against the collector. The Court's reaction was no doubt influenced by the fact that there was no statute of limitations for actions cognizable in the Court of Claims, and that an extraordinary number of importers of liquor were attempting to claim the benefit of the Court's decision in *Laurence v. Caswell*, that liquor duties were dependent not on the volume of liquor originally shipped (as had been assumed for many years) but on the volume of liquor actually imported, with reductions for evaporation and other losses. Few if any had protested the way in which the duty had been previously measured. Although the broad language of the Court's holding states definitively that "cases arising under the revenue laws are not within the jurisdiction of the Court of Claims," the Court clearly relied heavily on the idea that Congress had set out other means, with restrictions, through which importers could challenge duties believed illegally imposed. These importers were not to be allowed to circumvent the protest requirement by invoking the new forum afforded by the establishment of the Court of Claims.

The role of the court of claims in adjudicating claims against the United States retained remnants of its origins as an investigative branch of Congress for many years. See generally *Glidden v. Zdanok*, 370 U.S. 530 (1962). Only since

1977 have appropriations been made to fund all judgments of the court, with none being left for congressional action after the judgment. William M. Wiecek, "The Origin of the Court of Claims," 20 *Ad. L. Rev.* 387 (1968). See Marion T. Bennett, "The United States Court of Claims, A 50-Year Perspective," reprinted in 216 *Ct. Cl.* 85 (1978).

⁴⁹E.g., *United States v. New York & Cuba Mail S.S. Co.*, 200 U.S. 488 (1906) (taxes paid with full knowledge of facts rendering tax unconstitutional as a tax on exports cannot be recovered because of lack of protest); *Wright v. Blakeslee*, 101 U.S. 174 (1879) (claim for refund of succession taxes permitted even though nature of protest unclear, in contrast to claim for customs refund for which statute requires protest in writing); *Chesebrough v. United States*, 192 U.S. 253 (1904) (suit attacking the 1898 stamp taxes as unconstitutional direct taxes and seeking refund of stamp tax paid on transferred real estate cannot proceed where no protest made at time of payment, despite lack of mention of protest requirement in applicable refund statutes, and despite duress felt by taxpayer to purchase stamps to satisfy a contractual obligation). Congress reacted to these cases in the Act of March 4, 1907, c. 2919, 37 Stat. 1371, and allowed refunds of the taxes, "said refund to be made whether said stamp duties were paid under protest or not, and without being subject to statute of limitation."

⁵⁰A few outlying cases can be found. In one such decision, the Claims Court was willing to treat as not voluntary even in the absence of a proof of protest the payment at issue in *Heinszen v. United States*, 42 Ct. Cl. 58 (1907) (upholding taxpayer's right to refund of taxes paid to U.S. authorities in Philippines, despite congressional ratification thereof), but its decision was reversed on the ground that the ratification was effective, 206 U.S. 370 (1907). In reaching this result, the claims court in *Heinszen* had relied on the Supreme Court's refusal to expand voluntary payment doctrine in nontax cases. For instance, it cited *Swift Company v. United States*, 111 U.S. 22 (1884), a case in which merchant, which had illegally been compelled to accept stamps as its commission as stamp tax collector, was held not barred by the voluntary payment doctrine in a contract suit for past commissions.

⁵¹In the aftermath of the 1898 war, revenue needs quickly dried up. Controversial taxes were repealed and a few were struck down as unconstitutional. A series of additional (each one increasingly poorly drafted) statutes were enacted to

(Footnote 48 continued in next column.)

(Footnote 51 continued on next page.)

particular set of tax payments involved, and not all statutory refund claims.

Thus it is generally understood that the protest requirement remained a feature of federal tax refund procedures.⁵² Indeed, in many instances the federal courts continued to insist that protest be made before payment, even when Congress deliberately indicated that a protest⁵³ or a claim for refund⁵⁴ made at a later date would suffice. The opportunities for the federal courts to confirm the protest requirement in the last 50 years have been limited by generally more complete statutory remedial schemes that pre-empt judicially created remedies, but a few modern cases have acknowledged it.⁵⁵ Is there, then, still a general federal

ensure that all such claims for refund were entertained. Suits under these refunding statutes, raising questions both of statutory interpretation (especially with respect to the timing of the repeal of the inheritance tax) and constitutionality, were brought both in the district courts and in the claims court under the federal question jurisdiction provided by the Act of March 3, 1887, c. 359, section 1, 24 Stat. 505. Only after considerable resistance by the courts in which they were brought were these cases recognized as procedurally distinct from the ordinary cases against the federal collector. See generally *United States v. Hooslef*, 237 U.S. 1 (1915) (reviewing the refunding statutes and concluding that when Congress had specifically directed for claims against tax in question suit [sic] challenging stamp tax as a tax on exports allowed to proceed [sic] even though taxes not paid under protest); 26 Op. Atty Gen. 472 (1908) (clarifying the distinction between the general statutes for refund, and the special refunding statutes).

⁵²Even in the few cases in which the federal courts have ruled in favor of taxpayers to arguably expand the jurisdiction of the federal courts in tax cases, the courts have nevertheless noted that the taxes involved were paid under protest. E.g., *Dooley v. United States*, 182 U.S. 222 (1901), note 27 *supra* (allowing suit in court of claims to challenge imposition of import duties on shipments from Puerto Rico, since, if as the taxpayer claimed Puerto Rico was within the United States, such duties could not constitutionally be customs duties); *United States v. Emery, Bird, Thayer Realty Co.*, 237 U.S. 28 (1915), note 27 *supra* (allowing suit in court of claims to challenge 1909 corporate tax, concluding that nothing in administrative scheme made applicable to that tax suggested an intent similar to that found in *Nichols* to make collector's suits the exclusive remedy).

⁵³E.g., *Bird v. Saltonstall*, 164 U.S. 54 (1896) (holding, over strong dissents, that the 1877 revision of the customs statutes removed requirement of contemporaneous protest and substituted instead the need for administrative appeal); cf. *Gulbenkian v. United States*, 175 F. 860 (C.C.D.N.Y. 1909), (holding that failure to protest duty barred recovery of taxes held to be excessive as result of determination in unrelated litigation), *aff'd* 186 F. 133 (2d Cir. 1911) (on ground that statutory procedures had not been followed).

⁵⁴E.g., *George Moore Ice Cream v. Rose*, 289 U.S. 373 (1933) (holding that section 1014 of the Revenue Act of 1924, section 3226 of the Revised Statutes, 43 Stat. 253, had been amended to substitute the requirement that a timely claim for refund be filed for the requirement of contemporaneous protest).

⁵⁵E.g., *Deppe v. Lufkin*, 116 F.2d 483 (1st Cir. 1940) (in suit in the nature of restitution, although collector of customs could not have legally collected fines assessed against the plaintiff relating to illegal aliens, the fines could not be recovered because of lack of evidence that the protest was

doctrine that, in the absence of a statute providing otherwise, no taxpayer can recover a refund (whether against the collector or against the United States) unless he protested as the tax was paid? Surely a strong argument can be made that such a doctrine survives.

At this stage in the litigation, the HMT taxpayers who have sued directly under section 1581(i) would surely argue that imposing such a requirement would amount to an unfair change in the procedures they must follow, the same sort of altering of remedies that the Supreme Court denounced in *Reich* and in *Newsweek*. One way to defeat such a claim would be to argue that the requirement has remained a part of the nonstatutory action for refund — even though no suits have been brought based on that action in at least forty years. There is a certain irony in the fact that it is only because Congress has in most cases rather methodically provided procedures whereby taxpayers can challenge taxes and pay refunds thereof that the HMT tax-

made at the time the fine was paid; "It is clearly the law that where there is no mistake of fact there can be no recovery of fines or taxes voluntarily paid under mistake of law."); *Jimenez v. Domenech*, 80 F.2d 767 (1st Cir. 1935) (assuming common law action against collector survives legislative enactment of refund procedure directly against territory, common law action nevertheless barred by lack of protest, under "settled law in the United States except as changed by statute," and despite fact that "it is obviously unjust for a government to retain money illegally collected under an unconstitutional law, but this is a matter for the legislature"). In other cases, statutory protest requirements have been honored after review of their common law derivation. E.g., *District of Columbia v. McFall*, 188 F.2d 991 (1951) (endorsing the common law approach, citing *Cooley's Taxation* (4th ed. 1924) at sections 1282 and 1292 for the view that that no recovery could be had of a voluntary payment, that mere protest would not suffice to demonstrate involuntariness, and that therefore, if statutory provisions requiring protest were to be used, they must be literally followed; no recovery available where taxpayer had paid an automobile excise tax to the District of Columbia, but not mailed a letter to the collector until a week later, had not adequately "paid under protest" as required by the relevant statute.)

Federal courts have also endorsed and acknowledged protest requirements in cases not clearly controlled by federal law. E.g., *Union Pacific R.R. v. Dodge County Commissioners*, 98 U.S. 541 (1878) (taxes ultimately held illegal under federal grant held not recoverable because no specific challenge to tax made at time of payment); *Moses v. Read*, 63 F.2d 16 (3rd Cir. 1933) (suit in federal court for refund of state taxes barred for failure to protest until tax held violative under commerce clause in unrelated litigation); *International Paper Co. v. Burrill*, 260 F. 664 (D. Mass. 1919) (allowing suit against state collector despite fact that statute of limitations had run on suit directly against state, but noting that protest was probably required and was given); *Roxana Petroleum Corp. v. Bollinger*, 54 F.2d 296 (7th Cir.) (1931), *cert. denied* 286 U.S. 554 (recovery of state motor fuel taxes held unconstitutional in unrelated litigation barred because when tax "was freely and voluntarily paid, without purpose or intention of the taxpayer at time of payment to question or resist it or recover it back, it may not there after be recovered"). See also *Jenkins v. Missouri*, 962 F.2d 762 (8th Cir. 1992) (those objecting to court-ordered taxes held invalid in *Missouri v. Jenkins*, 495 U.S. 33 (1990) barred from recovery for failure to follow state statutory requirement of payment under protest).

(Footnote 55 continued in next column.)

payers might be able to claim that the protest requirement has been abandoned. But would the recognition of a protest requirement really be something that the HMT taxpayers could not have foreseen had any thought been given to the matter at the time the HMT was paid?

Another way to defeat such a claim of surprise would be to argue that the procedures outlined by Customs should have put HMT taxpayers on notice that some sort of protest would be required. But whether anyone could have anticipated the kind of protest that would be required, and the time at which it must have been made, is an entirely different matter.⁵⁶ Although Customs promulgated regulations under the HMT, the provisions relating to challenges to the HMT are cursory at best. The first set of regulations contained minimal information about the procedures for the collection of the HMT.⁵⁷ A more complete statement of the procedures to be used in challenges to the HMT seems not to have been formally attempted until November 1994, after the constitutional challenges to the HMT had begun.⁵⁸ This statement instructed that the forms ordinarily used at the time of payment to Customs should be used to indicate a challenge to the applicability of the HMT and that the protest made on these forms must be made within 90 days of the time of payment. This instruction could be construed as implicitly asserting that the protest required was of the payment of the tax, and, further, that the protest involved was the statutory protest anticipated by section 1514, not the common law protest. This announced procedure, however, was at least in tension with, if not in conflict with, the procedures that appeared to have been anticipated in earlier announcements about HMT disputes not involving constitutional challenges.⁵⁹

These announcements seemed to indicate that a protest could be taken from a claim for refund even if no protest had been made at the time of payment.

Customs, believing that it was so compelled by the Supreme Court's decision in *United States Shoe*, has since renounced any earlier statements regarding the procedures to be followed in challenging the HMT.⁶⁰ It appears to have simply made a strategic decision to avoid presenting any of the hard questions to the courts regarding the basis for the HMT plaintiffs' suits, and to limit its losses by relying on the statute of limitations applicable to section 1581(i).

This tactic may allow the government to duck the fundamental due process issues that a failure to allow any remedy would have entailed, but it seems unlikely to keep the government from defending against the claim that it has participated in (and misled the Supreme Court into complicity in) a bait-and-switch. Even without asserting either that sovereign immunity operates as a bar to monetary judgments under section 1581(i) in the absence of an express statutory basis for a claim to monetary relief, or that a common law protest is required as a precedent to any suit for refund of taxes in the absence of a specific statutory remedy, the government is likely to find itself awkwardly defending its changing positions on the appropriate HMT refund procedure. Some who have challenged the HMT began their quest for refunds by filing a protest within 90 days of payment;⁶¹ others began by filing protests within 90 days of a denial of claims for

⁵⁶The taxpayers in the lead case on the merits, *United States Shoe*, appear to have complied with the Custom's determination with respect to at least a part of their claims, 523 U.S. 363. Indeed, lawyers advised potential clients to file "administrative protests" without feeling the need to clarify any ambiguities about what that might mean. See, e.g., the advice to file an "administrative protest" offered on the Web page of Munford Page Hall, II, Washington, D.C. Office of Dorsey and Whitney LLP, at <http://www.exportprac.com/hmt.htm>; Christopher Wall, Mark A. Monborne, William L. Matthews, Winthrop, Stimson, Putnam & Roberts, <http://www.winstim.com/public/bulletin/bull9748.html>; David Serko, Serko & Simon LLP, <http://www.customs-law.com/pubs/article1.htm>, all available as of April 18, 1998.

⁵⁷T.D. 87-44, 52 FR 10201, Mar. 30, 1987 (simply requiring filing of a summary sheet with quarterly payments). Specific forms (Form 349 for payments and Form 350 for claims for refunds) were introduced with T.D. 91-44, 56 FR 21446, May 9, 1991.

⁵⁸T.D. 94-91, 59 FR 60,044.

⁵⁹In T.D. 92-4, 57 FR 609, Jan. 8, 1992, Customs had indicated that those exporters seeking to take advantage of a new but retroactively effective exemption from the HMT should pay first and then seek the protection of the exemption in connection with a claim for refund on Form 350, a procedure that could easily be taken to be implicitly asserting that protests were properly made from claims for refund, not from acceptance of payment, and that no time limit would be imposed on the filing of claims for refund through Form 350.

⁶⁰In a press release dated April 28, 1998, Customs appeared to announce that the protest procedures would not apply to export-related HMT:

The Supreme Court also affirmed the decision of the lower courts that protest procedures are inapplicable to refund claims for export-related Harbor Maintenance Taxes. The public is hereby advised that the Customs Service will not decide or respond to any protests alleging that the export-related Harbor Maintenance Taxes are prohibited by the Export Clause of the United States Constitution. Any person who previously received correspondence from Customs concerning any such protests should disregard such correspondence and not expect further communications regarding such protests.

Customs does, however, appear to acknowledge the appropriateness of proceeding under 19 USC section 1514 and 28 USC section 1581(a) with respect to other HMT proceedings, including the assertion of deficiencies against taxpayers. E.g., *Princess Cruises v. United States*, 15 F. Supp. 2d 801 (1998); *Carnival Cruise Lines, Inc. v. United States*, 866 F. Supp. 1437 (CIT 1995).

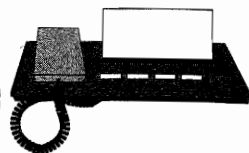
⁶¹Throughout the early stages of the litigation in the CIT, Customs continued to assert that acceptance of the HMT payment was an action subject to protest under section 1514, and that all protests must therefore be filed within 90 days of payment. See, e.g., *Baxter Healthcare Corp v. United States*, 925 F. Supp. 794, 799 n.8 (CIT 1996)

refunds.⁶² Both types of taxpayers arguably were in good faith following procedures laid out by Customs at the time that they acted; yet it is possible that in some circumstances both types of taxpayers may be foreclosed from any refund if the Supreme Court's language in *United States Shoe* — that there is no jurisdiction under 1581(a) for claims for refund of the HMT — is taken seriously.

⁶²*E.g., Swisher v. United States*, 27 F. Supp. 2d 234 (November 6, 1998), appeal pending, involves such a taxpayer. In *Swisher*, the taxpayer is arguing that the Supreme Court's statements regarding jurisdiction in *United States Shoe* should be limited to those cases in which no claim for refund or amended return was filed, and that the Court did not address jurisdiction in cases in which such a claim had been filed, and thus left open the possibility that section 1514 allows a protest of a denial of such a claim. In *Swisher*, the CIT more thoroughly examined the possibility that a claim could be brought under section 1581(a), but concluded that it could not, largely because section 1581(i) is only available when section 1581(a) is not. The court held that none of the refund-like procedures that might be predicate to section 1581(a) jurisdiction could apply to the HMT claims because Customs could not on its own have granted such a refund given that it had no power to declare the HMT unconstitutional. This argument overlooks the fact that once a reviewing court had so ruled, Customs clearly would have had such power, and the fact that the agency might not view itself as having the power to make a determination about the constitutionality of a statute does not mean that procedures appealing from the actions of that agency are not the proper route for raising constitutional challenges. The fact that an administrative body does not have the power to declare a statute unconstitutional does not ordinarily make inapplicable the administrative procedures through which similar claims not based on constitutional grounds are made, or eliminate the need to exhaust such remedies.

The court in *Swisher* assumed that no statute of limitations would apply to the section 1581(a) approach urged by the taxpayer, largely because Customs itself had been regularly allowing the filing of claims for refund of the HMT years after it had been paid.

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