In the

Supreme Court of the United States

Federal Energy Administration, Et Al., Petitioners,	)	
v.	)	
Algonquin Sng, Inc., Et Al., Respondents.	)	No. 75-382

Washington, D. C.
April 20, 1976

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HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

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FEDERAL ENERGY ADMINISTRATION, ET AL.,

Petitioners,

v. No. 75-382

ALGONQUIN SNG, INC., ET AL.,

Respondents.

Washington, D. C.,

Tuesday, April 20, 1976.

The above-entitled matter came on for argument at 10:42 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ROBERT H. BORK, ESQ., Solicitor General of the United States, Department of Justice, Washington, D. C.; on behalf of Petitioners.

FRANCIS X. BELLOTTI, ESQ., Attorney General of Massachusetts, Boston, Massachusetts; on behalf of Respondents.

HAROLD B. DONDIS, ESQ., Rich, May & Bilodeau, One State Street, Boston, Massachusetts 02109; on behalf of Respondents.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 75-382, Federal Energy Administration v. Algonquin.

Mr. Solicitor General.

ORAL ARGUMENT OF ROBERT H. BORK, ESQ.,

ON BEHALF OF PETITIONERS

MR. BORK: Mr. Chief Justice and may it please the Court:

We are here on writ of certiorari to the Court of Appeals of the District of Columbia. That court, with one judge dissenting, reversed the District Court's determination that section 232(b) of the Trade Expansion Act of 1962 empowers the President in certain cases to use a system of license fees to control or to adjust the imports of oil and other commodities into this country.

The reasoning of the majority of the panel was that section 232(b) is a delegation by Congress to the President of the power only to impose quotas but not to impose license fees. Hence, the court upheld the contention of the respondents that the fees at issue here are without warrant in law.

Before coming to the merits of that discussion, I will address briefly, as requested by the Court, the question of whether these suits are barred by the Anti-Injunction Act. Neither we nor the respondents believe that they are so far.

Our position is simply that the Anti-Injunction Act

applies only with respect to taxes imposed by the Internal Revenue Code of 1954 and the Internal Revenue Code of 1939, and we think that both the text of the legislative history support that view.

QUESTION: Has that defense been raised wnywhere along the line?

MR. BORK: It was discussed below, Mr. Justice Blackmun, but it was --

QUESTION: Certainly here there is no disagreement about it that I --

MR. BORK: There is no disagreement about it, but we were requested to discuss it by the Court.

The Anti-Injunction Act is in the 1954 Code and it is contained in Chapter 76 of Subtitle F, which -- section 7851 of that Code, which is quoted at page 20, Footnote 13 of our brief, our main brief, provides that Subtitle F, which includes the Anti-Injunction Act, applies to any tax imposed by this title, and of course the fees at issue here are not imposed by that title. Then it says, Subtitle F, does not apply to taxes imposed under the 1939 Code, except as Subsections B and C provide, and Subsection C provides in fact that Chapter 76 of Subtitle F applies to the '39 Code, and that carries with it the Anti-Injunction Act.

So I think the clear implication is that the Anti-Injunction Act applies outside the '54 Code only when

specifically made applicable, and it is specifically made applicable only to the 1939 Code, hence we think it is not applicable to the fees here which, whatever else they are, certainly are not taxes imposed by the 1954 Code or the 1939 Code.

The respondents have made additional arguments in this direction in their brief and we accept one of them and we prefer not to accept the other. Their first argument is that these fees are not taxes and hence do not fall under the Anti-Injunction Act. That argument is in some tension with their argument later on in the brief that they are taxes and cannot be delegated, but in any event we agree that they are not taxes and don't fall under the Anti-Injunction Act, for that reason.

The other argument is that the Anti-Injunction Act would not apply to petitioner review FEA regulations in the Court of Appeals, because the Court of Appeals jurisdiction for the purpose is given by the FEA Act. However, the repeal of a statute and a policy so basic as that expressed in the Anti-Injunction Act I think ought to be expressed, and there is certainly no intimation of a desire to repeal the Anti-Injunction Act in the FEA Act, so I think that argument is incorrect. But the other two I think are correct and support the notion that there is no application of the Anti-Injunction Act here.

With that, I would like to turn to the merits, if I

may, and discuss directly the President's power under section 232(b) to impose license fees for the importation of foreign oil. And perhaps I should say a word about why the President shifted from the imposition of quotas to the use of license fees.

Quotas had been used for some time in this field and had been found rather unsatisfactory. For one thing, they are quite rigid. They specify particular amounts. And as demand changes, domestic demand changes, they provide much too much protection for the domestic industry or much too little protection for domestic industry, and it becomes an administrative nightmare constantly adjusting the size of the quota, whereas a fee sets the margin of encouragement you wish to give to the domestic industry, in this case for national security purposes, and as domestic demand changes imports increase or decrease, but the margin remains there and you are given the amount of protection you desire.

Well, section 232(b) states that the Secretary of the Treasury must advise the President when he so finds that an article is being imported in such quantities or under such circumstances as to threaten to impair the national security, and the President, unless he disagrees, shall take such action and for such time as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security.

Here the finding was made by the Secretary of State concerning oil and petroleum products. I should state in passing, perhaps, that this section of the statute has never been used in its history for any commodity other than oil. Here the Secretary of the Treasury made that finding, the President agreed and he placed license fees on the importation of oil to lessen the amounts which were imported.

Now, I take it that the respondents do not challenge the finding that there was a threat to national security and, indeed, the language of the Court of Appeals suggests that they agree that there was. So all we are talking about is the language of the statute.

Now, I read it. The respondents in the Court of Appeals read it as if it said "the President shall take such action as he deems necessary to adjust imports, provided that the only action he shall deem necessary is quotas." That is not what the statute says. If it were a quota statute only, it would be quite easy to write it that way, many delegations of power in this field are written as quotas. This is deliberately given very broad application, "such action as he deems necessary."

So the plain text of this statute supports the President's power to use license fees, they are certainly without doubt a means of adjusting imports, they have been used in the history of this Republic since the beginning, monetary exaction has been used from the beginning as a means of

adjusting imports.

Now, when we turn to the legislative history, we find that it bears out that plain meaning of the statute rather clearly, and I think no other conclusion is really possible.

This national security provision appeared in its present form in the Trade Agreements Extension Act of 1955. The Senate Committee on Finance had before it a number of proposals to control imports of various kinds of products. Oil was certainly by no means the only kind of product that was considered. There was zinc and lead and fluorspar and so forth.

Now, one of these amendments that was before them was by Senator Neely, which provided for a quota system on oils in section 1 and provided for a general power to take such action with respect to any products as he thought necessary in section 2. This was replaced, the Neely amendment was replaced by what we have here, which was then the Byrd-Millin amendment. Now, that was a compromise of all of these various proposals, some of them giving broad power, some of them requiring quotas, some of them applying different products by name. And the Byrd-Millikin amendment was quite broad in this sense, and it simply says that when there is a finding by the Director of the Office of Defense Mobilization about effective imports on national security being threatening, the President is given powers to take such action as is deemed necessary. So as to all products,

they adopted the second section of the Neely amendment as a compromise in this Byrd-Milliken amendment, or adopted the same form of approach.

Now, the significance of that is, when you realize that the Byrd-Milliken amendment in this respect is identical to the approach of the Neely amendment, is that Senator Martin, who was a cosponsor of Neely, said that during the hearings that Neely gave the President the power to take such action as is necessary, and that that included the power to impose import quotas or to increase duties.

Now, by a common euclidean proposition, if the Neely amendment gave that power and the Byrd-Milliken amendment is the same as the Milliken amendment, then the Byrd-Milliken amendment, which we have before us now in the form of 232(b), gives that power to use monetary exactions. But there is more evidence.

In the floor debate, Senator Milliken stated that his amendment gave the President the power not only to use quotas but also to use tariffs and import taxes. Senator Barkley, who was a member of the Finance Committee, said the power is to use quotas or to take such other steps as the President deemed desirable. He clearly thought there was something other than quotas that could be used.

Senator Bennett said the power included tariffs, quotas and stockpiling. Senator Byrd, in a colloquy with

Senator Saltonstall, which the Court of Appeals misinterpreted, said the amendment "puts other commodities on the same basis as agricultural commodities" were already on. Now, Senator Byrd had just been discussing with Senator Thye the President's power under the Agricultural Adjustment Act he uses duties as well as quotas to affect the size of imports.

Now, the respondents reply in their brief, as I understand it, that in the discussion of the Agricultural Adjustment Act, Senator Byrd referred to the use of quotas. Now, I don't know what to make of that, because the Act does provide for the use of duties, use of monetary exactions, unless the respondents are suggesting that Senator Byrd didn't understand the Agricultural Adjustment Act and therefore his misunderstanding of that Act must be carried over into the legislative history of this Act. But there is really no basis in the floor debate to say that Senator Byrd displayed a misunderstanding of the Agricultural Adjustment Act. It is an odd thing to attribute to him.

QUESTION: The Agricultural Adjustment Act, as I understand it, is explicit in authorizing duties, is it not?

MR. BORK: That is quite correct.

QUESTION: Unlike this statute.

MR. BORK: Unlike this, that's right. That is why I think it is interesting that he was saying we now put these on the same basis as agricultural products.

QUESTION: As I understood your argument, this Act is much broader, that is the powers of the President are much broader, that he may do anything he deems necessary.

MR. BORK: I don't mean to claim that he may do anything he may deem necessary. I think the meaning --

QUESTION: The legislative history uses some such language, does it not?

MR. BORK: Well, steps he deems necessary, but I think, Mr. Chief Justice, that we are talking about an area in which he may deem things necessary. After all, this is in Title 19, about customs and so forth. Now, the respondents here have suggested that he can close filling stations or he can declare, if you read it literally, he can declare dal ight saving time to be year-round, or that he can repeal Internal Revenue acts that apply to oil producers in this country, and so forth. I think all of that is -- well, I understand the motivation for that kind of liberal reading, but it just doesn't square with the legislative history or with the purpose of this statute or its placement in Title 19. I think we are effectively talking about the use of monetary exactions or quotas.

QUESTION: But can you suggest any statutes giving Executive power that are in any broader language than this, to take such action as he deems necessary, and do we have other statutes that are broader than that?

MR. BORK: Well, there is broader authority in

general under the Trading With the Enemy Act, which is discussed at page 51 of our opening brief.

QUESTION: That would come under the -- generally under the emergency type of statute and --

MR. BORK: Well, during time of war or declared national emergency, which he can declare, I suppose, to exercise plenary control over property, et cetera. That is almost without standards, whereas I think this statute does have standards, it does have criteria.

QUESTION: That is to adjust the imports?

MR. BORK: Well, yes, Mr. Justice Stewart, but in subsection (c) there are a list of topics that the President should consider in making the decision.

QUESTION: Yes.

MR. BORK: The Trading With the Enemy Act, as I understand it, does not have that kind of guidance for the President and in that sense it is a less confined delegation of power.

QUESTION: Solicitor, to oversimplify, you say that it is restricted to tariffs and these quotas, Congress could easily have said that.

MR. BORK: Oh, the Congress --

QUESTION: The Congress preferred to use that broad language, now what do we do with that?

MR. BORK: Well, I suggest, Mr. Justice Marshall, of course they did mention the possibility of stockpiling, and

there may be other restrictive actions. I didn't -- you see, the statute says, for example, when goods are imported in such amounts or under such circumstances.

QUESTION: Yes.

MR. BORK: Now, I suppose if it wasn't a question of amounts but a question of the circumstances, perhaps dumping is occurring of foreign products in one part of the country, and perhaps the President could use an anti-discrimination measure against the -- if national security was affected --

QUESTION: I thought you just limited it to abroad?

MR. BORK: I didn't mean to do that, Mr. Justice Marshall. I meant to say that I think it is limited to things the President does, acting on imports, rather than some domestic action he might take, like repealing the income tax laws, which would affect the level of imports, obviously, but I think is an extravagant and amusing suggestion. No, I didn't mean to say that only tariffs and quotas, I think there are a range of other restrictions that they were allowing him, as long as they react on imports.

Now, we have discussed in our brief the -- Congressman Cooper discussed this in the House, nothing to the contrary was said in the debates. The respondents keep stressing the fact that they can find a man who, when talking about this, only used the word "quota." They never find anybody who says it is restricted to quotas, it is limited to quotas, there is no

power to impose duties, they just found a man that used the word "quota." We have a number of examples in which it is perfectly clear that people are talking about monetary exactions as well as quotas.

Now, in 1958, the Office of Defense Mobilization submitted a report to a subcommittee of the House Ways and Means Committee, which committee is in charge of this matter, and that report explicitly stated that the legislative history of this provision indicated the President was authorized to impose new or increased tariff duties or quotas. And after that report was submitted, this very provision was reenacted in the Trade Act of that year.

Now, it was again reenacted as section 232(b) this time of the Trade Expansion Act of 1962, where it is currently located. In 1970, the House voted to amend that statute to take away the President's power to impose duties, fees or charges, and that amendment was deleted on the floor of the Senate and was not enacted. And finally, I think to cap it, in 1973, the President used the fee power on oil that this unsuccessful 1970 amendment would have denied him. And after the exertion of that power under section 232(b), Congress went ahead and reenacted it in the Trade Act of 1974, so it is -- I find it almost incredible to think that Congress did not know that it was enacting a power which on its face gave the power to impose license fees and which they had been told involved

tariffs or duties or fees, which the President had exercised before they reenacted it. I think there could hardly be a clearer demonstration.

Now, the Court of Appeals suggested that this statute should not be read broadly because, although it was written broadly, that was all right because other statutes were written narrowly. I think that is a very odd mode of statutory construction, to say that a broad statute must be narrowed because there are narrow statutes all around it. I think the comparison indicates that when they wrote a broad statute, they meant to write a broad statute.

In any case, as I have just pointed out to you, Mr. Chief Justice, there are other statutes that are broad. Trading With the Enemy Act is broader.

Now, at the end I want to come to two of respondents' arguments. I think they attempt to raise two arguments of constitutional dimension which do not -- first of which they suggest should affect the way in which we read the statute. They don't suggest the statute is unconstitutional, but they suggest we alter its meaning in order to avoid deciding whether it is unconstitutional, and I think there are fatal defects in that suggestion.

The suggestion is that this is an unconstitutional delegation to the President of congressional power and, in order to avoid that, we read it the way they want to read it.

The odd thing about that is that if it were too broad a delegation of legislative power, it is difficult to see why respondents think that quotas remain valid, although fees don't. But they attempt to salvage that point by saying that quotas are laid under the commerce power, while these license fees are laid under the taxing power, and that for reasons which are not disclosed and are certainly not obvious, the tax delegation doctrine is much more stringent when applied to a delegation of the taxing power. I don't think this is, by the way, a delegation by the taxing power. I think this is the commerce power, and it is common to use monetary exactions as modes of regulations under the commerce power. It is not necessary -- this isn't related to the taxing power.

Now, as I mentioned before, of course, when they are arguing --

QUESTION: Mr. Solicitor General, what authority does Congress rely on to levy an ordinary tariff? Is it the power to tax or the power of -- the commerce power?

MR. BORK: The ordinary tariff, I believe, Mr. Justice Rehnquist, is the power to tax, but they have used what could be in common parlance called taxes under the commerce power, to regulate in the past.

In any event, when arguing, as I said, under the --

QUESTION: Mr. Solicitor General, give me an example or two or that. I just don't have any in mind.

MR. BORK: Well, I confess that I -- there is a case in the thirties -- it may be Butler, I am not sure, I would have to find that --

QUESTION: But that it to spending power, I guess.

MR. BORK: Well, we have some in the brief but, I am sorry to say --

QUESTION: The use of monetary exactions to regulate commerce?

MR. BORK: Yes, yes. I wish it hadn't slipped my mind because it is a commerce case in the twenties or thirties, I will try to think of it as I go along --

QUESTION: We would find that helpful.

MR. BORK: -- in which that point was addressed, and the Court said there is no reason you can't use monetary exactions under the commerce power.

Here respondents are saying that although this thing is not a tax under the Anti-Injunction Act, it is a tax when we get to delegation doctrine, they have a concept of tax which is kind of accordian-like, and it collapses and unfolds according to the current needs of the analysis.

I don't think it is a tax, but I don't think it matters. Worse than that, I think respondents' argument is inconsistent in terms of constitutional policy. To look at their brief, on page 34, Note 44, they give us the reason why delegation doctrine applies more stringently when taxes are involved,

and the reason turns out to be Chief Justice Marshall's statement that the power to tax involves the power to destroy, and therefore we have to control this thing much more carefully.

But then it is too bad they put it that way, because on page 26, Note 30, they are arguing a different point, and there they say that 232(b), this very statute, although it gives no power to tax, which is too dangerous for the President to have, it does give them the power to place a complete embargo and destroy the commerce.

Now, they say the power to destroy does not imply the power to tax. Now, so far as I can make out, the argument runs something like this: The President cannot have power to tax because it involves the power to destroy, but he already has the power to destroy, and that is why he can't have the power to tax. Now, the dominant characteristic of that position I think is kind of incoherence.

There is really no reason rooted in constitutional policy why delegation doctrine should be applied more stringently to an import fee than to the power to embargo or set a quota, and I suppose that is the reason that this Court held in Hampton v. United States that, and held unanimously, that there is no distinction. It was their argument that the delegation to the President to raise import duty was unconstitutional, although other kinds of delegation would not be. And Mr. Chief Justice Taft and a unanimous Court said there was no

distinction between delegations under the commerce power and those under the power to levy taxes and fix custom duties.

In the second place, as I have mentioned, these things are laid under the commerce power and not the power to tax.

And finally I would suggest that there is no delegation doctrine issue in this case, and the suggestion that we avoid problems of delegation doctrine by reading a statute contrary to its intent and its language is therefore a device that we need not resort to.

The delegation doctrine cases which struck down statutes, the Panama Refining case and the Schecter Poultry case, even if we assume that they have not been undercut, and certainly a case like Southwestern Cable case suggest that they have been shrunken at least in some dimension, but even if we assume they have not been undercut and still stand as perfectly good law, they are not applicable here. One can just compare the statutes.

In Panama Refining, section 9(c) of the National Industrial Recovery Act gave the President completely unguided discretion whether or not to make criminal the interstate shipment of hot oil. Unlike the statute before us now, Congress provided no criteria whatever for whether or not he should make it criminal, required no findings as a predicate to his action, and declared no policy. The President was not only

unfettered, he was completely unguided.

Now, in Schecter Poultry, section 3 of the National Industrial Recovery Act authorized the President to impose codes of fair competition on industries. But when you look at the statute, the power was to regulate industry in all ways altogether, it had nothing to do with competition or fair competition. There was no policy guidance and, in fact, all that Congress had done was hand to the President his commerce power and left him to legislate at will.

Nothing of that sort has happened here, not remotely. The Congress here provides criteria for the President, it provides criteria which are as definite as the subject matter itself. The facts, as I say, are listed in 232(c), and here, unlike those cases, the Secretary of the Treasury is required to make a study and a finding prior to the President's decision.

Now, I have discussed already the fact that the respondents try to make this case sound like Schecter by talking about the various things the President might do, and I think I have adequately suggested why the legislative history and the placement of this statute confine it so that it is not anything like Schecter.

I have not time to discuss their final constitutional argument, which is the uniformity requirement as to duties. You will find substantive arguments as to that are included in

our brief. I would suggest here only that the issue is really not properly before the Court because it is not an alternative means, an alternative ground for sustaining the judgment below. The judgment below really requires the District Court to hold that no fees at all may be exacted. This theory would support a judgment which eliminated the exemptions from the fees which introduced the uniformity, but we could exact fees. So a different judgment would be required, and for that reason I think that argument is not properly before the Court at this time.

In short, what we have here is an energy crisis that endangers the national security, we have an energy crisis which Congress foresaw and provided for quite deliberately and repeatedly delegated to the President the power to cope with this threat by a limited means. The President responded, and I suggest neither the Court of Appeals' reasoning nor the arguments of the respondents here will stand analysis nor provide any reason to take this delegated power away from the President, and we ask that the judgment below be reversed.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Mr. Attorney General.

ORAL ARGUMENT OF FRANCIS X. BELLOTTI, ESQ.,

ON BEHALF OF RESPONDENTS

MR. BELLOTTI: Mr. Chief Justice and may it please the Court:

In accordance with the Court's instructions, we have briefed the Anti-Injunction Act, and in order to prevent overlapping of our arguments we have separated. Our plan was that I would take ten minutes -- I am not sure that we are going to need that much time now, Mr. Chief Justice -- to argue the Anti-Injunction Act, and Mr. Dondis would address himself to arguing that the President and the Federal Energy Administrator lacked the authority to impose the license fees on imported petroleum.

QUESTION: Mr. Attorney General, why are we so concerned about the Anti-Injunction Act here?

MR. BELLOTTI: I do not know, Your Honor, except that we were asked to brief it and argue it, and on the basis of the request of this Court we have done that and I have come down here to argue it, and I am not at all sure that that is an essential argument at this point.

QUESTION: The Solicitor General at least agrees with you and says there is no debate on that any longer.

MR. BELLOTTI: There is no debate, Mr. Chief Justice--

QUESTION: It was the Court who asked the parties to argue --

MR. BELLOTTI: Yes, Your Honor, and the parties cannot confer jurisdictions upon this Court, and I am not at all sure --

QUESTION: You are the wrong person to whom my Brother

Blackmun should direct that question, aren't you?

QUESTION: The answer is that some of the members of the Court were concerned about it and wanted to hear it and it is now being heard.

MR. BELLOTTI: I will do whatever pleases the Court, Mr. Chief Justice. I will either sit down or argue the Anti-Injunction Act.

[Laughter]

QUESTION: I know exactly how you feel. I know exactly how you feel.

QUESTION: You may make your own election and if there are any questions, it will prolong your argument on this subject.

MR. BELLOTTI: Thank you, Mr. Chief Justice. I will just take a few minutes.

I think very simply the license fees imposed here are not a tax. They are some sort of a hybrid, and I might add that we at no point claim they are tax, even Mr. Dondis' argument. We may claim they are something in the nature of a hybrid, in the nature of an attempt to exercise a tariff power which resides with Congress.

It would be anomalous to --

QUESTION: So if there were any difference with respect to the rules about delegation with respect to taxes, those rules wouldn't apply here because this just isn't a tax?

MR. BELLOTTI: This is not a tax. We never contend that it is a tax, Mr. Justice, at any point in our argument.

To attempt to apply the Anti-Injunction Act to -- which is part of the Internal Revenue Code, Title 26 -- to the trade laws of these United States, would be anomalous. The very purpose, and I suppose very simple purpose of the Anti-Injunction Act is to make sure that we have a guarantee of revenue to run our government. That is totally outside the intent of this Act with which we are dealing in these license fees, which are regulatory in nature.

QUESTION: General Bellotti, what if an action were brought to enjoin the enforcement of tariffs enacted by Congress, would that be subject to the Anti-Injunction Act?

MR. BELLOTTI: I would say that it would not, Mr. Justice Rehnquist.

QUESTION: Even though levied under -- even though Congress was exercising its taxing power?

MR. BELLOTTI: The Anti-Injunction Act applies, in my judgment, very simply to taxes imposed under the Internal Revenue Code, Title 26, and no others.

Congress was not directly involved in the imposition of these fees. It was not for the purpose of raising revenue, in spite of the fact that it raised probably the most massive amounts of revenues, more than any other tariff power in the United States. In 1974, the year before this, all of the

commodities that were entered into this country amounted to $4.3 billion. If this program, this license fee program had reached its ultimate conclusion, it would have anticipated $4.8 billion. However, the Court has said that -- has defined a tax as that which is in a condition to be collected as a tax and claimed by the proper official to be a tax. The license fee scheme falls on both of these counts. It is not collected by an Internal Revenue officer under the color of his office, it is not deposited in the general funds of the Treasury, it is collected by the Federal Energy Administrator and deposited in a suspence account and may, without appropriation be used for refunds and payments incident to the implementation of the licnese fee program.

I am not sure, Mr. Chief Justice and Justices, how much longer we want to go into any formal presentation of the Anti-Injunction Act. I think, very simply, it does not apply to taxes outside the Internal Revenue Code and obviously the very purpose of the Act, to perpetuate and to make sure the security of revenue does not apply at all here.

MR. CHIEF JUSTICE BURGER: If we don't have any questions, Mr. Attorney General, you may either argue the other points or you may delegate and assign that time to your colleague.

MR. BELLOTTI: In the interests, Mr. Chief Justice, of having no overlapping arguments, I will give my time to Mr.

Dondis.

MR. CHIEF JUSTICE BURGER: Mr. Dondis.

ORAL ARGUMENT OF HAROLD B. DONDIS, ESQ.,

ON BEHALF OF RESPONDENTS

MR. DONDIS: Thank you, Your Honor. May it please the Court:

The license fee now before the Court involves the broadest exercise of the tariff power in the history of the American Republic. In fact, we would have to go back to George III's stamp tax to determine as broad an executive power as is claimed in this case.

The statute is a simple one. It does not mention the tariff on its face. It states that the President can take such action and for such time as he deems necessary to adjust the imports of an article, and so forth, so that it won't threaten to impair the national security. I will get back to the exact wording and the exact meaning of that statute. But I would like to emphasize our position that the Court should give this a very narrow and careful construction because in effect the statute under the interpretation of the government undermines the whole tariff structure of the United States.

QUESTION: What do you say was the objective of Congress in this particular section, Mr. Dondis?

MR. DONDIS: It was to put on a quota, Your Honor. It was written in the background of complete discussion of the

quota problem. It was put in essentially for the oil companies who were worried about competition abroad.

QUESTION: Well, to adjust and regulate imports, isn't that the objective?

MR. DONDIS: Yes, but I will explain just what it adjusts, but I don't want to just plunge into that problem. I would like to give you a little bit of a background. I certainly want to answer your questions directly. I would like to -- I will say though that the first measures under this statute was a voluntary quota program. The Senate and Congress as a whole overwhelmingly discussed it as a quota program, and it was designed to protect the oil companies substantially because they had a great many imports which were threatening prices in America. However, it was extended to allarticles.

Now, I think you should understand that since the statute does not mention tax at all, that once it is construed to include a tax, there is no limit on it, and that is --

QUESTION: Is that your position, that this is a tax?

MR. DONDIS: This is a license fee, Your Honor, which has a reach that reaches farther, much broader than tax, and I will explain why it does.

QUESTION: But it isn't a tax, though?

MR. DONDIS: I have to accept the nomenclature of the government that it is a license tax, but it has all the instance of a tariff and something more.

QUESTION: Well, then, I have to change my notes here. I have the Attorney General as saying it was not a tax.

MR. DONDIS: It is --

QUESTION: Do I have to change my notes?

MR. DONDIS: Yes. I will explain what it is. It is a very minor point, but let me try to explain it now.

QUESTION: If it is a tax, you may find yourself under the Anti-Injunction Act, and that is --

MR. DONDIS: No, I don't think you would, Your Honor, because I don't like to argue that question but there is a clear right of appeal under the Federal Energy Act, in any event. I don't have that problem.

The reason why I think I had better answer that question -- the reason why it really has a sweep far broader than a tax is that the monies are paid in a fund. They are all monies exacted on imports, so in that sense it is certainly a tariff and hence all the incidence and the economic effect of a tariff. But the monies are paid into a fund and the government allows exemptions based upon various parts of the country, so that certain parts of the country, because of these exemptions, don't pay as high a license fee as others. The result is that the imposition is not uniform and it is in violation of the uniformity clause of the Constitution.

Now, I believe -- and I can only speculate -- that the government set this up as a license fee system in order to avoid

that problem.

QUESTION: Mr. Dondis, did you make this argument in the lower court?

MR. DONDIS: Yes.

QUESTION: And the Court of Appeals did not pass on this, did they?

MR. DONDIS: No, I don't think they finally characterized it. I think they accepted it --

QUESTION: What is your response to the Solicitor General's argument that we may not consider it because it would not sustain the judgment before us?

MR. DONDIS: On the uniformity provisions?

QUESTION: Yes.

MR. DONDIS: Oh, well, I simply say that the government has chosen the form of the system, and I am personally convinced that it was chosen to get around the Uniformity Act. Now, we couldn't appeal from the tariff because that is what the government didn't have. It had what they call a license fee system which is very comparable to that which was invalidated by this Court in the CATV and NEPCO cases. All I can say is we can only appeal from what they give us.

QUESTION: I may not understand your argument. Is your non-uniformity argument one that is intended to demonstrate that it is not a tariff because it is not uniform --

MR. DONDIS: No, no.

QUESTION: -- or is it one that is intended to demonstrate that the relief should be to eliminate the lack of uniformity?

MR. DONDIS: No, it is one to demonstrate that this statute should be very carefully and narrowly construed, and if there is a constitutional question, then the tariff should be construed --

QUESTION: Well, there is no constitutional question of --

MR. DONDIS: -- is not to allow a license tax system at all.

QUESTION: There is no constitutional question derived from the non-uniformity point unless we decide it is a tariff.

MR. DONDIS: Well, I would think it would apply in the case of a license fee system.

QUESTION: What in the Constitution requires a license fee system to be uniform?

MR. DONDIS: Because if a license fee has all the effects of a tariff, Your Honor, I think it would have to be uniform.

QUESTION: Well, for example, could the President say we will have no imports at all through the West Coast, say, or the East Coast, one or the other, just close up certain ports to the import of oil, could that be done?

MR. DONDIS: I think he could do that subject to the

restrictions of the due process clause. Now, obviously he would kill a lot of people if he did that. I think the due process clause takes over at some point.

QUESTION: Do you make the due process argument here?

MR. DONDIS: No, we are not raising the constitutional question.

QUESTION: I am trying to understand the thrust of your non-uniformity argument, and I really don't have it yet.

MR. DONDIS: Well, I can only say we are bringing before the Court a question of the interpretation of the statute and we say the statute must be interpreted narrowly.

QUESTION: Must it be interpreted to require uniform treatment of all parts of the country if there were, for example, quotas --

MR. DONDIS: Yes, in the program it only provides the uniform treatment, and this is not what the government has done. I don't think the government should profit on what it has done.

QUESTION: So if they have quotas administered by different ports of the country, they would have to be uniform at every port, you say?

MR. DONDIS: Yes, I think they could do that. They haven't set up such a system. But one aspect of the program is that it has an unlimited tax, there is no limit in the statute itself, and as a result it has become the highest tariff in history and the tariff on oil is many times the very high

tariff wall established by the Smoot-Hawley Act.

Now, another aspect of it is that the government used this statute to abolish a tariff, and this was invalidated by the Court of Appeals. So the government apparently claims that it includes the right to abolish a tariff and, mind you, this applies to the entire all articles that can come into the United States. The government apparently asserts that power, provided it makes a finding in the national security.

QUESTION: Well, that makes quite a difference, does it not?

MR. DONDIS: Pardon?

QUESTION: That makes some difference then?

MR. DONDIS: Yes, but how much difference, Your Honor? The government claimed below -- and it is very hard to dispute -- that the national security is not something that can be reviewed in this Court. The government claimed below that it had to provide no hearings on the question and, as a matter of fact, in those days of total war, it is doubtful that there are any commodities that would not be within this clause. But if you look under the Trading With the Enemy Act, for example, in the commerce, they have a list of commodities. They have almost every conceivable commodity affecting the public interest.

QUESTION: What hurt your client the most, an embargo or this license fee?

MR. DONDIS: The license fee is a devastating -- we

never objected to the quota. A license fee --

QUESTION: How about an embargo?

MR. DONDIS: Well, I am not sure of the embargo could be put on. That would be a real due process question. We wouldn't have the lights, it would --

QUESTION: Well, it may be, but what about under the statute, would the President have the power to do it?

MR. DONDIS: The President have the power of quota and it is a very large power, no question. But the reason why I --

QUESTION: I just wonder if you want a narrow construction, whether you ought to construe it narrowly to exclude quotas --

MR. DONDIS: No.

QUESTION: -- or narrowly to exclude license fees?

MR. DONDIS: There is no way, because the word "restrict" clearly implies quotas, and because the statutory history again and again refers to quotas. There is no doubt that this was enacted under a background of quotas, no doubt. But I suggest that one perconic power does not imply another. And I also suggest to Your Honors that you have never implied a tax, never in the history of this Court from language which does not explicitly provide for tax, and here there is no such language, there is no language that mentions a measure of tax nor a method of calculation of tax. There is no such thing.

QUESTION: But efore we can combat that argument, we have to find that this is actually a tax?

MR. DONDIS: What's that?

QUESTION: Before we can buy that argument, we have to agree with you that it is a tax?

MR. DONDIS: No, I don't think so. I think the two of them, whether it a license fee or a tariff, they are equally lethal.

QUESTION: Well, if we find that this is not a tax, what good is your present argument?

MR. DONDIS: I think it is inviolative of the tariff clause and it is not within the power granted to Congress.

QUESTION: Do you say the Congress couldn't have done this?

MR. DONDIS: I'm sorry, the power granted by Congress. I would like to point out that if the President has this power, he does not have to use the elaborate mechanism of Title 19 of the U.S. Code, which involves the -- which involves all the technical requirements of tariffs, and it very importantly involves the recommendation of the International Trade Commission, which is a basic body for governing tariffs.

In other words, if you take all the powers taken together under this statute as claimed by the government, that is, on a limited tariff, and add the power to abolish a tariff on almost any article there is in foreign commerce, in our view,

as a national security provision, complete circumvention of the tariff power, then I suggest to you that the President, if the government is right here, has the whole tariff power, lock, stock and barrel, and Congress has given it up completely. And I suggest further that 1862(b) will eventually swallow the entire tariff structure. I admit that it will happen slowly. Here it has been applied only to oil. But I think tomorrow --

QUESTION: You agree, I suppose, that this is just a question of statutory --

MR. DONDIS: Yes, I di.

QUESTION: -- and whichever way we decided it, if we happen to decide in a way that Congress doesn't approve, they can pretty quickly change the situation.

MR. DONDIS: I don't think they can, Your Honor. They can't --

QUESTION: Well, do you mean -- they have the power, do you think, as a matter of politics, they could not, is that it?

MR. DONDIS: Yes, they tried to put on a moratorium on this enormous fee for five months and they couldn't override a veto. I don't think -- for one thing, the very existence of the tariff creates vested interests throughout the country. This immediately -- for example, this tariff hurt the East very greatly. It probably created vested interests in the

Midwest immediately, and those Senators would naturally be very loathe to override a veto. So I think once Congress gives up the power, I doubt that it can get it back so easily, unless it makes some mammouth kind of deal with the President. But it certainly was unable to get this back, even though a majority of Congress and the House disapproved of it. This is why I am saying, Your Honor, that this Court has never presumed a tax to a case when it is not mentioned in a statute, and this would be a precedent if it does so, and I would --

QUESTION: Perhaps the answers are in the papers and I just -- if you win, where does the money go, what happens to the $4 billion?

MR. DONDIS: I think it would have to be refunded.

QUESTION: To whom?

MR. DONDIS: To those who paid it. We had a problem of that in the Circuit Court. The government wanted to refund a very large share of it to the oil companies, and we made a motion opposing that in the Circuit Court, and the government changed its mind. The government does claim a right to rebate this, which is another example of their vast powers that they have.

QUESTION: May I come back to your discussion of what might happen in Congress? If the Congress had expressly authorized the imposition of these fees, are you arguing that it would be unconstitutional?

MR. DONDIS: I don't ask the Court quite to get to that problem. I realize there is the Schechter problem. There are no standards in this Act, no really workable standards in the Act for the term "national security." If you look under 1862(c) --

QUESTION: But before we get to standards, I am interested in the power of Congress and what you think Congress has intended here. How do you interpret the failure of Congress in 1974, when this language was reenacted, just a year after the President had imposed fees --

MR. DONDIS: That is quite easy.

QUESTION: -- on your argument?

MR. DONDIS: That is quite easy. There are two reasons: First, the government abolished the tariff and it also had put exemptions on the fees, so the tariff wasn't even being felt by that time. The Circuit Court mentioned that. Also, Congress in '74 mentioned specifically that it hadn't gotten to the problem of the oil tariff.

What is more important, Your Honor, is the 1962 statute. Look at that. That specifically gave the government the power which the government now claims today. It specifically gave a tariff and for security reasons, and that was rejected in 1962, and Senator Byrd gave a very complete analysis of that of the reasons why it was rejected. That is a far more important indication, because during the sixties,

and in '58, the protectionists tried to add the tariff power to this section and were unable to, and only in 1970, when, for the first time after fifteen years, the President's Task Force reported that perhaps a tariff could be put on, did Congress start to attempt legislation the other way. It abandoned '70 legislation because President Nixon promised not to put one on. It was not until '73 that he put a mild one on, and the bite of it, as the Circuit Court said, the bite of it was not felt and was not dealt with in '73.

QUESTION: The bite may not have been felt, but do you draw any distinction in principle between the fees imposed in '73 and those imposed in '75?

MR. DONDIS: They were very, very minor

QUESTION: Right, but in principle is there a distinction?

MR. DONDIS: In principle, they are the same, but I would, for example, point to my own experience. We were readying a suit to question that, but we were doing it very leisurely. It was not a great threat and I think many members -- Representative Vanik indicated he didn't even know it was on during one of the hearings.

QUESTION: You are saying that you don't think the Congress was aware that these 1973 fees were in effect?

MR. DONDIS: I think they were generally aware and not greatly concerned about the whole problem. It had had no

bite whatsoever by that time, the Circuit Court so found.

QUESTION: Do you think the Congress was unaware that the President lacked the -- that the President were to set the power perhaps to increase the amount of the fees?

MR. DONDIS: Well, it happened very suddenly, in early 1974, when Congress was very sharp-eyed.

QUESTION: In sum, you just think the Congress just didn't know what it was doing?

MR. DONDIS: I'm sorry, Your Honor, I didn't --

QUESTION: Well, the question isn't very helpful. You can forget it.

MR. DONDIS: I don't think Congress was aware of it.

I would like -- I don't have much time to answer all of the positions by the government -- I would like to address just a word to "such action as he deems necessary." I don't think that is utterly expansive power. The government takes a different position than the Solicitor General has taken here.

The term "such action as he deems necessary" is very common words in statutes, and they don't mean that they expand power, the basic power given in the statute. All they mean is that the President or the official can take such measures as he deems necessary in order to use the basic powers. For example, the Federal Power Act has a separate section which says the Commission shall have power to perform any and all

acts necessary or appropriate to carry out the provisions of this Act.

And in the NEPCO case, with Your Honors' unanimous decision, you validated the license, that general power was present, and the Circuit Court said that that did not expand the powers.

Now, the government takes the broadest possible -- let me see, I need the government's brief -- they take the broadest possible position. They say, "The President's range of choice with respect to the collective actions that he may take under the provision is subject to only one limitation. The President must deem the action to be necessary to accomplish the proscribed objective adjusting the imports of the article, to eliminate the threat to the national security. The statute does not otherwise limit in any way the nature of the action that the President may take."

Now, the Solicitor General seems to have backed down from that position, because obviously he must. For example, the President would not be allowed to use subsidies to adjust imports. He certainly couldn't put on a depletion allowance. Under this --

QUESTION: Do we have to decide any more here than whether he has exercised here, the power is valid?

MR. DONDIS: I think you have to decide -- well, what I am trying to say, Your Honor, is that this general clause

doesn't mean much, "such action as he deems necessary." The Solicitor General admits that that just cannot be true, otherwise the President could occupy Saudi Arabia for that purpose. And the important part of the statute is the word "adjust." And the statute says the President can take such action as he deems necessary to adjust the imports of an article. Now, that word "adjust" is a very specific word used throughout the Code, and I have looked high and low in the Code and I can find no reference, no use of the word "adjust" that means an indirect adjustment of the type that the government contends for. It usually means a kind of a manual, exact and precise change. As a matter of fact, the court below said it meant withdrawal of goods from the warehouse.

Now, the government has produced no statute which the term "adjust" refers to an indirect uncertain amount of change in imports, and I don't think that is what it means.

QUESTION: Well, isn't it change in imports, even though it is indirect, and nevertheless an adjustment in imports?

MR. DONDIS: I think it is a change, but I don't call it an adjustment because "adjust" is a verb and I think it implies something definite and certain. Now, for example, in this case, on the first tier, the first tier imports, the President didn't indicate whether they would change imports at all, and within a few months --

QUESTION: Well, do you take the position that the license fees will have an impact or no impact on the level of --

MR. DONDIS: A very uncertain impact. For example, in this situation --

QUESTION: Uncertain as to whether it has any impact at all or just uncertain as to amount?

MR. DONDIS: Yes, uncertain as to amount and even in some situations as to whether it has any impact at all. In this situation, it had no impact. The imports went up during the period of this fee.

QUESTION: Do you think the demand is relatively inelastic so far as being responsive to price?

MR. DONDIS: Absolutely inelastic. And, furthermore, the -- my time is up -- furthermore, the --

QUESTION: The demand for oil was absolutely inelastic, that is your position?

MR. DONDIS: In this situation, I think it is, Your Honor.

QUESTION: But that may not have been the purpose of the fee.

MR. DONDIS: No.

QUESTION: The purpose of the fee may have been to raise the price.

MR. DONDIS: That's right, it was to raise the

domestic price so that --

QUESTION: Yes?

MR. DONDIS: -- consumption of all oil in America would go down and incidentally the foreign consumption would go down.

QUESTION: Oh, I don't know. It may be that raising the domestic price of oil would encourage domestic production.

MR. DONDIS: But it is a most indirect method. This is not what I call an adjustment of imports. You can do the same thing by rationing gasoline in the U.S. or you could put a use tax on oil in the U.S.

QUESTION: But Congress didn't limit the President. It gave him power in broad language. He could have rationed gas, probably, but --

MR. DONDIS: Not under this statute, Your Honor, I don't think so.

QUESTION: He could have done several other things, but he elected to do this one.

MR. CHIEF JUSTICE BURER: Very well, your time is up.

MR. DONDIS: Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Solicitor General?

ORAL ARGUMENT OF ROBERT H. BORK, ESQ.,

ON BEHALF OF PETITIONERS -- REBUTTAL

MR. BORK: Just a few matters, Mr. Chief Justice. I

would like to point out in the first place that the tariff on oil is in effect in this case involves in no way the assertion of a power to remove any tariff. The tariff laws are not at stake in this case.

Secondly, in reply to a question from Mr. Justice Powell, we discussed the 1962 unsuccessful amendment to amend this law, which would have given the President explicit power to lay duties and impose quotas. The reason that was not passed is it was not like this statute. In the first place, it was not a national security statute. The President was empowered to do anything when the national interest was involved, a much broader statute and, furthermore, there were no criteria in the statute for when he should do any of these things. If there was a statute like Schechter, like the NIRA, in any sense, it was that statute and that was why it was rejected by the Congress.

QUESTION: Mr. Solicitor General, what -- you probably have said in your brief or in argument and I probably missed it -- what do you think was the basic purpose of these fees?

MR. BORK: The fees, Mr. Justice White, was to have a method of providing cutting down foreign importsa and developing American production, which would provide a known margin.

QUESTION: Twin purposes? Certainly, whatever impact it might have had to limit imports, that was part of the purpose, I take it?

MR. BORK: It was to limit imports and decrease American dependence for national security reasons on foreign oil.

QUESTION: And so they wanted to raise the price and encourage domestic production, among other things?

MR. BORK: That is correct, that is one of the purposes, to achieve something of enough independence so that, for national security purposes, the Nation wouldn't be absolutely dependent upon foreign oil.

But, Mr. Justice Stevens, I was asked about the question of whether whatever uses monetary exaction, regulation of the commerce power, we were not -- I was not sufficiently prepared for that, but apparently the answer is rather -- Board of Trustees of the University of Illinois v. United States, 289 U.S. 48, this case lays that doctrine that because the taxing power is a distinct power, it does not follow the dutins, may not be imposed in the exercise of the power to regulate commerce, the contrary is well established, Gibbens v. Ogden.

That is all I have, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 11:43 o'clock a.m., the above-entitled case was submitted.]

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