ORIGINAL

In the

Supreme Court of the United States

ZENITH RADIO CORPORATION,

Petitioner,

v.

UNITED STATES,

Respondent.

NO. 77-539

April 25, 1978

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IN THE SUPREME COURT OF THE UNITED STATES

ZENITH RADIO CORPORATION, Petitioner, v. UNITED STATES, Respondent.	No. 77-539

Washington, D. C.

Tuesday, April 25, 1978

The above-entitled matter came on for argument at 2:38 o'clock p.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:

FREDERICK L. IKENSON, ESQ., Stewart & Ikenson, 1001 Connecticut Avenue, N. W., Washington, D.C.; on behalf of the Petitioner

WADE H. McCREE, JR., ESQ., Solicitor General of the United States, Department of Justice, Washington, D. C.; on behalf of the Respondent

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Mr. Ikenson, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF FREDERICK L. IKENSON, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case presents the question of whether the forgiveness of a commodity tax on the exportation of certain consumer electronic products from Japan is a bounty or grant under our countervailing duty law. The petitioner is a domestic producer of such consumer electronic products as television sets, radios and the like.

In 1970, petitioner filed a complaint with the Treasury Department, claiming that Japan conferred a bounty or a grant upon the exportation of like products by reason of the remission of a commodity tax on exportation. In January of 1976, the Secretary of the Treasury made a determination that no bounty or grant was paid or bestowed on exportation.

Under a then recently enacted statute, the petitioner sought and obtained judicial review over the Secretary's negative determination in the United States Customs Court. From the pleadings filed by the parties in the court, it became clear that the central facts were not in dispute. Japan imposes a commodity tax on certain products when shipped from the

manufacturer's factory for domestic consumption, that is consumption in Japan; however, the same products when shipped for export from Japan are exempt from payment of the commodity tax.

Each of the parties moved for summary judgment, the petitioner arguing that, as a matter of law, the remission of the tax on exportation constituted a bounty or grant; the government arguing the contrary. A three-judge panel of the Customs Court agreed with the petitioner and awarded us summary judgment. On appeal, the Court of Customs and Patent Appeals reversed the 3-to-2 decision and in February of this year this Court granted certiorari.

We say, Your Honors, that the tax commission clearly is a bounty or grant on exportation and that offsetting duties called countervailing duties should be assessed on imported products from Japan which benefit from the tax remission.

The countervailing duty law as it now exists has remained essentially unchanged since the first general countervailing duty law was enacted as section 5 of the Tariff Act of 1897. Since that time, the law was reenacted five times, and it was twice construed by this Court in the Downs case and in the Nicholas case. Both decisions made clear that the statute's coverage is extremely broad and particularly with respect to the remission of tax on exportation, that that event is a bounty or grant.

In Downs, the first of the two countervailing duty

cases considered by this Court, the Court had before it a very complex Russian program which sought to control the production, price and exportation of sugar. The scheme was extremely complicated but it included two facts which this Court considered most important.

Fact number one, all sugar sold domestically was subject to an excise tax. Fact number two, all sugar exported from Russia was exported free of such tax. The Court proceeded to state that whenever a tax is imposed upon all sugar produced but is remitted on all sugar exported, then by whatever process or in whatever manner or under whatever name it is disguised, it is a bounty upon exportation.

Now, it is true, there was another aspect of the Russian plan which the Court considered. Exporters of sugar received certificates which were marketable and valuable. The Court discussed whether or not these certificates also constituted a bounty or grant, and the Court said that it did. But that does not detract from the Court's very forceful language that the principal and the key facts in the entire scheme were the two that I mentioned to Your Honors, that all sugar sold in the home market is taxed and that all sugar exported was sold free of tax.

This language of this Court declaring that the remission of tax under such circumstances is a bounty or grant requiring the imposition of countervailing duties is not or

was not unguarded language as the government would characterize it. That language is consistent with repeated statements of this Court, both in the Downs case and in cases subsequent to and prior to Downs. In the Nicholas case, the only other countervailing duty case, this Court cited as an example of a bounty or grant on exportation, the remission of a tax when that tax is levied on products sold in the home market.

In an earlier case, in Passavant, the Court expressed its recognition as to why governments remit taxes on exportation. The Court said doubtless to encourage exportation, to encourage the introduction of domestic goods into export markets, taxes are remitted on exportation. There was no mystery about the benefits of tax remission on exportation. The Court perceives the benefit and the Court deems such a benefit to be a countervailable bounty or grant.

Notwithstanding the teachings of this Court, which are quite clear, the Secretary of the Treasury has developed a practice under the countervailing duty law of excusing from countervail remissions of indirect tax. The practice unquestionably conflicts with decisions of this Court.

Now, as I said earlier, the Congress reenacted the statute five times since 1897 and it reenacted it several times after this Court's Downs decision and after this Court's Nicholas decision.

Of course, Congress reenacted the statute after the

administrative practice began to be put into place. A fundamental question arises. By reenactment of the statute after this Court's decision and after the administrative practice of the Secretary, what did Congress have in mind. Did Congress intend to ratify the practice or did Congress intend to ratify this Court's decisions. The question is so --

QUESTION: Or neither.

MR. IKENSON: That is always a possibility, Your Honor, except I think it is a rather well settled principle that when Congress reenacts a statute after a judicial interpretation of the statute becomes known to it, it is deemed to have ratified that interpretation.

QUESTION: Or is it possible that the problem was regarded as so delicate and difficult that they would rather have this Court decide it?

MR. IKENSON: I think not, Your Honor. I think clearly Congress --

QUESTION: Well, your point is that this Court did decide it in the Downs case, isn't that right?

MR. IKENSON: That's correct. Our point is this: Congress was aware of the Downs case and certainly by the time of the last reenactment, the Trade Act of 1974, it was aware of the Nicholas case, it was aware of the administrative practice. How did Congress respond in the Trade Act of 1974?

Firstly, it opened the courts to American

manufacturers by providing specially for judicial review over negative countervailing duty determinations by the Secretary. This enabled American manufacturers who were agrieved by the non-assessment of countervailing duties on imports which were benefited by tax remission on exports to come to the courts and to invoke this Court's teachings of Downs and Nicholas.

The Congress went further. The Congress -- the key committees of the Congress discussed the administrative practice in the legislative history of the Trade Act and said that we are neither approving nor disapproving of that practice. They then left the situation -- they rather invited resolution of the question by the courts by making judicial review available to American manufacturers by stating clearly that they were not expressing approval or disapproval of the administrative practice.

QUESTION: Mr. Ikenson, can I ask you a factual question about the Downs case? It is kind of a hard case to understand.

MR. IKENSON: Yes, Your Honor.

QUESTION: The Solicitor General says that the actual countervailing duty that was assessed there was measured by the value of the certificates rather than the certificates plus the questioned tax. Do you agree with that analysis, as a matter of fact? I know you would draw a different inference, but can we accept that as a correct interpretation?

MR. IKENSON: Well, I must preface my response to Your Honor by saying that the value of the grant in the Downs case was not before the Court. It was the understanding of the parties at the time and of the courts below that the amount of countervail was not judicially reviewable. The sole question was whether or not the entire Russian scheme constituted a conferral of a bounty or grant. So whether or not the actual amount of countervailing duty was correct was never put before the Court.

Now, to respond more directly to Your Honor's question: The amount of countervail put on by the Secretary of the Treasury was equal to what the Secretary determined to be the profit gained by the Russian exporter by reason of the export certificate. I wouldn't say that the amount of countervail equaled the value of the certificate. It was based upon the Secretary's determination of profit that was earned.

QUESTION: I see.

MR. IKENSON: When the Court discussed the certificate and indicated what value it felt the certificate had, it said clearly the value of the certificate is 1.25 rubles per pood, which was a unit of weight, because that was the market value, that was the amount of money that an exporter could receive for his certificate. The Court looked differently at the value of the certificate than the Secretary of the Treasury.

I hope I have not given you any too long an answer, Your Honor.

QUESTION: No. I thank you for it.

QUESTION: Mr. Ikenson, what was the role of the administrative practice in a case such as this? Is there latitude for the Secretary of the Treasury as the statute is presently drawn to decide one way or the other and be affirmed by the courts in either case?

MR. IKENSON: We say, Your Honor, that there is no latitude at all. The statute is mandatory, it is clear and as understood by Congress the amount of discretion given to the Secretary of the Treasury is very slight if existent at all. The Secretary has discretion to determine the amount of a bounty or grant. He does not have discretion to determine what a bounty or grant is.

QUESTION: Well, what you more accurately say in response to my Brother Rehnquist's question, if this amounts to a bounty or grant, then he has no discretion whatsoever?

MR. IKENSON: That's true, Your Honor.

QUESTION: And you further say that as a matter of law this is a bounty or grant.

MR. IKENSON: That is true, Your Honor.

QUESTION: But wouldn't you allow for any situations where the Secretary in a close case might decide something was or was not a bounty or grant and say that his determination

should be affirmed by the Customs Court in either event? Or do you say flatly no, it goes either one way or the other, depending on how the Court decides?

MR. IKENSON: I would say that as a matter of law a program is or is not a bounty or grant.

QUESTION: Well, you don't think you will win that argument though, because it has already been decided, you say, whether it is or isn't.

MR. IKENSON: That's correct. My next point was, Your Honor, that in this particular case, with this particular type of program, the Court has determined that as a matter of law, a tax remission on export is a bounty or grant.

I would like to comment --

QUESTION: Even though in some other context sometimes a court has approved a decision of an administrator construing a statute and two or three years later or ten years later he comes back with a different construction of the statute and he gets affirmed here then, too.

MR. IKENSON: Yes, but that -- in those cases, the administrator is given -- is conferred a broad discretion in administering the statute.

QUESTION: Well, all he has got is the words of the statute to interpret and enforce and he does it one way in one decade and another way in another decade.

QUESTION: Every eight years, as in the case of the

Labor Board.

MR. IKENSON: Well, in this particular statute, Your Honor, the Secretary of the Treasury is not even named as the person who shall determine whether a bounty or grant is bestowed. Instead, the statute has read consistently whenever a bounty or grant is bestowed, et cetera, then the Secretary shall determine the amount of bounty or grant and assess the duty.

QUESTION: So as far as the statute reads, he has no role in determining whether it is one way or another?

MR. IKENSON: As a practical matter --

QUESTION: But somebody has to have in this instance.

MR. IKENSON: That's correct, and I should say that this has already been discussed by a lower court in 1940. The Court of Customs and Patent Appeals noted that the statute does not even provide that the Secretary should make the initial determination. However, as a matter of custom and common sense, it should be the Secretary to make this determination.

QUESTION: Mr. Ikenson, do we know here exactly what principles the Secretary applied in reaching his decision?

MR. IKENSON: We do not know, Your Honor. The Secretary did not offer any explanation as to his reason for not countervailing. However, we do not claim that that is an error in this case because we view the role of the Customs

Court as being a court that affords trial de novo and we are not reviewing a decision of an administrative agency -- we are not reviewing it under the general terms of review, general standards of review where we look to an administrative record or the standards of arbitrariness and capriciousness and the like. We had a trial de novo available to us in the Customs Court and under those circumstances we do not feel that it was error for the Secretary not to have elaborated on his reasons for his negative determination.

I would like to comment briefly on a point made by the Chief Justice regarding the Congress' awareness of the sensitivity of this problem. There is no question that Congress appreciates that the application of countervailing duties is a very delicate issue, that the application of countervailing duties by the United States unilaterally certainly can cause international friction. Congress was aware of this when it enacted the Trade Act, and it devised a master plan to deal with countervailing duties.

On the one hand, it was concerned about promoting international harmony and international trade. On the other hand, it was concerned about permitting domestic industry to stand by and suffer because it had to compete with unfair competition with bounty-fed or subsidized competition. So Congress struck a very delicate balance. It directed the Executive Branch to try to negotiate an agreement on the

application of countervailing duties.

On the other hand, it directed the Secretary of the Treasury to enforce the countervailing duty law by putting time limits on him in handling countervailing duty petitions. It also provided for judicial review of negative determinations.

Congress had to do more to prevent American manufacturers' suits from upsetting the international applecart. So what Congress did was to give limited discretion to the Secretary of the Treasury to postpone the assessment of countervailing duties in cases where bounties or grants were bestowed. This is the way that international friction could be avoided under the congressional plan. This is what Congress provided. However, the government was not content with this plan; rather, the government has chosen to call to Your Honors' attention the alarming consequences that could follow from a reversal by this Court.

We say that those consequences need not occur and, furthermore, Congress was aware of the danger of such consequences it provided for it and any consideration of them by this Court would be unnecessary, it would be improper. It is not part of the congressional contemplation.

I would reserve the balance of my time for rebuttal, Your Honors.

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General,

would you prefer to begin in the morning? There is four minutes now.

MR. McCREE: I will prefer to begin in the morning.

MR. CHIEF JUSTICE BURGER: Very well. We will let you begin at 10:00 o'clock tomorrow morning.

[Whereupon, at 2:56 o'clock p.m., the Court was adjourned, to reconvene on Wednesday, April 26, 1978, at 10:00 o'clock a.m.]

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IN THE SUPREME COURT OF THE UNITED STATES

ZENITH RADIO CORPORATION, Petitioner,	:	
v.	:	No. 77-539
UNITED STATES, Respondent.	:	

Washington, D. C.

Wednesday, April 26, 1978

The above-entitled matter came on for further argument at 10:10 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:

WADE H. McCREE, JR., ESQ., Solicitor General of the United States, Department of Justice, Washington, D. C.; on behalf of the Respondent

FREDERICK L. IKENSON, ESQ., Stewart & Ikenson, 1001 Connecticut Avenue, N. W., Washington, D. C.; on behalf of the Petitioner

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume arguments in Zenith Radio Corporation v. United States.

Mr. Solicitor General.

ORAL ARGUMENT OF WADE H. McCREE, JR., ESQ.,

ON BEHALF OF THE RESPONDENT

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

The question presented in this appeal is whether the remission of the Japanese commodity tax which is imposed on certain consumer electronics products only if they are sold in Japan is a bounty or grant within the meaning of the Tariff Act of 1930.

When the Congress required the imposition of a countervailing duty in addition to any duties otherwise imposed whenever a bounty or grant was paid or bestowed upon the manufacture or production or export of an article imported into the United States, it did not define the words "bounty" or "grant," and it then became the duty of the Secretary of the Treasury not only to compute the net amount of a countervailing duty that might be due, but also and initially to determine whether the triggering event the grant or bounty had occurred.

Since a variety of governmental activities could properly be regarded as bestowing a bounty or grant, for

example, a favorable property tax rate or perhaps exemption from a property tax altogether, the Secretary required some guidance in defining these words.

As we have set forth on pages 19 through 24 of our brief, the Secretary was not without direction from the Congress. In the evolution of the statutory language and in the explanations of the congressional debates, it became evident that Congress did not regard the non-excessive remission of an excise tax as a bounty or grant, and we define non-excessive remission to mean a forgiveness of the tax, not in excess of what was actually paid.

In that portion of our brief we point out that as early as 1890, in the sugar tariff, we find the earliest use of the word "bounty" in the context of the encouragement of exports. The record on debate indicates what Congress understood then by its use of bounty, and this was the remission or drawback of indirect taxes exceeding the taxes the exporters had paid on the goods.

By leave of Court, I would like to use one sentence from the remarks of Senator Gibson in the congressional debate on that act, and this is found at page 21 of the government's brief. And Senator Gibson, after giving an example, said: "But upon the export of a ton of sugar, he received back as a drawback $117.60, making a clear bounty of $20.54 per gross ton of sugar imported." This follows a statement that only

$97.06 per gross ton was paid.

So it is clear from that example that it was the $20.54 excess over the tax paid by the exporter that was regarded as a bounty.

QUESTION: Mr. Solicitor General, don't you think that the words "directly or indirectly" in the statute that we are presently dealing with might expand that view of the word "bounty"?

MR. McCREE: They might be so regarded, except in 1890, in the first Sugar Act, the language was used, directly or indirectly was employed at the time Senator Gibson gave us this example, which would indicate that it was understood then just to indicate the excessive remission. It wasn't added subsequently.

On page 20 of our brief, we set forth about half-way down the page the language of the 1890 statute, and the second or third line from the bottom of the quoted language, we show that directly or indirectly was found initially when bounty was first employed.

QUESTION: Mr. Solicitor General, does the word "drawback" have -- is that a term of art? It is unfamiliar to me.

MR. McCREE: It was my first acquaintance with it, too, if the Court please, and it is used as I understand it synonymously with -- it means a payback, a remission may be

an exemption from the tax; a drawback is a return of the amount paid, and it has been used consistently to mean a non-excessive drawback unless it indicates otherwise.

After that first Sugar Tariff Act in 1890, in 1894, as we point out on pages 21 and 22 of our brief, a proviso was added to the sugar tariff that makes clear that a non-excessive remission does not require a countervailing duty. That proviso is found at the bottom of page 21, and it provides that the importer of sugar produced in a foreign country the government of which grants such direct or indirect bounties may be relieved from this additional duty which was a countervailing duty in case said importer produces a certificate of said government that no indirect bounty has been received upon such sugar in excess of the tax collected upon the beet or cane from which it was produced.

There again we have the guidance that the Secretary found in the early statutory history of countervailing duties. Finally, in this brief excursion into the statutory history, in 1897 we find that the statute was revised and made applicable to all imported products and not just sugar, and there the proviso was deleted but we find the addition of language which we believe for the reasons I will state to be a substitute for the proviso. That language is that there shall be levied and paid an additional duty equal to the net amount of such bounty or grant. We believe that the use of net

amount means the mount in excess of the tax otherwise paid, and this would appear to be the intention from the floor debate that we set forth on page 22 and 23 of our brief.

And if this legislative history then is proper guidance, the Secretary has indeed followed it consistently in his application and interpretation of the statute for eighty years, during which time, as my brother pointed out, the Congress has reenacted this statute in almost the identical language.

We point out in Footnote 15 on page 24 that the Congress had explicit notification in 1949 of the Secretary's construction and application of the statute, and nonetheless reenacted the statute knowing that he did not apply it to the non-excessive remission of an excise tax.

Also, and perhaps even more pertinently, in 1973, when the Zenith petition was pending before the Secretary, a witness requested an amendment to require the countervailing non-excessive remission and that amendment was rejected and the Congress, of course, was aware not only of the practice that is attacked here but also of its application indeed to the litigant before us.

QUESTION: General McCree, do you agree with your opponent as to the allocation of function between the Secretary, the Customs Court and the CCPA that he stated yesterday?

MR. McCREE: Well, the Secretary has by regulation imposed on the Collector of Customs this or has delegated to him the duty placed upon the Secretary of the Treasury and the Collector of Customs makes the determination which can be challenged in the Customs Court and in the Court of Customs Appeal.

QUESTION: What standard does the Customs Court use in determining whether or not the Secretary properly determined that something was a direct or indirect bounty?

MR. McCREE: We submit that the Customs Court determines whether the Secretary or his delegate has made a reasonable interpretation of the statute. We believe that this is a statute very much like other statutes that are entrusted or the administration of which is entrusted to an administrator, either an agency or a Cabinet officer, and that he has the right, indeed the duty to make classifications to implement its application, and we submit that the proper judicial review is whether the classification is reasonable to carry out the purposes of the statute.

QUESTION: Mr. Solicitor General, I thought yesterday that your opposition said that the Customs Court regarded this as de novo.

MR. McCREE: If the Court please --

QUESTION: Do you agree with that?

MR. McCREE: I heard him say that, and I disagree

with him. I don't think the Customs Court decides itself whether this is a bounty or grant. I think it decides whether the Secretary's determination is a reasonable one.

QUESTION: Then my next question is the one I would have asked him if it was answered the other way, how do we know from this record the standards the Secretary employed here?

MR. McCREE: We know because we have eighty years of consistent interpretation, unvarying from the holding made here today that the -- or made in this case that the non-excessive remission is not a grant or bounty.

QUESTION: Well, certainly in this case the Secretary didn't say that much. He sat on it for years and then came up dry, is what it about amounted to.

MR. McCREE: If the Court please, that is correct, and we would agree that a detailed reason would have to be given if the Secretary was considering something that had not been considered by him before. But here, ever since, as our brief on page 10 I think, note five, points out, since 1898, in the first synopsis of decision 696 has made this same construction. And after having done that since 1898, which if memory serves is the year of the Spanish War, unvaryingly he has so interpreted and applied the statute.

So we suggest that under those circumstances perhaps he need not give the kind of detailed reasoning that would be

necessary otherwise for appropriate judicial review of his action.

QUESTION: I guess all I am saying is I would feel a little more comfortable had he spelled out his reasons where we have judicial review.

MR. McCREE: If the Court please, I share the Court's concern for responsible administrative action, and I think that is something that administrators should do. But I suggest that when this is a consistent application, perhaps here we need not be as concerned as we might be otherwise if it were a new application.

I would like to suggest that not only has the Secretary consistently made this interpretation, but also the international trading community understands this to be the construction of our statute. Indeed in the General Agreement on Tariffs and Trade, an acronym pronounced GATT, the agreement which we have entered into through the Executive Branch of the government, because the Congress has not, specifically sets forth that the non-excessive remission of a consumption tax, an excise tax, that this Japanese commodity tax, as my brother would agree is, is not the grant of a bounty or subsidy that would trigger the imposition of countervailing duties, which all of the subscribers to the General Agreement on Tariffs and Trade employ in one way or another.

And so we suggest that here we have eight years of

uninterrupted, unvarying construction of the statute, of the original statute, with congressional reenactment five times, with awareness not only of the practice but also of the specific application to Zenith, the petitioner in this case. And we suggest that the classification that the administrator has adopted is reasonable under all the circumstances, so that even if this case fell outside of it, it would still be appropriate, as this Court has recognized, if a classification is reasonable, although we don't have to argue that because we believe that this case is well inside of it.

We also think --

QUESTION: I didn't see it in your brief, do you not -- and I take it here, too, that GATT does not supersede an act of Congress?

MR. McCREE: If the Court please, we do make that concession, yes, and that is correct as we understand it.

We would also like to observe that, as my brother has argued and as the dissent in the Court of Customs and Patent Appeals urges, this is not inconsistent with any of the decisions of this Court. As Mr. Justice Stevens' inquiry yesterday afternoon brought out, in the Downs case, which my brother urges is a governing precedent and would require this Court to rule to the contrary, we did not have an excessive remission of an excise tax simpliciter. We had there instead the remission of a tax and the bestowing of a certificate,

which was a matter of great economic value and, as the colloquy between the Court and my brother developed and demonstrated, the amount of the duty that was countervailed was either the value of that certificate or a profit derived from the exercise of that certificate and was not in the amount of the excise tax that was remitted.

Also my brother made reference to other authority which he believed was controlling of this, contrary to the position of the government, we suggest that an examination of that authority would reveal that it is not. The Nicholas case involved a clear export premium. This was a case involving the export of spirits from the British Isles to the United States, and there an express premium, a threepence and five pence on different quality or strength of spirits was bestowed, and indeed the question there was whether there was some warehouse tax that would justify England giving this advantage found to be a grant or bounty, and the Court held that regardless of the British government's purpose, it was indeed a grant or bounty. But this was in --

QUESTION: Mr. Solicitor General, you must have to concede, I should suspect, that the language in the Downs case is squarely against your position?

MR. McCREE: If the Court please, we do concede that, there is that language in Downs that is against us, and this Court has cautioned us and other counsel that appear here many

times of the hazard of taking language out of context of an opinion and urging it as controlling in another situation.

QUESTION: Now how is this out of context of the opinion?

MR. McCREE: Well, if the Court please, I wish I could answer that simply, and I will give you the best answer I can, because I find the Downs opinion one of the most confusing opinions I have tried to parse in a number of years.

QUESTION: It has a lot of complications.

[Laughter]

MR. McCREE: I would like to think that it was alone in this classification, but I have to agree that it is not. But Downs concerns a very complex system of controlling sugar prices within Czarist Russia, and apparently every producer had to place his sugar into three categories -- so-called free sugar, other sugar that could be transferred into free sugar under certain circumstances, and then surplus sugar. And there was one level of tax on the free sugar, there was an excise tax that could be levied for domestic consumption, this could -- there was a double tax on the surplus sugar. The sugar in the middle apparently was subject to manipulation by a bureaucracy that oversaw this entire scheme.

To sell the surplus sugar at the double tax was prohibitive, so nobody would want to do that. But apparently some of these persons would like to export that, and if they export

that sugar, then the tax would be remitted and it could go abroad. Now, it was not just the remission of this tax that occurred when it was exported, but also a certicicate was given, a thing of value that permitted a person then to transfer from his surplus sugar to his free sugar.

QUESTION: In the domestic market?

MR. McCREE: In the domestic market, an equivalent amount.

QUESTION: Right.

MR. McCREE: And it was not the remission of the tax that was countervailed there, but it was an amount equivalent either to the value of the certificate or computed in some way on the value of the certificate, and it is for this reason that I respond to the Court that that language is taken utterly out of context.

QUESTION: Well, out of context perhaps of the facts of the case, but not really out of context of the opinion in the case. And as we were told yesterday by your brother, it was understood at that time and by that Court, as he tells us, that the amount of the tax was not a reviewable matter and was not there an issue, the amount therefore of the grant or bounty.

MR. McCREE: Well, it appears that the parties conceded that they were discussing -- conceded the amount that they were discussing, and I submit that if the Court -- that if

a court decides -- if a court uses language not necessary to the decision of a case, that that language isn't controlling, because a case decides a controversy, and this Court doesn't issue advisory opinions. And if this language is to cover a situation not before the Court, it shouldn't be deemed by anyone who reads it or this Court to bind the Court in another situation.

QUESTION: It purports to be, this statement, under the summary of the test.

MR. McCREE: It purports to be that and in this respect it is confusing.

QUESTION: It is not casual inadvertent language, is it? It is quite positive and repetitive even.

MR. McCREE: It has all the vices of irresponsibility, but it does not decide the controversy --

QUESTION: Well, you suggest that he may have been in error but he was not -- the author was not in any doubt about this.

[Laughter]

MR. McCREE: I would adopt that and wish that I had suggested it earlier.

QUESTION: The trouble is, it wasn't only the author, it was eight other members of the Court who joined it.

MR. McCREE: That is exactly so.

QUESTION: General McCree, by your version, the

whole Miranda opinion is dicta, because it addressed a number of subjects that weren't before the Court at all.

[Laughter]

MR. McCREE: By leave of the Court, I am having enough difficulty with this problem and I would like to make no comment.

[Laughter]

QUESTION: I think Miranda has had a lot of difficulty without being involved in it.

QUESTION: Mr. Solicitor General, the fact that the Court has used dicta in other cases doesn't mean this wasn't dicta.

MR. McCREE: That's correct. And I would suggest, too, that since Downs, the Secretary has consistently countervailed only excessive remissions, and the Congress has been aware of it and the Congress must be presumed to be aware of Downs, including this language.

QUESTION: Would it be fair to say that the Secretary has consistently ignored the language of Downs?

MR. McCREE: Well, I would prefer to say that the Secretary has consistently recognized what Downs really held, despite the language, and has consistently followed that practice and with congressional concurrence -- and here we are concerned with a matter that is entirely within the province of the Congress, the Congress has established the countervailing

tax and the Congress can take this away, and I believe our job here is to decide what has the Congress decided to do. And when the Congress has specifically declined to require the countervailing of a non-excessive remission in the case of this very litigant, it would appear that the Secretary is indeed following the Congress' direction.

QUESTION: Mr. Solicitor General, could I ask a question which perhaps I shouldn't ask. It may be a little delicate, but at the request of the Department of State you distributed a communication from the government of Japan in this matter, and let me read from one portion of that: "The government of Japan fully understands that the government of the United States is acting in good-faith," and so forth. "In the unlikely event that the United States should proceed in a manner violative of the very international rules in the establishment of which it has taken leadership to further the objective of freer international trade, those countries who join with the United States in establishing such rules to promote economic development through normalization of international trade might be compelled to question the good-faith of the United States."

What does that mean vis-a-vis this case?

MR. McCREE: I don't think it means anything as far as the duty of this Court is concerned here today. I think --

QUESTION: You do not regard it as a threat to this

Court?

MR. McCREE: I do not and I certainly circulated it only because it had been forwarded to us from the Department of State and we circulated it for what it was worth. We don't suggest that this Court should be responsive either to any threat or any apprehension of apocralyptic consequences in the field of international trade. This Court's task as we see it is to decide what did the Congress mean by these words "bounty or grant" in the Tariff Act of 1930 as illuminated by the legislative history that we have written about in our brief and discussed this morning and as illustrated by the consistent practice of the Secretary over eighty years and as illustrated by the understanding of the international trading community. And we think that this Court, of course, would expect the Congress to respond in any way it deemed fit if the Congress did not agree with the statute as this Court will ultimately construe it. But this Court has the absolute power to construe this as it sees it in its judicial, its informed judicial judgment.

QUESTION: In any event, you are here in good-faith doing your best to uphold the position espoused by the government of Japan anyway?

MR. McCREE: Well, if the Court please, I regard my role here as seeking to uphold the construction that the Congress, that the Secretary of the Treasury has placed upon

the statute committed to you to administer, and the client of the government here is the Secretary of State and not a foreign prince or potentate.

QUESTION: Do you mean the Secretary of the Treasury?

MR. McCREE: The official whom we represent here is the Secretary of the Treasury who is the person required to do this.

QUESTION: You say the -- you talk about the consistent administrative construction -- just so I am sure of it, he has never had a rulemaking proceedint on this, has he?

MR. McCREE: He has not.

QUESTION: And it is all rested in adjudication or it has rested in rulings by the Collector of Customs which in a sense is an adjudication by him?

MR. McCREE: That is exactly correct, if the Court please.

QUESTION: Except that is subject to review?

MR. McCREE: And that is subject to review.

QUESTION: So it rests in just a line of adjudications?

MR. McCREE: Indeed it does, and very much like the Labor Board does. The Labor Board --

QUESTION: Well, do you know or do you recall in your work on this whether the statute that was at issue in Downs also delegated power to the Secretary, or was it directly

to the Collector of Customs?

MR. McCREE: My recollection is that it did not identify the person --

QUESTION: Because that case started out by a ruling of the Collector of Customs, I take it, and then there was a Board of Appraisers.

MR. McCREE: That's correct.

QUESTION: But did the Secretary of the Treasury get into the act for the first time after Downs?

MR. McCREE: I believe the delegation is really to the General Counsel of the Treasury by the Secretary of the Treasury.

QUESTION: Well, it isn't now.

Mr. McCREE: Yes.

QUESTION: I mean now the Congress delegates it to the Secretary of the Treasury, and I am just wondering if under the statute that was in force at the time of Downs, that Congress made the delegation to the Secretary, gave -- empowered the Secretary, rather than the Customs Collector?

MR. McCREE: I can't give you the exact quotation, but it was to the Secretary of the Treasury. He was the Executive Branch official required to --

QUESTION: At the time of Downs?

MR. McCREE: At the time of Downs.

QUESTION: Mr. Solicitor General, I assume that had

the Secretary of the Treasury back seventy-five years ago, after Downs, and all his successors since then had taken the language of Downs literally, the language that you described as dictum, and there had been this consistent interpretation pursuant to the Downs case and congressional acquiescence, legislative acquiescence, as you have suggested, then you wouldn't be here?

MR. McCREE: I think that is a fair statement, if the Court please?

QUESTION: Your friend would have prevailed at an earlier stage.

MR. McCREE: I think he would have, Mr. Chief Justice.

QUESTION: Do you know what position the Secretary took at the time of Downs?

MR. McCREE: The Secretary's position at the time of Downs was, as we indicate --

QUESTION: You don't think it was what the Court --

MR. McCREE: Indeed it was not. If one reads the briefs in Downs and reads the record before -- reads the Supreme Court in Downs, the entire contention was what to do about the amount of the certificate, the value of the certificate and not the excise tax that was remitted. It was a thing about the remission of the excise tax, and that is the nub of our entire argument.

QUESTION: That is the way the entire case started, by the imposition of a charge by the --

MR. McCLURE: The imposition of a countervailing duty in the amount of that. In the appendix, at 4951, the Secretary's view in Downs is set forth in detail.

And so the government respectfully requests and submits that the judgment of the Court of Customs and Patent Appeals here is correct and asks this Court to affirm it.

Thank you.

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

Mr. Ikenson.

ORAL ARGUMENT OF FREDERICK L. IKENSON, ESQ.,

ON BEHALF OF THE PETITIONER--REBUTTAL

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

I would first like to address myself to a question posed by Mr. Justice White regarding the role of the Collector of Customs and the Secretary.

The statute has consistently given authority to the Secretary to determine the amount of countervailing duty to be assessed. The Secretary delegates functions to Collectors of Customs throughout the United States to assess countervailing duties to offset particular grants.

In the Downs case, the Secretary of the Treasury made

a determination that the Russian program conferred a bounty or grant and then issued instructions throughout the United States to Collectors of Customs. The Downs case arose in Baltimore, where the collector there imposed a countervailing duty in an amount equal to that contained in the instructions from the Secretary of the Treasury, and that was protested by the importer who then litigated the subject.

QUESTION: And did this Court agree with the Secretary, it upheld the Secretary?

MR. IKENSON: That is not correct, Your Honor.

QUESTION: Isn't it? What did they say?

MR. IKENSON: Well, at the very outset of the case, the amount of countervailing duty was not put in issue for the reasons that I gave yesterday. The amount of countervail is not deemed to be judicially reviewable. The question framed by the parties was whether the Russian program conferred a bounty or grant. The courts below, the Board of General Appraisers and then the Fourth Circuit determined that, yes, there was a bounty or grant for two reasons.

QUESTION: Well, so did the Collector of Customs, I take it.

MR. IKENSON: The Collector of Customs made no determination. He just made an assessment of duty. He made no determination. The Secretary --

QUESTION: I know, but his assessment had to rest on

something.

MR. IKENSON: It rested on instructions to collect so many cents a pound.

QUESTION: The Secretary of the Treasury had made a determination?

MR. IKENSON: That is correct, Your Honor.

QUESTION: Which the collector was following?

MR. IKENSON: That is correct, Your Honor.

QUESTION: So in that sense didn't the United States -- didn't this Court agree with the Secretary or not?

MR. IKENSON: I would say not, it was not asked to agree or disagree with the Secretary's determination to assess a particular amount of duty.

QUESTION: I know, but how about whether or not there was a reason for a --

MR. IKENSON: Yes, Your Honor, they did agree with the Secretary that there was a reason.

QUESTION: He could be challenged only by the foreign party upon whom the duty was imposed, rather than by any domestic competitor?

MR. IKENSON: That's correct. It was challenged by the importer.

QUESTION: The importer.

MR. IKENSON: That's correct. And I think it is very important to appreciate the kind of review that was

available to importers at the time of Downs and continuing through the present date. There was de novo review before the Board of General Appraisers, which is the predecessor to the Customs Court. It is improper to suggest that the standard of review is review based on administrative record which then must be tested by either substantial evidence or some standard of reasonableness.

There is a trial de novo, there has -- every countervailing duty case that sever been litigated since the turn of the century has been the subject of a trial de novo either before the Customs Court or its predecessor, the Board of General Appraisers.

In the Downs case, there was a trial de novo. Downs argued that --

QUESTION: What issues are determined in trial de novo?

MR. IKENSON: Beg pardon, Your Honor?

QUESTION: What issues are determined in de novo?

MR. IKENSON: All questions of fact. A presumption of correctness attaches to the Secretary's determination. The importer then approaches the court or in those days the board with the obligation to rebut that presumption, to go forward and present evidence to show that the Secretary's determination was incorrect.

QUESTION: Well, what deference does the Customs

Court expect to give to the Secretary's interpretation of the statute, at least as much as we might?

MR. IKENSON: I would say that they give deference to the Secretary, and there are standard presumptions of correctness that attach to government officials' actions, and if that is what Your Honor means by suggesting that -- the kind of deference that Your Honors give, I would say yes. There is a deference that the --

QUESTION: Whether or not the Secretary is ignoring Downs or not, I guess it is true that he has for a long time taken a position contrary to yours?

MR. IKENSON: That is correct, Your Honor.

QUESTION: But isn't it also true that the Customs Court didn't even have an index of its opinions until the 1940's?

MR. IKENSON: An index of its opinions?

QUESTION: Yes. You said it would give this careful attention, they were indexed for the first time in the 1940's, weren't they? Judge Richardson did it.

MR. IKENSON: Well, there may have been some assistance given to the bar for the purpose of helping research cases, but there are bound volumes of Customs Court reports going back to before the turn of the century, Your Honor.

QUESTION: Was that true before 1940?

MR. IKENSON: Yes.

QUESTION: I don't guess it matters in this case, but it was not --

MR. IKENSON: It is true, Your Honor, there were bound volumes. It might have been --

QUESTION: But there was no index.

MR. IKENSON: Well, I am afraid I do miss the point of Your Honor's question.

QUESTION: Well, I have a very hard time of doing research without an index. I am just speaking personally.

MR. IKENSON: Yes, Your Honor. I would like very much to turn back to Downs and the issue as put to the Court. Downs argued after the Board of General Appraisers decided against them and after the Fourth Circuit decided against them, he argued before this Court that the lower courts were wrong. He argued that the lower courts found that the Russian scheme conferred two bounties, a bounty by reason of the tax remission, a bounty by reason of the conferring of the certificate. Downs made it clear to the Court that this was his understanding of the lower courts had said, and then Downs argued in his brief that the courts below were wrong on both issues. Downs argued that the certificate did not constitute a bounty. Downs also argued that the remission of tax did not constitute a bounty. This was squarely put before this Court. It was briefed by Downs. Downs headed a section

of his brief with the following language -- "The remission of excise taxes on the exportation of sugar is not a bounty or grant on exportation as the terms are used in section 5."

The government joined issue with Downs on both points. The government said that both the remission of the tax could be a bounty and both the certificate could be a bounty. The Court then decided the issues presented to it.

I would like to turn to some other remarks made by my distinguished adversary. He indicated that in 1949, Congress received explicit notice of Treasury's practice and didn't amend it. However, that is not the entire story, because in that period of time, 1949 and 1950, when the Executive Branch brought Treasury's practice to the attention of Congress, it asked Congress to amend the law because there is a potential conflict between Treasury's practice and judicial interpretations. Congress refused to amend the law.

QUESTION: Is that in the plural, interpretations, cases in this Court, Downs and what else?

MR. IKENSON: Downs and Nicholas. In the Treasury Department explanation to the Congress, there was no specific reference to the Court's decisions by name.

QUESTION: By name.

MR. IKENSON: It said there were judicial interpretations. Congress refused. In 1973, the Solicitor General --

QUESTION: Was there a bill introduced?

MR. IKENSON: There was a bill introduced.

QUESTION: Did it get out of committee?

MR. IKENSON: It got out of committee in 1950, it passed the House and then it died. The following year it was introduced, it did not get out of the Senate Finance Committee.

QUESTION: Are those committee reports instructive or not?

MR. IKENSON: The reports indicate that Congress was concerned about another feature of the bill which would have provided for an injury requirement which was not present in the countervailing duty statute. However, the testimony at the committee hearings are instructive in that --

QUESTION: What about the report, what did it say about countervailing duties?

MR. IKENSON: There was no mention of the -- the second time, Your Honor, the bill did not get reported and in trying to understand the reason why the bill was not reported out, we can look to the hearings and we find that there is testimony of at least one Senator who felt that the conflict between the Treasury's practice and the Judiciary's interpretation was not satisfactory.

QUESTION: Any reference in that colloquy to Downs by name?

MR. IKENSON: Not by name, Your Honor.

QUESTION: Well, has it been our practice to give

much attention to committee reports of bills that never were passed?

MR. IKENSON: Well, I raise this, Your Honor, only to respond to my brother's suggestion that some weight should be given to the fact that Congress knew of the practice in 1949 and did nothing to repeal it. It was in fact asked to codify it and refused. That is my point, Your Honor.

QUESTION: Is it reasonably arguable that that meant that Congress was satisfied with Downs to the extent that any of the members ever gave it any thought one way or the other?

MR. IKENSON: I think --

QUESTION: The interpretation of Downs by the Secretary, I don't mean the literal language, the Secretary's interpretation of Downs.

MR. IKENSON: That the Congress did not take steps to change the statute?

QUESTION: They were satisfied with what the Secretary was doing, notwithstanding this explicit language in Downs.

MR. IKENSON: I think not, Mr. Chief Justice. I think if Congress is told there is a potential conflict between a judicial interpretation and an administrative practice, and Congress does nothing, if anything is to be inferred, it should be that Congress was satisfied with the judicial interpretation.

QUESTION: Or satisfied with the conflict.

MR. IKENSON: Well, that is something I did not consider, Your Honor.

In 1973, the Solicitor General advised that a witness told the Congress that -- suggested to the Congress that the law be changed to clearly provide that the remission of indirect tax on exportation be deemed a bounty or grant, and Congress did nothing to -- did not adopt the suggestion. I don't think any great weight can be given to this turn of events because Congress in 1973 and '74 clearly wanted to pave the way for smooth negotiations and for an international agreement. It did not wish to begin at that time to isolate specific bounty practices and instruct the Secretary of the Treasury that he must immediately begin countervailing. Instead, Congress did devise this very complex scheme which I described to Your Honors yesterday. I think that was Congress' way of dealing with the problem. It wanted an international agreement, it did not want to be selective.

Thank you, Your Honors.

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

[Whereupon, at 10:55 o'clock a.m., the case in the above-entitled matter was submitted.]

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