OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: UNITES STATES Petitioner v. HAGGAR APPAREL COMPANY.

CASE NO: No. 97-2044 C.2

PLACE: Washington, D.C.

DATE: Monday, January 11, 1999

PAGES: 1-60

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner :

v. : No. 97-2044

HAGGAR APPAREL COMPANY. :

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Washington, D.C.

Monday, January 11, 1999

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

KENT L. JONES, ESQ., Assistant to the Solicitor General, Washington, D.C.; on behalf of the Petitioner.

CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first in No. 97-2044, United States v. Haggar Apparel Company.

Mr. Jones.

ORAL ARGUMENT OF KENT L. JONES

ON BEHALF OF THE PETITIONER

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

In 1978, this Court held in the Zenith Radio case that substantial deference should be given to Treasury interpretations of the Tariff Act. In the present case, the Federal circuit, without even citing Zenith Radio, held precisely to the contrary and concluded that no deference should be given to Treasury interpretation. The court concluded that a 1980 statute directed the Court of International Trade to reach the correct decision in customs cases and that this statutory obligation was inconsistent with affording any deference to Treasury interpretations.

Respondent has abandoned that reasoning in this Court, and the reasoning of the court of appeals is manifestly incorrect. The statute on which the court of appeals relied is 28 U.S.C. 2643(b). That statute merely

provides procedural options for the Court of International Trade in situations where the evidence presented to that court is not sufficient for it to reach the correct decision.

In adopting the statute in 1980, the legislative history made clear that Congress merely intended to provide to the Court of International Trade the same kind of remand and retrial authority possessed generally by Federal district courts. Certainly nothing in the history of that provision reflects any intention by Congress to abandon the principle of deference to Treasury interpretations that this Court had articulated only 2 years prior to that date.

QUESTION: Well, is -- are these supposed to be interpretive regulations or legislative regulations?

MR. JONES: These are -- the regulations that are at issue in this case are interpretive regulations.

QUESTION: All right, then if that's the case, then what they have is the power to persuade but not the power to control.

MR. JONES: Absolutely. It is -- the question is --

QUESTION: All right. Then we should simply look are -- what they thought was are they persuasive.

MR. JONES: The question that the Federal

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circuit resolved was a different question, incorrectly in our view. The Federal circuit concluded that they could ignore the regulation altogether, that the regulation was to be given no deference, was in effect a null and void act, because, the court reasoned, that the Court of International Trade was supposed to reach the correct decision.

QUESTION: Well, I mean, you'd think -- if -- if it's an interpretive regulation and therefore it has the legal force that -- whatever is given to the power to persuade, though not the power to control. When you have an expert body like the Treasury that knows a lot about it, you would give a lot of deference. Except, if you were an expert body that knew just as much about it, then why would they have some special power to persuade?

MR. JONES: Well, if -- if by the expert body you're referring to you're referring to the Court of International Trade, the Court of International Trade is a specialized court just like the Tax Court, and the Tax Court, just like the Court of International Trade, has been directed by this Court in decisions such as National Muffler Dealers and for the Court of International Trade in the Zenith Radio case to defer to the agency's reasonable interpretation.

QUESTION: Mr. Jones, did you agree with the

premise that -- that for interpretive regulations, we accord the agency only the power to persuade and not to control? I -- I thought we --

MR. JONES: I --

QUESTION: -- the power to control so long as it was -- it's within the range of the ambiguity. And even if we thought that another interpretation might be better, we would go along with the agency. Is --

MR. JONES: No. Clearly -- clearly you have more fairly described the actual standard that the Court has applied, and when I didn't bicker with --

QUESTION: Bicker, because I think --

MR. JONES: All right.

QUESTION: -- it's crucial to this.

(Laughter.)

QUESTION: I think it's crucial to the disposition of this case really.

MR. JONES: Well, it is crucial to the disposition of the case ultimately that the court do what this Court said it should in Zenith Radio which is to defer to --

QUESTION: But what is it precisely? Because you have used Chevron in your briefs, and then you cite National Muffler --

MR. JONES: Yes.

QUESTION: -- which is not quite Chevron. And then Justice Breyer brought up interpretive regulations, which sounds to me like Skidmore. So, which kind of which degree of deference is it?

MR. JONES: You're asking a question that I think it's fair to say the Court has never answered, which is in this -- there -- there's a high Chevron and a low Chevron, and then there's in between that hasn't been fully elaborated by the Court.

The high Chevron is where the agency is given an express authority to interpret a particular statutory provision and makes a substantive legislative rule. And then it's to be treated as valid if it's not arbitrary and capricious and clearly inconsistent with the statute.

There's a low Chevron that doesn't require any statutory authority to adopt rules. It's based simply on the implied authority of the agency to interpret and implement the statute that Congress has designated for it to administer.

What we have here and also in the Internal Revenue Code is something in between. We have an express statutory authority to issue rules generally. For example, 19 U.S.C. 1624 is -- provides a general authority to the Treasury to adopt any necessary rules under the Tariff Act. That's precisely parallel to 26 U.S.C. 7805

which authorizes the Treasury to adopt any needful rules under the Internal Revenue Code.

QUESTION: I didn't understand all that, Mr. -- this is a much more difficult enterprise than I had ever imagined. There are three Chevrons?

MR. JONES: Well, I think the Court has resisted the temptation to vulcanize --

QUESTION: I really had thought there was -- I had really thought there was just one, and I thought Skidmore was pre-Chevron and speaks from an era that -- that simply bygone. I -- I --

MR. JONES: I may be referring to this in a more academic than a practical way. As a practical way, I think which is the way the Court has addressed it, basically there are two standards. There is the standard of what I call the high Chevron standard, which is perhaps the Skidmore test you're referring to, which is when the agency has specific rulemaking power granted by Congress for a specific subject. That's the high deference.

The lower deference in Chevron doesn't require any specific grant of statutory power. It's based on what the Court described in Chevron as the implied authority to interpret and implement a scheme when Congress has told the agency to administer it.

QUESTION: At any rate, are you saying that the

interpretive -- the authority of the Treasury in this Customs area is identical to its authority in the Internal -- for the Internal Revenue Code?

MR. JONES: It -- I -- well, it's more than that. There's a parallel provision. The 1624 that I referred to is parallel to the general interpretive authority in the Internal Revenue Code.

In addition, there is a specific interpretive authority for classification issues which, of course, this case involves. It authorizes the Treasury adopting the rules and regulations for the classification of goods, classification and assessment of tariffs.

Now, respondent's new argument, the one that he didn't make below but is presenting to this Court, is that -- that this -- that a statutory authority to issue the classification rules is limited in 1502 by a clause at the end of it which says, classification rules at the port -- various ports of entry. And respondent, without any authority whatever, says that just reading that, they can tell that that means that it doesn't permit rules that apply to importers, that it only applies to Customs officers. Well, that's illogical and it's also inconsistent with the longstanding principle of this Court since 1809 in Vowell and M'Clean that tariff duties only arise at the ports of entry, in the words of that opinion.

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So, a rule that classifies goods at the ports of entry applies directly to importers because that's where the duties arise, that's where the goods are classified and valued, and where the duties are assessed.

Respondent's new argument -- I think I should, you know, put it in -- in its framework. Respondent's new argument is that because the Court of International Trade is to make a de novo determination of liability, that that is inconsistent with giving deference to the Treasury's interpretation of the legal issues involved in the case.

In fact, respondent goes so far as to say that whenever a court is to make a de novo determination of liability, it is to ignore agency regulations even when Congress has expressly authorized the agency to adopt interpretive rules. That -- that suggestion is radical and it's flatly inconsistent with general case law of this Court and, in particular, it's inconsistent with the customs and tax litigation.

In customs and tax cases, Federal courts have long been charged with the responsibility of making independent factual determinations, of making determinations of law and applying the facts to the law to determine ultimately independently the amount of tax or customs duty owed. The Federal district courts do that. The Court of Federal Claims does it, the Court of

International Trade and the Tax Court. They all have exactly the same responsibility.

QUESTION: Mr. Jones, suppose you had a statute that said in so many words the court shall decide the question de novo.

MR. JONES: If -- you know --

QUESTION: Might not -- might not the -- the respondent's disposition apply in that situation?

MR. JONES: Well, no, and -- and certainly I want to address that, but I also want to point out that they cited a Law Review article authored by you for that proposition. And if one looks at that Law Review article, what one sees is that the article said that if Congress directed the courts not to give any deference to the agency and provided for de novo review, that's -- that's -- the difference is that in providing for de novo review, Congress has not told the agencies to ignore the courts. In fact, Zenith Radio is exactly that kind of a case, as is Atlantic Mutual, which the Court decided last term.

QUESTION: Well, Zenith Radio -- they talked about administrative practice, as I recall.

MR. JONES: There were Treasury decisions.

QUESTION: And -- and this -- that's somewhat different than an interpretive regulation.

MR. JONES: It's a lesser --

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QUESTION: It may be -- it may be that this is an even stronger case --

MR. JONES: Yes.

QUESTION: -- I assume that you would argue, but there is a difference.

MR. JONES: Yes, and the difference would be, as you pointed out, to suggest even greater deference would be owed to the agency's formal interpretation set forth in an interpretive rule. And, indeed, this interpretive rule, that we will address later on in this argument, was issued as a result of notice and comment procedures.

QUESTION: Can I ask you one quick question about that? This is something I don't know the answer to. But the Treasury, of course, is in charge of our tax laws, and basically when you write a new law, the first place Congress gets the law from is the Treasury. They run right over. They're talking to each other. They're -- they're part of the legislative process.

Now, is Treasury in the same relationship to the customs laws? Because from reading this, I had the impression there's the GATT in there. There are special trade reps and -- does Treasury take part in the creation of the law --

MR. JONES: The -- the --

QUESTION: -- customs as it does in the law,

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say, income tax?

MR. JONES: Well, there's two -- two types of -- of law -- two ways to answer that. One is legislative proposals. Legislative proposals, under a formal method provided for in the tariff acts, come through the President, but with the consultation with the Treasury. And as a practical matter, I think it's realistic to assume, although the statutes don't lay this out, that the Treasury has a substantial role in that process unless the President spends a lot of time.

QUESTION: But as a matter of practical fact, is there like a whole section of people in the Treasury whose job it is to look over the customs and tariff laws and to propose --

MR. JONES: Well, there's the customs --

QUESTION: -- changes and do all these things? You know how they do it in the tax area.

MR. JONES: Oh, of course. I mean, in the tax area there's the Internal Revenue Service.

QUESTION: Right.

MR. JONES: In the customs area, there's the Customs Service.

QUESTION: And do they do roughly the same thing in respect to evaluating substance of laws and what the proposals are and so forth or not?

See, their whole argument is --

MR. JONES: You're asking a question that I think might be beyond my ability to answer.

QUESTION: Maybe we should take evidence on this. Do you think we should take evidence on how -- how much involved the agency is with the enactment of the law? Do you think it makes any difference?

MR. JONES: I think what makes a difference is --

QUESTION: Do you want us to give more deference if the agency is intimately involved?

MR. JONES: I just want the Court to -- to repeat what it held in Zenith Radio, which is that the standard amount of deference is owed to these regulations that are --

QUESTION: Mr. Jones, do we also owe deference in this area to interpretations by the U.S. Trade Representative or by the International Trade Commission?

MR. JONES: No. In enacting the Harmonized Tariff Schedule in 1988, Congress noted the different roles performed by the various entities, and it specifically said that the role of interpreting and applying the Harmonized Tariff Schedule was designated to the Customs Service, which works, of course, for the Treasury.

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The -- the rulemaking authority is -- is designated by statute to the Secretary of the Treasury, and it is subdelegated by regulation to the Customs Service, but the Customs Service can't adopt regulations until the Secretary approves them. So, ultimately it is the function of the Treasury to adopt these rules and regulations.

QUESTION: So, if we don't defer to these regs, we don't defer to anything, or our Court doesn't defer.

MR. JONES: It --

QUESTION: There's nothing else to defer to.

MR. JONES: I can't -- it's hard for me to come to grips with such a broad proposition, but certainly --

QUESTION: Well, I don't know what other sources there would be if it wasn't the commission or the trade rep.

MR. JONES: There -- there is no other source of interpretive authority under the Tariff Act other than the Treasury acting through the Customs Service. That is it. These are its authoritative, interpretive regulations, and the court -- Federal circuit just went down this route of looking at this procedural statute and said, well, that justifies us not applying the deference that Zenith Radio said we should apply, although they didn't cite Zenith Radio and didn't try to distinguish it in their opinion.

QUESTION: Mr. Jones, on Zenith Radio, I think that the respondent has said, well, that's for countervailing tariff and it has nothing to do with classification.

MR. JONES: Respondent has done a good job of -- of fairly confusing something that's really very clear. What is very clear is that up through the time that Zenith Radio was decided in 1978 and for a year past that, through 1979, in the words of the Customs Court in the ASG Industries case, which is cited on page 6 of respondent's brief -- and I'll quote the court. Every countervailing duty case litigated, just as every tariff classification and valuation case in modern times has been tried de novo in this court. That de novo review was the only form of review known to the Customs Court through the Zenith Radio case. It was after that that Congress said that certain countervailing duty cases can be reviewed on the administrative record.

Through 1978 -- and by the way, in that 1979 opinion, the Customs Court specifically referred to its opinion in Zenith Radio as an example of a de novo review proceeding. So, the Court's holding in Zenith -- this Court's holding in Zenith Radio that the Customs Court should defer to the agency's reasoned interpretation of the statute is directly applicable to this case. That was

just as much a de novo proceeding as this one is.

QUESTION: Would you -- would you comment on the -- on the final clause of the introductory provision of the regulation which says nothing is --

MR. JONES: Yes.

QUESTION: -- intended to deprive the importer of the rights of judicial review?

MR. JONES: Right.

QUESTION: Do you -- under your view is that just surplusage?

MR. JONES: Well, I think it's more -- it's sort of polite surplusage. What -- what the agency meant -- I think the amicus Customs and Trade Bar Association is absolutely right, that what this last sentence reflects is simply the agency making clear that its rules, as it said in the first sentence of this introductory paragraph -- its rules here are interpretive and are not substantive legislative, binding legislative rules that are designed to preclude judicial review of the topics.

The agency had been criticized in the comments, which frankly shouldn't be considered by the Court because they weren't properly raised in this case, but they have been filed in an untimely fashion.

But in any event, the agency was asked to consider whether it had authority to adopt such rules and

it concluded in the -- that it had authority to adopt interpretive rules but it didn't mean to adopt binding legislative rules. And I think that was a correct assessment.

QUESTION: Most of the FCC's rules are interpretive rules. Are you -- they're --

MR. JONES: It's very common --

QUESTION: Are they Chevron III? I mean, I see now why you're -- why you're trying to draw this distinction between legislative rules and interpretive rules. I -- I was never aware that --

MR. JONES: Oh, I --

QUESTION: -- that we give greater deference to legislative rules than interpretive rules.

MR. JONES: I think, Justice Scalia, that if you look at the Chevron -- the -- the paragraph in Chevron that talks ultimately about reasonable agency rules, a couple of sentences earlier you'll see a standard, a sentence talking about deferring when it's not arbitrary and capricious. And that's what I was talking about, the high Chevron standard and the low.

I don't think I'm making this up. I think -- I would just encourage you to look at that paragraph in the Court's opinion.

And I --

QUESTION: One paragraph in the Court's opinion in Chevron?

MR. JONES: Well, it -- it reflects decades of opinions.

QUESTION: This is a -- this is a major distinction in administrative law that -- that -- that we are going to give lesser deference to those rules of an agency that are interpretive rules. I mean, I --

MR. JONES: Well, if -- if I'm wrong about that, then --

QUESTION: To my mind, the force of the FCC rules, which are almost entirely interpretive, is -- is -- is no less than the force of --

MR. JONES: It is a different articulation of the degree of deference, whether as a practical matter, as I said earlier, it results in different decisions --

QUESTION: Well, if it doesn't result in different decisions as a practical matter, why -- you know, why confuse us with it?

MR. JONES: I think because it is in fact a very complex subject, that when Congress tells an agency to do something, it may be -- and it does it, maybe that has a little more legislative effect than when the agency is just interpreting something without any legislative direction.

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QUESTION: Do you think --

QUESTION: I'm sorry.

QUESTION: But that -- can Chevron -- may I ask? Can Chevron, as you refer to it, be read in this way, that the Court was describing as arbitrary and capricious or indicating as being arbitrary and capricious whatever was outside the realm of reasonable interpretation allowed by the ambiguity of the language, so that it was really engaging in two alternative formulations?

MR. JONES: Let me make clear that I -- this case does not turn on this distinction because all we're saying is that what we -- all that I'm saying and I believe that the United States is saying is that -- is that we believe that what is -- what I've described as the lower Chevron deference standard applies in this case. It is the articulation of the standard in Zenith Radio that is identical to this. It's the same standard in Zenith Radio as to what I've talked about is the second standard in Chevron.

QUESTION: Okay, but you --

QUESTION: Even so it troubles me. What portions of -- what portion of Chevron are you referring to? Let me -- let me look at it. Justice Stevens maybe remembers it. I don't.

(Laughter.)

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MR. JONES: I'm relying on that assumption.

Maybe I could give you that cite on my -- could I give you that cite on my reply -- rebuttal argument, please?

QUESTION: How about -- how about the answer to my question? I -- I agree with you. I don't think the case turns on it, but you have raised the distinction. Do you think Chevron is fairly read in -- in the way that I suggested with arbitrary and capricious being sort of the -- an alternative formulation of what is outside the -- the realm of reasonable interpretation?

MR. JONES: I think that there is a logical and substantive difference between the two formulations.

QUESTION: Which is what?

MR. JONES: Which is that when Congress has given an agency an express authority to interpret a specific statutory phrase -- for example, an agency might be told to decide what -- what kind of chemicals are bad pollutants, and when it does that, its determination is going to be upheld unless it's arbitrary and capricious and it's utterly unsupported by the statute. That's the kind of substantive legislative rule.

On the other hand, if Congress didn't give such authority to the agency and the agency was simply saying we think boron is a bad pollutant, that would -- should be

sustained if it's a reasonable interpretation.

Now, if I may, I think I should --

QUESTION: An unreasonable interpretation should be sustained in the other situation. Right?

MR. JONES: I -- I can't draw that distinction.

QUESTION: I can't either. That's why I don't -- I don't understand.

(Laughter.)

MR. JONES: I think that the distinction is not on whether another one could be unreasonably sustained. It's whether it could be arbitrary -- whether if it weren't arbitrary and capricious, it could be sustained. These are tests this Court has articulated.

QUESTION: If I could --

QUESTION: You want to get the other. If you want, can I ask you about the other -- about the reg itself?

MR. JONES: Please do.

QUESTION: You don't have to answer if you want to make a different point. But what's confusing me about it is it says, chemical treatment of components, permapressing. Right. And then -- but -- but the chemicals evidently were inserted in the United States.

MR. JONES: Yes.

QUESTION: And -- and so, does this reg mean

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that if you have two pairs of trousers, company A puts chemicals in it and company B doesn't. They send both to Mexico. And then in Mexico what happens is an identical thing to both: They put it in a -- in a press and they press it just like that, and they send it back. Does it mean that the one company pays and the other doesn't?

MR. JONES: If -- if one -- I don't want to be tautological because I don't think there is a simple tautological answer, but the tautological point is that if the permapressing occurs in the foreign country --

QUESTION: What is just what I said. They took both pairs of trousers, they put it in an iron, and they ironed it. In the one, because there were chemicals, that led to permapressing; in the other, it didn't. So, they're treated identically. Now, is there a difference or not a difference?

MR. JONES: Yes, there is a difference because in -- in your hypothetical the -- the material that was permapressed was improved. The other material was just --

QUESTION: All right. So, now then, I wonder is this reg rational.

MR. JONES: Yes.

QUESTION: Because how can it be that -- that -- that when you do exactly identical things to the two

pairs of trousers, all you did was put them in a press and you pressed them like that --

MR. JONES: Because the regulation addresses the statutory issue, and so let me put the issue in the -- in the context of the statute.

This regulation interprets a statutory provision that provides a duty exemption for goods that are -- that are manufactured in the United States, exported abroad, assembled abroad, and then returned to the United States. Those duties come back -- those goods come back duty free.

But the statute provides that this exemption will not be available if while the goods were abroad, they were improved by a process that was not incidental to the assembly process. The regulation interprets the statutory phrase, incidental to the assembly process, by stipulating, specifying that any substantial process performed abroad, other than assembly, that has the primary purpose of improving the article is not to be regarded as incidental to assembly. And it's one of approximately 10 examples. It says the chemical alteration of fabric by permapressing is an example of such a specific process performed -- substantial process performed abroad that's for the purpose of improvement.

The regulation is a reasonable interpretation of the statute because the history of the statute makes clear

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that Congress in -- in authorizing incidental to assembly operations abroad meant to encompass only, in the words of the conference report, minor operations, minor processes, and as examples gave cleaning and lubricating of an assembled article as an -- as examples, and went on to say cleaning and lubricating, in describing them, said such processes, if of a minor nature, may be regarded as incidental to assembly.

Now, the regulation in saying that significant processes for the improvement is plainly generally valid under this meaning of the statute and, as applied to permapressing, is also valid because, as the facts of this case make clear, permapressing involves a significant amount of capital and time in the foreign operation. It is wholly unrelated to the assembly process, and it's for the purpose of improvement.

QUESTION: But what about the split that's involved? I mean, if -- if all of the whole -- whole permapressing operation were done in Mexico, then it would seem to fit within the regulation purposes.

MR. JONES: Well, all of the permapressing operation for this purpose is done in Mexico.

QUESTION: But the --

MR. JONES: Let me answer that. At page 20 of the joint appendix --

QUESTION: The chemical process occurred in the United States, didn't it?

MR. JONES: Well, the chemical spraying of the fabric occurred in the United States, but the permapressing, as described on page 20 of the joint appendix in the complaint is -- is obtained when -- and I'm quoting the complaint -- the heat of the oven expels a molecule of water from the pre-polymer in the fabric, which cross-links the cellulose fibers. That is the permapressing.

The work done in the United States was like the manufacture of the cloth. It was a significant step towards coming up with an article that was going to be permapressed, but the permapressing actually occurred in Mexico.

QUESTION: The statute allows painting --

MR. JONES: Yes.

QUESTION: -- and calls it incidental. This, you know, seems -- seems to me more incidental than painting.

MR. JONES: Well, again in saying that paint --

QUESTION: I don't know what I'm supposed to know about this, but --

MR. JONES: -- in saying that painting can be

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incidental to the assembly process, the history makes clear that it's painting of a minor nature. And -- and, indeed, in the General Motors case, for example, which is cited in -- in the briefs, the court of -- the Federal circuit correctly held that some kinds of operations that you might call painting are, in fact, a lot more significant than just this kind of minor nature of stuff that -- that is involved in protective coating.

QUESTION: Of course, this -- this current issue -- is that an issue of the validity of the regulation?

MR. JONES: No.

QUESTION: Or is that an issue of the application of the regulation --

MR. JONES: It is --

QUESTION: -- to these facts?

MR. JONES: It is -- it is the latter, and -- and we think that the facts clearly reflect that the regulation should properly be applied in this case, but in fairness, the court has not --

QUESTION: That's not the -- is that the issue that we have?

MR. JONES: It is the ultimate issue that the courts have. Whether this Court thinks it's prepared to reach that question or not, I can't say, but I can say that the courts below have not reached it because the

Federal circuit incorrectly held that it could ignore the regulation altogether.

QUESTION: Why -- why is -- I mean, the chemical -- it says chemical, treatment of permapressing.

MR. JONES: Yes.

QUESTION: It doesn't say anything in the reg about the chemical treatment taking place in Mexico, but it does use the example of permapressing.

MR. JONES: Well, it --

QUESTION: So, your interpretation, which is Treasury's interpretation, is a general interpretation of the reg.

MR. JONES: Yes.

QUESTION: If the permapressing -- it isn't this case. It's -- it's true across the board.

MR. JONES: True. If the permapressing is performed abroad, then it's a significant operation that doesn't -- that disqualifies the goods for the assembly. And in our view the permapressing is the permanent pressing that occurs.

I'd like to reserve the balance of my time for rebuttal.

QUESTION: Very well, Mr. Jones.

Mr. Phillips, we'll hear from you.

ORAL ARGUMENT OF CARTER G. PHILLIPS

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MR. PHILLIPS: Thank you, Mr. Chief Justice, and may it please the Court:

The Government suggests to you that the -- this may be a case of high Chevron or low Chevron. I submit to you that this is a case of no Chevron. And the reason for that is that you cannot determine whether or not any kind of deference is due to the agency's interpretation simply by citing other statutory schemes or cases that interpret other statutory schemes.

In order to decide in a particular case whether or not respect is due to the regulations or interpretations of the particular agency, it's absolutely essential to examine the source of regulatory authority, the nature of the judicial proceeding that Congress provided for, and in this case take a very hard look at the regulation itself because it expresses as plainly, as anything can, the very limited nature of the authority that Customs purported to exercise in this particular context.

And if you follow those three sources of law, they all point in precisely the same direction, which is that Customs never has had, in the 200 years of its existence, the kind of authority that the Government purports to claim that it has now on the basis of an

utterly ahistoric analysis of this particular problem.

Instead, what we know is that Customs binds its own people at their ports of entry, and that's all Customs purports to do. It does not purport to bind either this Court or the Court of International Trade or the importer when it adopts regulations such as section 10.16 that's at issue in this case.

QUESTION: But, Mr. Phillips, an agency certainly doesn't have to go through notice and comment rulemaking in order to bind it's own people. It just issues instructions.

MR. PHILLIPS: It does need to go through comment and notice rulemaking when it adopts a regulation pursuant to headnote 11 which provides the procedures with regard to the admission, okay, that's applicable to this particular kind of case. The procedures with regard to admission are things like inspections, what's required to inspect to make a determination with regard to the classification. That is a, quote, substantive rule. It's procedural in nature, but it is a delegation of authority and it does require the notice and comment rulemaking because you have to comply with those specific procedures in headnote 11 in order to be allowed to make a protest that's valid under the statute.

But with respect to the rest of the rules, it's

absolutely clear they were not intended to be substantive rules or in any way to bind anybody, and that's because Customs doesn't have the authority to do that. And -- and that is as clear as can be. I think it's as clear as can be in the -- the sentence in section 10.11 of the regulation. But if you read section 10.11 in context of the comments --

QUESTION: Well, where do we find these, Mr.Phillips?

MR. PHILLIPS: I'm sorry, Mr. Chief Justice. Section 10.11 is on page 36 of our brief, and it says, nothing in these regulations purports or is intended to restrict the legal right of importers or others to a judicial review of the matters contained therein.

QUESTION: Well, the Government is not trying to foreclose judicial review.

MR. PHILLIPS: Well, the notion that what this regulation is really talking about is simply to prevent all judicial review is -- is inconsistent with the nature of the comments that were made. No one criticized the comments because they would foreclose judicial review. Everyone criticized the comments because they purported to exercise substantive rulemaking authority that the agency did not have, and the agency somewhat inartfully said, no, no, no, we didn't mean to intend anything along those

lines. And that's a perfectly rational understanding of both their authority and the nature of the responses that they made to the -- to the comment.

QUESTION: It certainly is clumsily put if that's what they -- that's what they had in mind.

MR. PHILLIPS: Well, but the -- the other alternative interpretation is that it's utterly superfluous, that is, that -- that the IR -- I mean -- excuse me -- that Customs decided to tell the world that it was not going to foreclose judicial review. But everyone knows that agencies don't have the authority to foreclose judicial review particularly in a -- in a statutory scheme like this which provides for de novo judicial review.

QUESTION: May I -- may I ask you sort of a broad question? I understand you say it's neither high Chevron nor low Chevron; it's no Chevron. And you don't have to tell us whether you think there is a high and a low Chevron under your approach to the case. But it is your -- is it your view that every statute that provides for de novo review is a no Chevron case?

MR. PHILLIPS: That is the argument that we make, yes, Your Honor. I believe that is --

QUESTION: So, the mere fact that they provide for de novo review, that's the end of the ball game for

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you.

MR. PHILLIPS: I think that is the clearest evidence that Congress did not mean to have these issues decided in the first instance by a particular agency. I think it's clear under those circumstances that the enforcement -- the ultimate enforcement of the statute is something that Congress expected the judiciary to undertake.

QUESTION: And you don't think there could be a category of cases in which the facts would be reviewed de novo, but there would be some degree, whether low, high, intermediate, some degree of deference to the agency's view of the law.

MR. PHILLIPS: Well, since the ultimate question really is one of -- of congressional intent --

QUESTION: Right.

MR. PHILLIPS: -- I could imagine a situation in which Congress had expressed itself in a way that it meant for the de novo review to be limited to the facts and in a way that would allow the contrary inference. I just think that when all we know is that Congress has acted in the way it did is the de novo review mechanism -- the stronger inference obviously is that it meant for these matters not to be dealt with as a matter of Chevron deference.

QUESTION: Isn't it equally clear that Congress

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can specify that there will be de novo review, including de novo review of rulings of law in a given case, without thereby implying anything about what would be a proper source of determining what the proper -- what the correct law is, i.e., without in any way implicating that there should not be deference in -- in looking to agency regulations in making the ruling for?

MR. PHILLIPS: I don't think that's the natural inference to draw from that kind of extraordinary scope of -- of judicial proceeding. And so -- I mean, you can reach an opposite inference, but I think you -- I would -- I would at least look for clearer evidence that Congress really meant for some deference to arise in a situation where Congress has so clearly indicated that it wants de novo review. And there are two aspects of this case that make that seem to me unbelievably powerful.

One, you know, the Government doesn't mention section 2638 which in my experience is a remarkable provision. Let me see if I can find it. 2638 is mentioned in our brief again at -- oh, at 2a of the -- 2a of the respondent's brief. And 2638 specifically says that the -- that Customs is -- is -- you don't even have to make the presentation to Customs in order to preserve your right to protest; that is, you don't have to make the same argument --

QUESTION: On 2a of your brief, I don't find the section that you're referring to.

MR. PHILLIPS: I'm sorry. I may have -- I may have misspoken. I apologize. You're right. I apologize. It is 20a. I'm sorry.

QUESTION: Thank you.

MR. PHILLIPS: I misread the 0.

In section 20a, where we talk about section 2638, it's an extraordinary provision because it says all you need to do is present the fact that you protest and that's sufficient to justify allowing you to go to court to challenge it. That means that you can present one set of arguments to the Customs and a completely different set of arguments to the court, and the court reviews those de novo.

And it seems to me an extraordinary concept that I could -- you know, I could completely mislead Customs. They would reach a result that might be reasonable on the basis of what I present, and then I start all over again de novo. Obviously, you can't be deferring to the Customs' decision in the specific case.

And therefore, it seems quite unlikely that Congress would have, in that kind of a scheme, intended to allow Customs regulations which just generally inform the Customs agents how to proceed, what the law is, and that

that is in some sense binding on either importers or on the -- or on the -- or on -- or on the courts.

QUESTION: Why doesn't that -- why doesn't that just prevent -- present the kind of situation that Justice Souter alluded to? You -- you continue to acknowledge that the agency's rules are one source of law, but if the -- if the person challenging the -- the assessment wants to appeal to another source of law, he's -- he's entitled to bring forward whatever he wants. I don't see why that provision necessarily says that agency rules are nullified in -- in this -- in this proceeding.

MR. PHILLIPS: I think that's a gross overstatement, that the agency rules are nullified. I mean, I understand that's the Solicitor General's position, but if you read the Court of International Trade and the Federal circuit's opinions, they analyzed the rule and said they thought it was inconsistent with the statute. And then in the next paragraph of their analysis, they turn to the question of whether or not it is entitled to Chevron deference, which I took to be the fullest form of it, and said --

QUESTION: Well, it's never entitled --

MR. PHILLIPS: -- no.

QUESTION: -- to Chevron deference if it's inconsistent with the statute, I mean, if that's what

you're saying.

MR. PHILLIPS: No, but they -- but they reviewed it in two different ways. They -- they -- because the -- the Court of International Trade and the Federal circuit have always been willing to give what I would regard as Skidmore deference to whatever Customs does. They read it for what it's worth and they accept it for what value it has in terms of helping them to decide a case. They have never been willing to give Chevron deference for the -- for all of the reasons that I've identified.

One, the statutory scheme is not one that -- that lends itself -- it is a very de novo review proceeding and has been for the -- for the entirety of 200 years.

QUESTION: But the situation that you describe where the importer can make entirely new arguments in the court seems to me to argue for the necessity for the uniformity that would be attained by following the -- the regulations of the agency.

MR. PHILLIPS: I don't think so. Where -- where the court sought -- I mean, where Congress sought clear uniformity was by creating the Court of International Trade and allowing the specialized court to set it. It did, indeed, try to have a second level of administrative uniformity because there was a problem in the relationship

between the Customs houses and the commissioners of Customs at one time and the Secretary of Treasury, which is why 1502 is -- is -- is an extraordinary provision.

It says, the Secretary shall act in a particular way and Customs shall follow the instructions. That's not an accident. That's a function of a -- of a division of power between the Secretary and the -- and the port commissioners.

And Congress stepped into that void and said, no, no, no, it's important for at least initial administrative consistency to insist that Treasury says what the Customs officers shall do and they will do what Treasury says.

QUESTION: Congress has to say that?

MR. PHILLIPS: Yes.

QUESTION: Why -- why would Congress have to say that? Isn't -- isn't the Customs department under the authority of the -- of the Secretary of the Treasury?

MR. PHILLIPS: To be sure as a matter of --

QUESTION: Are we going to have a special law in every Department that the employees of that Department shall obey the -- the Secretary?

MR. PHILLIPS: In general, you'd hope not, Justice Scalia. On the other hand, it was reasonably clear that Customs commissioners viewed themselves as

presidential appointees with a significant amount of independent authority. And as a consequence of that, Congress stepped in.

This is an historic anomaly. I don't -- I don't know of any other agency where that's true, but I don't know of any other agency that's like Customs with respect to almost any other aspect of this, which is why I think it's a fundamental mistake to look to other agencies to try to determine what authority Customs has.

Yes, Justice Breyer.

QUESTION: Proposition. Congress, in legislating -- in legislating the substance of tariff legislation, looks to Treasury, namely Customs, in the same way that Congress, when enacting income tax legislation, looks to Treasury, namely the Bureau of Internal Revenue. That's the proposition. Is that true or false?

MR. PHILLIPS: No, that proposition is incorrect.

QUESTION: All right. Now, explain to me in what way that's incorrect.

MR. PHILLIPS: Because it is the President and the -- and the -- and the U.S. Trade Representative and the International Trade Commission that serve the policy making role vis-a-vis Congress and vis-a-vis the rest of

the world. And part of that's the reason for the Harmonized Tariff Schedule is because it's important to be able to reconcile our tariff arrangements with tariff arrangements in other countries. And that's done at a very high policy level.

And that's why -- not only is it -- is it that Congress would turn to them in seeking guidance on how to proceed, but more fundamentally Congress has delegated extraordinary authority to the President to modify these tariff schedules as -- as necessary, either as a matter of efficiency or as a matter of dealing with international affairs.

And -- and when you get the description of what's going to happen in -- in response to the Harmonized Tariff Schedule, you get these majestic statements about the U.S. Trade Rep and the President and then it turns to the Customs Service, and the Customs Service is supposed to send instructions to its people on what to do. It's clear that Customs was not viewed as a policy making entity --

QUESTION: I -- I saw that too. I see that now. I see your argument definitely now.

If we go back to the time when being a port -- was he called a customs collector? A port -- I don't know. A customs collector was a major political

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appointment.

MR. PHILLIPS: Yes.

QUESTION: I mean, a hugely important job at that time, say, in the 19th century or earlier. Who else could Congress have looked to other than Treasury as -- for advice about what the substance of -- of Treasury regulation -- of Customs regulation should have been?

MR. PHILLIPS: You mean back in the --

QUESTION: Yes.

MR. PHILLIPS: -- in the 19th century?

QUESTION: Yes, 19th century.

MR. PHILLIPS: My guess is they would have turned to the -- to the Commissioner of the Port Authority of New York, as well as to the Secretary of Treasury, because these people independently seem to be acting.

And that's why Congress had to pass a law in 1502 that specifically said, no, we're going to order these things in a particularized fashion, and they did so.

QUESTION: On the one hand, you describe an agency that has such extraordinary independence that they have to be told to follow regulations through notice and comment, and on the other, you say they have no policy making authority. So, this is a -- from both aspects, a truly extraordinary agency that has notice and comment rulemaking just binding on the people who work there, the

employees, and yet, on the other hand, it certainly is unusual.

But with respect to the expert -- I think you said Congress set up the expert tribunal, the Court of International Trade. Well, Congress set up a Tax Court too, and the Tax Court does give deference, even if they call it National Muffler instead of Chevron. They do give deference to Treasury regulations.

MR. PHILLIPS: Right. The difference -- there are a couple differences.

One is that there is no counterpart to 2638 with respect to the -- to the IRS. You must present the precise grounds upon which you choose to protest tax -- a tax, or otherwise you are barred. That's the variance doctrine. It's been decided by this Court since 1940. There -- so, there is a vast difference in the regulatory scheme between Treasury and Customs, and it's -- in terms of de novo review. And I think it's important to recognize that 2638 is a remarkably broad grant of authority that -- that distinguishes Treasury from Customs.

And -- and, you know, the Solicitor General in his reply brief saying that they were placed on a par is just simply wrong. There is no statutory --

QUESTION: Does 2638 have nothing to do with

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appraisals? You say that as distinguished from classification where the agency gets no deference --

MR. PHILLIPS: Right.

QUESTION: -- they do get deference when it comes to appraisals? Is that --

MR. PHILLIPS: I'll --

QUESTION: Setting the value of the goods.

MR. PHILLIPS: Well, the -- there has been some lower court decisions dealing with deference under those circumstances. My argument would be, I think, that that's -- those probably are wrong, but that's not an issue for this case.

QUESTION: So, you think the same thing goes for appraisals as for classifications.

MR. PHILLIPS: Yes, Your Honor. I think they are covered by precisely the same statutory scheme.

And so you have -- and let me go back to the rulemaking authority because I think it's very important to understand under 1502. Not only does it only -- I mean, that language at the ports of entry is terribly pivotal language, and it -- and it goes back to the distinction of the Zenith case that Mr. Jones made a great deal about in his -- in his argument.

If you look at the Zenith opinion, the Court says in Zenith, it describes the grant of regulatory

authority and it's a broad authority to deal with all duties. But you know what's missing in the language of the Zenith opinion is any reference to the ports of entry, and the reason for that is clear, is because the grant of authority in countervailing duties cases, even in 1979, was significantly broader.

And then in the 1980 statute, we have this extraordinary de novo review that's provided with respect to Customs in the classification context, and Congress then dealt with the countervailing duties, consistent with this Court's decision in Zenith, and said that that's based on an administrative record and that that's based on -- on ordinary standards of administrative review.

So, Congress, even with respect to Customs -- I want to be clear about this because one of the things the Government challenges us on is that somehow we are saying that Customs, as an entity, is divested of any kind of -- of respect or deference as a consequence of our decision -- of our arguments here. And nothing could be further from the truth.

Again, I think you have to look at the three sources of -- of information with respect to what Congress intended.

QUESTION: Why -- why -- why is it that because there's no administrative record in the scheme we are

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reviewing here, that the Secretary is entitled to no deference as to the regulations? It seems to me those are two very different things.

MR. PHILLIPS: Well, I think it's an odd notion to say that how you take your regulation and apply it to a specific case is a decision that the courts will utterly ignore. And yet, how you adopt an abstract rule in a particular context should in some sense be binding in a legislative fashion.

QUESTION: Well, it seems to me that this is a case where uniformity is all the more necessary and that we should, therefore, defer to the regulations as the source of law even though in the Court of International Trade there will be a de novo hearing on a new record. At least we'll have uniformity as to what the source of law is.

MR. PHILLIPS: That would be -- I would think that more persuasive. And -- and it seems to me that the only point that that goes to is the extent to which de novo review in some sense divests this regulatory scheme and the regulations of their authority.

It still doesn't answer what I -- what I regard as the more -- the continuing and fundamental problem, which is Congress never delegated to Customs the authority to adopt regulations that it intended to be binding in

making these kinds of substantive determinations. And that is precisely what section 1502 says by saying those regs are limited to the ports of entry, and it's the same thing when you look at the -- at the Harmonized Tariff Schedule because -- I'm sorry.

QUESTION: You -- you just -- how are the -- what are Customs hearings of this sort normally about? I mean, are Customs hearings where there are disputes of brute facts common or not? I mean, do some people argue, no, I did import a piece of steel that looks like this, and somebody says, no, no, that was not imported on such and such a day? Or is it that they concede what the item was and the question is whether to -- how it fits within a given tariff?

MR. PHILLIPS: I think it is more the latter than it is the former.

QUESTION: Well, do we have any -- because if it's -- I mean, I guess that's your argument. Do we have any factual basis? I mean, if it's only the latter kind of thing, a de novo hearing would be irrelevant I guess under the Government's interpretation of the law, but if it's a lot of the latter thing, if it's a lot of disputes of real brute facts, then I guess that de novo would have a big meaning. How do I find out the answer to that? What are Customs hearings about?

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MR. PHILLIPS: Well, perhaps Mr. Jones would be in a better position to give you a broader based assessment of what Customs hearings are about, but --

QUESTION: Well, isn't it entirely possible that they might involve factual inquiry into things like precisely what was done in the United States and precisely what was done in Mexico --

MR. PHILLIPS: Yes, I would -- I would expect --

QUESTION: -- as a factual matter. I can imagine that there would be a lot of factual evidence on things of that sort, wouldn't there?

MR. PHILLIPS: Oh, I'm -- I'm sure there are lots of disputes that raise lots of factual questions. That's why there's a significantly large number of Customs officers out there, and presumably they're keeping themselves well occupied. So, I don't -- I don't have any doubt about that.

I think the -- the nature of the process is, however, extremely informal and tends to move quite rapidly, and then in somewhat contrast to the judicial proceedings which are somewhat more -- obviously, more formal as a process matter but are not particularly complicated given that this is a routinized process --

QUESTION: Mr. Phillips, could you repeat your argument with reference to 2638 for me? I'm not quite

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sure I really understand your point.

The statute, as I understand it, says that if you make a protest, you can bring a civil action under -- under 515, but you're not limited in the civil action to the grounds of the protest that you made at the port of entry.

MR. PHILLIPS: Right.

QUESTION: Now, why does that have anything to do with the rules that should govern the disposition of the civil action? That's what I don't quite understand.

MR. PHILLIPS: Well, what -- what it says, at least to me -- it seems an -- illogical to say that we have a set of rules and the agency acts pursuant to those rules and makes a decision.

QUESTION: Right.

MR. PHILLIPS: But that decision could have been based on completely the wrong -- everything could be wrong about that --

QUESTION: Well, but they're two different decisions.

MR. PHILLIPS: -- because you didn't have to raise the argument.

QUESTION: They're two different decisions. One you make at the port of entry.

MR. PHILLIPS: Right.

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QUESTION: And you say, these goods didn't come from Mexico; they came from Spain. And then you later realize you're wrong and you bring a suit and say, well, the real problem was they did the permapressing in Mexico and I -- I failed to point that out.

Now, the fact you can make that argument in the later proceeding doesn't seem to me to have anything to do with the question of whether a regulation that relates to permapressing shall be given deference. It just seems to me they're two entirely different ball games.

MR. PHILLIPS: Well, it's -- it's very much the same question Justice Kennedy asked me, and obviously I'm not being as persuasive as I'd like to be. But my --

QUESTION: Indeed, you -- you've persuaded me to the contrary.

(Laughter.)

MR. PHILLIPS: Now, I'm really unhappy.

(Laughter.)

QUESTION: It -- it seems to me that if -- if you're position is right, 2638 is inexplicable. If indeed it is an -- an entirely new determination not only on the facts, but on the law, if that's what de novo review means, why would you need 2638?

MR. PHILLIPS: Oh, I think to define precisely the breadth of the -- of the de novo review. Otherwise

you would assume --

QUESTION: -- de novo. You decide what the law governing this thing is.

MR. PHILLIPS: But -- but, see, the difference is that if you go back to the -- to the example that the Solicitor General points to, which is review of IRS protests, you have to identify the precise grounds and you are stuck with the precise grounds that you've identified. All I'm saying is that this -- this is to my mind the broadest, perhaps the most breathtaking, de novo proceeding that I know about.

QUESTION: But when you answered Justice Stevens' question and my question, why isn't this a preeminent case for applying at least a uniform source of law on which we can then make a de novo determination based on the facts?

MR. PHILLIPS: Well, there's two answers to that. One is the inference to draw when Congress creates an entire scheme of de novo review is that it does not look to the enforcing agency as the source of uniformity.

And then, two, when you get to the -- the genuine source of uniformity in this particular statutory scheme, we know that it's the Court of International Trade because it is a specialized court.

QUESTION: Well, but the Court of International

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Trade in a case like -- is certainly bound to follow the decisions, say, of the Federal circuit, is it not?

MR. PHILLIPS: Oh, to be sure, and of this Court --

QUESTION: So, de novo doesn't mean you just decide as an original proposition for yourself what the law is if other courts which are above you in the hierarchy have said differently.

MR. PHILLIPS: That's -- that's clearly the case and that's the fair inference you'd draw from the -- from the statutory scheme Congress has created of -- of appellate review.

But the question is, what inference do you draw from a scheme of extraordinary de novo review coupled with a remarkably narrow grant of rulemaking authority?

And let's remember, there are five provisions that were cited in the adoption of these regulations, and each one of them points to the ability to bind Customs or to bind individual employees of the particular service. And the Government only discusses essentially 1502 and, in doing that, reads out of the statute ports of entry, that language, which I submit to you is terribly important. And then when you get to the regulation --

QUESTION: But what makes it so important? I mean, that's where it happens. The goods come in and they

have to be classified at the port of entry.

MR. PHILLIPS: If you contrast that language, Justice Ginsburg, to the language in Zenith, the grant of authority in Zenith, you would say the same thing there, but the term, ports of entry, isn't included in the grants of authority to deal with countervailing duties. Those presumably arise as well at the ports of entry, just like every other duty arises there. The fact that Congress put that language in there was terribly important to --

QUESTION: Well, but your argument is -- is also that this language is just a reflection of a long historical tradition of the distinctiveness of the Customs Service and whatnot. That's quite inconsistent with the way we came out in Zenith, even though we didn't have this statute. You assert that this statute just reflects a long historical tradition, and in fact in Zenith, it seems to me that historical tradition was -- was not observed.

MR. PHILLIPS: Well, it may not have been observed in part because I don't think the issue of -- of deference arose -- was briefed in Zenith. And if you just look at the sources of authority that the Court looked to in passing, it said that this is an ordinary administrative -- judicial review and administrative proceeding, which is one in which you would routinely grant deference, and second, it described the -- the

authority conferred upon Treasury in -- in terms that are significantly broader than the terms that are employed in this particular case. I submit to you that Zenith simply does not help to get to the right result in this particular case.

Again, I'd like to go back to the regulation because I think to my mind what is extraordinary about this case is the way all the parts fall together. This is remarkably broad de novo review judicial proceedings. It is remarkably narrow grant of authority, and Customs, in 1974 at the pivotal time, recognized in response to a very pointed set of comments that it was not exercising the kind of authority to which Chevron deference would be applied.

I guess I go back to my initial point. This is not high deference -- or high Chevron or low Chevron. This is no Chevron. I'm inclined to rest on our briefs --

QUESTION: Of course, in 1974 there was no Chevron then. That's clear.

(Laughter.)

MR. PHILLIPS: That's true.

I could address the substantive regulation, but if -- if there are no questions, I'm inclined to rest on the briefs.

QUESTION: Well, one question about that. Would

you -- would you reach the same result if the chemical treatment also occurred in New Mexico -- I mean, in Mexico?

MR. PHILLIPS: Well, they would certainly have a -- a stronger argument, although I -- I think the more compelling arbitrariness of this regulation arises in the different treatment of the pants that Haggar has itself because they have one set of pants that come in chemically treated from the United States that are pressed and then receive a permanent press as a consequence of that, and another pair of pants that are pressed and then baked and are both treated in the same way. And those get absolutely contrary treatment under this particular regulation.

QUESTION: Well, that could be a question of the application of the regulation, not -- not whether permapressing can't be taken out from this --

MR. PHILLIPS: Well, I guess it goes to the -- to the validity of a -- of a regulation that -- that tries to use the term permapressing which is I think not a self-defining concept and one that doesn't seem to provide much help in terms of how to resolve any specific case.

And -- and indeed, I -- I would read that one paragraph of the Federal circuit's analysis of the permapressing regulations as just saying, look, this is

inconsistent with the statute. The statute tells us incidental to assembly is a comparative process. We use the Mast factors. We always engage in individualized decision making. We ought to treat the permapressing process the same way we treat the painting process. It's all a presumption but it's not categorical. There are no irrebuttable presumptions embodied here, and if it does that --

QUESTION: But the -- one of the things about Mast, the last factor in that, seems that -- that the importer would always win because it's always cheaper to do it all someplace else.

MR. PHILLIPS: Well, except that if the cost of the assembly process is -- of the incidental parts -- incidental -- of the parts that aren't the assembly process are expensive, as in a case like General Motors or Chrysler, then -- then you would bar it under those circumstances and you'd say it's not incidental because it's not a minor operation. It is at that point a significant operation.

But that is precisely what Mast is designed to get at and that is precisely why you don't need a regulation here. You just need consistent application of the analysis the Federal circuit has devised and to be applied. And it was applied properly in this context.

The Government doesn't contest it on that basis, and accordingly, the Court should affirm.

If there are no further questions.

QUESTION: Thank you, Mr. Phillips.

Mr. Jones, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF KENT L. JONES

ON BEHALF OF THE PETITIONER

MR. JONES: Thank you, Mr. Chief Justice.

I just want to see if I can point the Court to what seems to be a little bit of a confusion in the presentation here.

There are three steps to reaching a conclusion. You find the facts, you determine the law, and you apply the facts to the law. Chevron operates at that second stage only. A court can make a de novo determination of the facts and that doesn't change the fact that in determining what the law is, it is to defer to the agency's reasoned interpretations.

The Court has held that in many cases and has specifically held it in -- in the one case that respondent cites as his leading authority, Adams Fruit Company v. Barrett. In Adams Fruit Company, the Court held that there was a de novo review, that the agency couldn't interpret the scope of the judicial remedy, but that that didn't deprive the agency of its authority to make

substantive interpretations of the statute. And the Court went on to say that in that de novo exclusive judicial proceeding, the Court would defer to the agency's reasoned interpretations of the substantive scheme.

That is a principle that the Court has applied in numerous contexts, not just in tax and customs cases, but has specifically applied it in customs cases. The Court would have to, in effect, overrule Zenith Radio to -- to change that standard in this case.

QUESTION: If we could get down to the last thing, if you have just a moment to it.

MR. JONES: Sure.

QUESTION: The argument is in the end you are absolutely absurd to make a distinction between pressing a little longer and pressing and baking.

MR. JONES: Well, I don't think that there are facts in this case that involve pressing a little longer. In fact, the facts show that they didn't do that, that that's not practical. And I don't know what is being referred to at this point in the argument.

But let me answer your -- your question more generically. A quibble about the application of the permapressing rule to this case doesn't denigrate the -- the validity of the substantive provision of the regulation. It defines acts incidental to assembly to not

include significant processes.

The Court can rely on the -- on the general standard even if it's confused about the application of the example. And the general standard plainly applies when -- when -- on the findings of the trial court that there was significant capital, significant time. It was unrelated to assembly and it was for the purpose of improvement. The trial court said that these factors militate against a duty allowance, but the court balanced them to reach a different conclusion.

Well, the agency's balance is different, and as this Court has held in many situations, the agency doesn't have to establish that its regulation is the only reasonable interpretation or that it's the one the Court would adopt in the first instance. It's sufficient, under Chevron, that the agency made a reasoned exposition of the text consistent with its purpose in history.

QUESTION: Mr. Jones, I -- I wish you could give me some -- make up some explanation for the extraordinary provision in the regulation that says, you know, this -- this will not deprive anyone of the right to judicial review.

MR. JONES: Well, I think --

QUESTION: Of all of the materials brought forward by -- by the respondent, I really think that --

that is the one that most smells like what he says this whole system is set up to do.

MR. JONES: If you look at the very first sentence of that paragraph in the regulation, it says, these sections --

QUESTION: Where are we, Mr. Jones?

MR. JONES: I'm sorry. I am holding in my hand a copy of the regulations. This issue was raised in respondent's brief, and I don't think -- I don't know if it's cited.

The very first sentence of the regulation says that these sections set forth definitions and interpretive --

QUESTION: That's at page 36 of the red brief.

MR. JONES: Thank you.

QUESTION: It says that these regulations set forth interpretive regulations. That's what the agency intended to accomplish. The last sentence -- I think amicus Customs and Trade Bar is right -- just reflects that, yes, these are interpretive rules, not binding legislative rules. You have a right to go to court to challenge them.

I know my time has run, but the cite that you asked for, Justice Scalia, is 467 U.S. 843 to 844. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Jones.

The case is submitted.

(Whereupon, at 11:03 a.m., the case in the above-entitled matter was submitted.)

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