

September 24, 1980

CONGRESSIONAL RECORD—SENATE

S 13345

this problem by adding a new category of cases to those which are already instituted in the district courts.

Under these circumstances, it makes good sense in terms of the availability of judicial resources to transfer some of the cases now instituted in the crowded district courts to the underutilized customs courts.

Another existing defect is that the court is hamstrung in exercising its responsibilities because, as a matter of settled law, it lacks critical equitable powers; it may only entertain cases and controversies which have often reached a degree of ripeness that could make equitable relief too late to be useful, and it cannot fashion equitable remedies when appropriate. The proposed Customs Courts Act of 1980 resolves this long-standing problem by granting the court full equitable powers. This provision will provide a forum for litigants seeking immediate relief in matters arising from import transactions. At present, litigants can only hope the district court will find subject matter jurisdiction and grant an equitable remedy.

In conclusion, S. 1654 would make it clear that the Customs Court—renamed the U.S. Court of International Trade—possesses broad jurisdiction to entertain certain civil actions arising out of import transactions. In addition, the Customs Courts Act of 1980 would make it clear that, in those civil actions within its jurisdiction, the court possesses the authority to grant the appropriate relief when required to remedy an injury. These provisions, when coupled with those contained in the Trade Agreements Act of 1979, make it clear to those who suffer an alleged injury in this area, that they may seek redress in a court with confidence that their case will be heard on the merits—not decided upon jurisdictional grounds and that, if they are successful, the Court of International Trade will be able to afford them the relief which is appropriate and necessary to make them whole.

This legislation will offer the international trade community, as well as domestic interests, consumer groups, labor unions and other concerned citizens, a vastly improved forum for judicial review of administrative actions of the U.S. Customs Service and other Government agencies dealing with imported merchandise.

The language under consideration at this time is largely an improvement over the original provisions of S. 1654. However, the one glaring exception is the political affiliation requirement. This provision, which is also current law, states that no more than five of the nine members of the court may be from the same political party. I am strongly opposed to this measure, but I am willing to accept passage of the bill with it intact, in light of the imminent end of the session.

I view this legislation as too important to risk a time-consuming conference over the single provision provoking disagreement between the House and Senate. As you may be aware, the Customs Court Act of 1980 complements the Trade Agreements Act of 1979, which took effect

January 1, 1980, so its expedited passage is of great importance. If however, this bill is passed without deletion of the political affiliation requirement, I will seriously consider sponsoring legislation next session to correct what I consider to be an inappropriate requirement on a court established under article III.

It is inappropriate to have a political affiliation requirement for Customs Court's judges for several reasons. First of all, the Customs Court is and would continue to be unique among article III courts in being subject to such a requirement. The requirement is a vestige of a provision originally applied to the board of general appraisers—the precursor for the Customs Court—established in 1890 as a quasi-administrative, quasi-judicial body to review classification and evaluation of imports.

A political affiliation balancing requirement may make sense in the context of appointees to regulatory boards and commissions, since such officials have relatively short terms, and are charged with making policy decisions often heavily tinged with political considerations. But article III judges appointed for life, who make decisions on the basis of assessment of facts and interpretation of law, should be appointed on the basis of merit alone, and without regard to any political considerations.

I believe that the retention of the political affiliation requirement will only tend to politicize the court—a result at odds with the bill's laudable goals of enhancing the importance and effectiveness of the court.

In addition, I would like the record to clearly indicate that the elimination of this requirement is supported by the Administrative Conference of the United States, the American Bar Association, the Association of the Customs Bar, the Committee on Customs Laws of the New York County Lawyers' Association, and the U.S. Customs Court.

At the request of the Senate Finance Committee, I would like to add one point of clarification regarding section 604 of the act. That section is not intended to imply that the so-called substantial evidence test applies to public interest determinations of the U.S. International Trade Commission in section 337 cases.

I would now like to take this opportunity to pay special tribute to those individuals who, through their untiring efforts, have helped make this bill a reality so it could come to the floor today.

Michael Altier, counsel of the subcommittee which I chair, deserves a great deal of the credit for the immense amount of work he put in. Also, Romano Romani, my staff director, deserves credit for his work on this proposal. In addition, I would like to thank Ann Woodley for all of her recent technical contributions to the legislation.

Before closing, I would also like to formally thank David Cohen, director of the commercial litigation branch of the Department of Justice. Mr. Cohen has been instrumental in assisting us in the development of this legislation.

This legislation is supported by the administration, specifically the Justice Department and the Commerce Depart-

ment, the American Bar Association, the Association of the Customs Bar, the Administrative Conference of the United States, the American Importers' Association, the New York County Lawyers' Association, the U.S. Customs Court and the U.S. Court of Customs and Patent Appeals. In addition we have received helpful suggestions from the U.S. International Trade Commission.

In conclusion, I would like to urge my colleagues to support S. 1654, the Customs Courts Act of 1980. It is a long overdue and very necessary piece of legislation. ●

Mr. ROBERT C. BYRD. Mr. President, on behalf of Mr. DeCONCINI, I move that the Senate concur in the amendment of the House.

The motion was agreed to.

Mr. ROBERT C. BYRD. Mr. President, I move to reconsider the vote by which the motion was agreed to.

Mr. BAKER. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

#### DOCUMENTARY MATERIALS PRIVACY PROTECTION ACT

Mr. ROBERT C. BYRD. Mr. President, on behalf of Mr. KENNEDY, I ask that the Chair lay before the Senate a message from the House of Representatives on S. 1790.

The Presiding Officer laid before the Senate the following message from the House of Representatives:

*Resolved*, That the bill from the Senate (S. 1790) entitled "An Act entitled the Privacy Protection Act of 1980", do pass with the following amendments:

Strike out all after the enacting clause, and insert: That this Act may be cited as the "Documentary Materials Privacy Protection Act of 1980".

#### UNLAWFUL ACTS

Sec. 2. (a) Notwithstanding any other law, it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize any work product materials possessed by a person in connection with a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce; but this provision shall not impair or affect the ability of any government officer or employee, pursuant to otherwise applicable law, to search for or seize such materials, if—

(1) there is probable cause to believe that the person possessing the materials has committed or is committing the criminal offense to which the materials relate: *Provided, however*, That a government officer or employee may not search for or seize materials described in subsection 2(a) under the provisions of this paragraph if the offense to which the materials relate consists of the receipt, possession, communication, or withholding of such materials or the information contained therein (but such a search or seizure may be conducted under the provisions of this paragraph if the offense consists of the receipt, possession, or communication of information relating to the national defense, classified information, or restricted data under 18 U.S.C. 793, 18 U.S.C. 794, 18 U.S.C. 797, 18 U.S.C. 798, 42 U.S.C. 2274, 42 U.S.C. 2275, 42 U.S.C. 2277, or 50 U.S.C. 783); or

S 13346

## CONGRESSIONAL RECORD—SENATE

September 24, 1980

(2) there is reason to believe that the immediate seizure of the materials is necessary to prevent the death of or serious bodily injury to a human being.

(b) Notwithstanding any other law, it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize documentary materials, other than work product, possessed by a person in connection with a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce; but this provision shall not impair or affect the ability of any government officer or employee, pursuant to otherwise applicable law, to search for or seize such materials, if—

(1) there is probable cause to believe that the person possessing the materials has committed or is committing the criminal offense to which the materials relate: *Provided, however,* That a government officer or employee may not search for or seize materials described in subsection 2(b) under the provisions of this paragraph if the offense to which the materials relate consist of the receipt, possession, communication, or withholding of such materials or the information contained therein (but such a search or seizure may be conducted under the provisions of this paragraph if the offense consists of the receipt, possession, or communication of information relating to the national defense, classified information, or restricted data under 18 U.S.C. 793, 18 U.S.C. 794, 18 U.S.C. 797, 18 U.S.C. 798, 42 U.S.C. 2274, 42 U.S.C. 2275, 42 U.S.C. 2277, or 50 U.S.C. 783); or

(2) there is reason to believe that the immediate seizure of the materials is necessary to prevent the death of or serious bodily injury to a human being; or

(3) there is reason to believe that the giving of notice pursuant to a subpoena duces tecum would result in the destruction, alteration, or concealment of the materials; or

(4) the materials have not been produced in response to a court order directing compliance with a subpoena duces tecum, and

(A) all appellate remedies have been exhausted; or

(B) there is reason to believe that the delay in an investigation or trial occasioned by further proceedings relating to the subpoena would threaten the interests of justice. In the event a search warrant is sought pursuant to this subparagraph, the person possessing the materials shall be afforded adequate opportunity to submit an affidavit setting forth the basis for any contention that the materials sought are not subject to seizure.

#### INAPPLICABILITY OF THIS ACT TO SEARCHES AND SEIZURES CONDUCTED TO ENFORCE THE CUSTOMS LAWS OF THE UNITED STATES

SEC. 3. This Act shall not impair or affect the ability of a government officer or employee, pursuant to otherwise applicable law, to conduct searches and seizures at the borders of or at international points of entry into the United States in order to enforce the customs laws of the United States.

#### REMEDIES

SEC. 4. For violations of this Act by an officer or employee of the United States, there shall be a cause of action against the United States as provided by section 1346(b) and chapter 171 of title 28, United States Code. Remedies against the United States provided by this section shall be the exclusive remedy or sanction, including the Exclusionary Rule.

#### DEFINITIONS

SEC. 5. (a) "Documentary materials", as used in this Act, means materials upon which information is recorded, and includes, but it not limited to, written or printed materials, photographs, motion picture films,

negatives, video tapes, audio tapes, and other mechanically, magnetically, or electronically recorded cards, tapes, or discs, but does not mean contraband, the fruits of a crime, or things otherwise criminally possessed, or property designed or intended for use or which is or has been used as the means of committing a criminal offense.

(b) "Work product", as used in this Act, means any documentary materials created by or for a person in connection with his plans, or the plans of the person creating such materials, to communicate to the public, except such work product as constitutes contraband or the fruits of things otherwise criminally possessed, or property designed or intended for use or which is or has been used as the means of committing a criminal offense.

(c) "Any other governmental unit", as used in this Act, includes the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, and any local government, unit of local government, or any unit of State government.

#### TITLE II—ATTORNEY GENERAL GUIDELINES

SEC. 201. (a) The Attorney General shall, within six months of date of enactment of this Act, issue guidelines for the procedures to be employed by any Federal officer or employee, in connection with the investigation or prosecution of an offense, to obtain documentary materials in the private possession of a person when the person is not reasonably believed to be a suspect in such offense or related by blood or marriage to such a suspect, and when the materials sought are not contraband or the fruits or instrumentalities of an offense. The Attorney General shall incorporate in such guidelines—

(1) a recognition of the personal privacy interests of the person in possession of such documentary materials;

(2) a requirement that the least intrusive method or means of obtaining such materials be used which do not substantially jeopardize the availability or usefulness of the materials sought to be obtained;

(3) a recognition of special concern for privacy interests in cases in which a search or seizure for such documents would intrude upon a known confidential relationship such as that which may exist between clergyman and parishioner; lawyer and client; or doctor and patient; and

(4) a requirement that an application for a warrant to conduct a search governed by this title be approved by an attorney for the Government, except that in an emergency situation the application may be approved by another appropriate supervisory official if within twenty-four hours of such emergency the appropriate United States attorney is notified.

(b) The Attorney General shall collect and compile information on, and report annually to the Committees on the Judiciary of the Senate and the House of Representatives on the use of search warrants by Federal officers and employees for documentary materials described in subsection (a)(3).

SEC. 202. Guidelines issued by the Attorney General under this title shall have the full force and effect of Department of Justice regulations and any violation of these guidelines shall make the employee or officer involved subject to appropriate administrative disciplinary action. However, an issue relating to the compliance, or the failure to comply, with guidelines issued pursuant to this title may not be litigated, and a court may not entertain such an issue as the basis for the suppression or exclusion of evidence.

Amend the title so as to read: "An Act to limit governmental search and seizure of documentary materials possessed by persons, to provide a remedy for persons aggrieved by violations of the provisions of this Act, and for other purposes."

Mr. ROBERT C. BYRD. Mr. President, on behalf of Mr. KENNEDY, I move that the Senate insist on its amendments and agree to the conference requested by the House on the disagreeing votes of the two Houses and that the Chair be authorized to appoint the conferees on the part of the Senate.

The motion was agreed to, and the President Officer (Mr. LEVIN) appointed Mr. KENNEDY, Mr. BAYH, Mr. DeCONCINI, Mr. HEFLIN, Mr. METZENBAUM, Mr. THURMOND, Mr. HATCH, Mr. SIMPSON, and Mr. MATHIAS conferees on the part of the Senate.

#### CLASSIFIED INFORMATION CRIMINAL TRIAL PROCEDURES ACT

Mr. ROBERT C. BYRD. Mr. President, on behalf of Mr. KENNEDY, I ask that the Chair lay before the Senate a message from the House of Representatives on S. 1482.

The PRESIDING OFFICER laid before the Senate the following message from the House of Representatives:

*Resolved,* That the bill from the Senate (S. 1482) entitled "An Act to provide certain pretrial, trial, and appellate procedures for criminal cases involving classified information", do pass with the following amendments:

Strike out all after the enacting clause, and insert: That this Act may be cited as the "Classified Information Criminal Trial Procedures Act".

#### TITLE I—PROCEDURES FOR DISCLOSURE OF CLASSIFIED INFORMATION IN CRIMINAL CASES

##### PRETRIAL CONFERENCES

SEC. 101. At any time after the filing by the United States of an indictment or information in a United States district court, any party to the case may request a pretrial conference to consider matters relating to classified information that may arise in connection with the prosecution. Upon such a request, the court shall promptly hold a pretrial conference to establish a schedule for any request for discovery of classified information and for the implementation of the procedures established by this title. In addition, at such a pretrial conference the court may consider any other matter which may promote a fair and expeditious trial. No admission made by the defendant or by any attorney for the defendant at such a conference may be used against the defendant unless the admission is in writing and is signed by the defendant and by the attorney for the defendant.

##### PROCEDURES FOR DISCLOSURE OF CLASSIFIED INFORMATION

SEC. 102. (a) (1) Whenever a defendant in any Federal prosecution intends to take any action to disclose or cause the disclosure of classified information in any manner in connection with such prosecution, the defendant shall, before such disclosure and before the trial or any pretrial hearing, notify the court and the attorney for the United States of such intention and shall not disclose or cause the disclosure of such information unless authorized to do so by the court in accordance with this title. Such notice shall include a brief description of the classified information that is the subject of such notice.

(2) (A) Within ten days of receiving a notification under paragraph (1), the United States, by written petition of the Attorney General, may request the court to conduct a proceeding to make all determinations concerning the use, relevance, or admissibility of the classified information at issue