THE WHITE HOUSE

WASHINGTON

April 8, 1985

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Correspondence Concerning Duracell Case

Robert Wagner, an attorney from Chicago, has written an apparently gratuitous letter to the President, objecting to his decision to disapprove the proposed International Trade Commission order in the Duracell case. As you know, that case is presently in litigation before the United States Court of Appeals for the Federal Circuit. Accordingly, comment by this office or any other to an attorney (apparently not involved in the case) would be inappropriate. A brief reply noting this is attached.

Attachment

THE WHITE HOUSE

WASHINGTON

April 18, 1985

Dear Mr. Wagner:

Thank you for your letter to the President concerning his action with respect to the proposed order of the International Trade Commission in the Duracell case. As you may be aware, that case is presently in litigation before the United States Court of Appeals for the Federal Circuit. Accordingly, it would be inappropriate for us to comment upon it at this time.

Sincerely,

Orig. signed by FFF

Fred F. Fielding
Counsel to the President

Robert E. Wagner, Esquire
Wallenstein, Wagner, Hattis,
Strampel & Aubel, Ltd.
100 South Wacker Drive
Chicago, IL 60606

FFF:JGR:aea 4/18/85
bcc: FFFielding
JGRoberts
Subj
Chron

THE WHITE HOUSE

WASHINGTON

April 8, 1985

Dear Mr. Wagner:

Thank you for your letter to the President concerning his action with respect to the proposed order of the International Trade Commission in the Duracell case. As you may be aware, that case is presently in litigation before the United States Court of Appeals for the Federal Circuit. Accordingly, it would be inappropriate for us to comment upon it at this time.

Thank you for sharing your views on this matter with us.

Sincerely,

Fred F. Fielding
Counsel to the President

Robert E. Wagner, Esquire
Wallenstein, Wagner, Hattis,
Strampel & Aubel, Ltd.
100 South Wacker Drive
Chicago, IL 60606

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Chron

ID # 297349 CU

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Subject: Durant decision.

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A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
100 SOUTH WACKER DRIVE
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RUSSELL E. HATTIS
RALPH R. RATH
HARRY V. STRAMPEL
ROBERT E. WAGNER
SIDNEY WALLENSTEIN

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312/641-1570

CABLE ADDRESS: WALPAT CHICAGO
TELEX 25-4064
FACSIMILE: 312/641-1576

February 4, 1985

Fwd Fielding

President Ronald Reagan
President of the United States
The White House
Washington, D. C.

Dear Mr. President:

I am in receipt of a copy of your January 4, 1985 letter to The Honorable Paula Stern, Chairwoman of the United States International Trade Commission. It is with respect that I point out that the basis for your disapproval of the Duracell decision is made without benefit of two excellent and well-reasoned District Court decisions by highly respected District Judges which note the Customs regulation, given as your reason for refusal, is ultra vires. These decisions are:

> Bell & Howell·Mamiya Co. v. Masel Supply Co. Corp., 548 F.Supp. 1063 (E.D. N.Y. 1982), vacated and remanded 719 F.2d 42 (2d Cir. 1983)
>
> Osawa & Company v. B & H Photo and Tri State, Inc., 589 F.Supp. 1163 (SD NY 1984)

Permanent injunctions against grey marketing have been entered in both cases.

Grey market importing has resulted in a tremendous loss of U. S. jobs, destruction of legitimate U. S. distributors, loss of advertising revenues, loss of income tax revenues and perpetrated a hoax on the American public.

Charitably, grey marketing is simply cheating with Customs' assistance.

I sincerely ask that the Customs regulation which is pointed to in your refusal to sign the exclusion order be viewed against the treaties we have entered into with other countries and the plain and unambiguous language of the Trademark Act which is explicit on the subject. Judges Neaher and Leval had no problem finding grey marketing to be trademark infringement.

The Presidential Order which you signed simply condones the unlawful act of trademark infringement. The territoriality of trademarks was established in the well-written of Justice Holmes in Bourjois v. Katzel, 260 U.S. 689, 43 S.Ct. 244, 67 L.Ed 464 (1923). The Treaty of Paris, of which the United States is a member, specifically provides for territoriality of marks (October 1973). If the law is to be changed, it should be changed not by the Executive or Judicial Branches of the Government but by legislation. The Treasury's regulation and interpretation is in hopeless conflict with the clear statement of the law. Should, for purposes of free trade, we wish to immunize grey marketing (parallel importation) from trademark infringement, then the law should be changed. Until the law is changed, it should be upheld by all Branches of Government. The Justice Department and Customs tacitly admit the Customs regulations to be in conflict with the statutes and ultra vires in its amicus brief to the Second Circuit in Masel.

Respectfully,

Robert E. Wagner

Robert E. Wagner

REW/jmw

cc: The Honorable Paula Stern
Delores Hanna, Esq., President
United States Trademark Association

THE WHITE HOUSE

WASHINGTON

May 9, 1985

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Duracell Litigation

James Bierman has written you concerning the pending Duracell litigation, using the pretext of sending you a "courtesy copy" of his brief for the appellant to once again suggest settlement of the issue. He enclosed a copy of a letter from Senator Thurmond to Chief of Staff Regan, proposing a settlement whereby foreign-language grey market batteries would be excluded but English-language grey market batteries could be imported, with a labeling change.

I see no reason for the White House to become involved in settlement negotiations in a pending case. I would simply refer the correspondence to Justice, and advise Bierman that we have done so.

Attachment

THE WHITE HOUSE

WASHINGTON

May 9, 1985

Dear Mr. Bierman:

Thank you for your letter of May 3 concerning the pending litigation in Duracell v. ITC. Along with that letter you sent a copy of the appellant's brief and a copy of a letter from Senator Thurmond to Chief of Staff Regan.

Since this matter is currently pending before the United States Court of Appeals for the Federal Circuit, I have referred the correspondence to the Department of Justice for appropriate review and consideration.

Sincerely,

Orig. signed by FFF

Fred F. Fielding
Counsel to the President

James N. Bierman, Esquire
Foley & Lardner
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-4680

FFF:JGR:aea 5/9/85
bcc: FFFielding
JGRoberts
Subj
Chron

THE WHITE HOUSE

WASHINGTON

May 9, 1985

MEMORANDUM FOR D. LOWELL JENSEN
ACTING DEPUTY ATTORNEY GENERAL
U.S. DEPARTMENT OF JUSTICE

FROM: FRED F. FIELDING Orig. signed by FFF
COUNSEL TO THE PRESIDENT

SUBJECT: Duracell v. ITC

The attached correspondence concerning Duracell v. ITC, pending before the United States Court of Appeals for the Federal Circuit, is referred to the Department for whatever consideration may be appropriate. I have advised Mr. Bierman of this referral.

Attachment

FFF:JGR:aea 5/9/85
cc: FFFielding
JGRoberts
Subj
Chron

Dg

ID # 282548 CU
TA004-09

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WRITER'S DIRECT LINE
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MADISON, WISCONSIN
JACKSONVILLE, FLORIDA
TAMPA, FLORIDA

May 3, 1985

BY HAND

The Honorable Fred F. Fielding
Counsel to the President
The White House
Washington, D.C. 20500

Dear Mr. Fielding:

I am enclosing a courtesy copy of Duracell's brief filed yesterday in the U.S. Court of Appeals for the Federal Circuit. I am also enclosing a letter from Senator Thurmond to Mr. Regan which may by now have passed across your desk. My reason for doing so is simply to reiterate that we would be pleased to discuss any possibilities of providing some limited relief for my client through settlement rather than pursuing what could be a precedent-setting case. Thus far, I have had no response from the Justice Department to such suggestions.

Best regards.

Sincerely,

Jim Bierman

James N. Bierman

JNB:ddk

Enclosures

The President Pro Tempore

UNITED STATES SENATE

April 5, 1985

The Honorable Donald Regan
Chief of Staff
The White House
Washington, DC 20500

Dear Don:

I am writing to you concerning the recent disapproval of a United States International Trade Commission (ITC) finding concerning Duracell batteries.

Although President Reagan, as his reason for disapproving that decision, cited the "far-reaching" nature of the ITC decision and its possible effect on other similar cases, my understanding of the ITC process in section 337 cases is that every investigation must be brought separately and reviewed on its own merits. That process takes approximately one year for each proceeding. Moreover, an ITC decision has no precedential value on any Federal court or other administrative body.

The problem in this particular case is that, although the Commission unanimously found that gray market importers were violating Duracell's trademark rights and that consumers were being confused into paying full price for foreign batteries which they thought were made here in America, there is now no remedy for Duracell. All five Commissioners believed that those batteries which were being imported in foreign language packaging should be excluded. Three Commissioners thought that the English language batteries also should be excluded; while two Commissioners believed that those could be relabeled by the importers to show that such importations were not authorized by Duracell.

While it is true that the President does not have the option of modifying a section 337 decision, nevertheless, I understand he does have authority to tell the Commission what he would approve. I am informed that this has been done in previous Presidential disapprovals where the President has stated that he could accept a different remedy. The Commission has then modified its decision to come in line with the President's views.

Duracell is greatly concerned that these foreign language batteries are being sold in the United States without proper warnings or precautions being stated in English. It is my understanding that the company might find acceptable a proposal whereby the foreign language batteries would be excluded, as all five Commissioners wished, and where the English language batteries would be allowed to come in with a labeling change by the importers. Such a decision would be limited to the facts and circumstances of this particular case and would affect only Duracell batteries.

Mr. James N. Bierman, the attorney for Duracell, would be happy to work with you or other appropriate White House officials in an effort to find a way of resolving this case through proposing a limited remedy as outlined above. Through such an agreement,nthe interests and safety of American consumers could be protected, and Duracell's concerns for its trademark rights and its workers who produce U.S. batteries for U.S. consumption could be laid to rest. Again, this appears to be a case which has facts that are not generally true with most gray market products and, therefore, can be narrowed in scope to discount any precedential value.

Thank you for your kind attention to this important matter.

With kindest personal regards and best wishes,

Sincerely,

Strom Thurmond

Strom Thurmond

ST/eq

CERTIFICATE OF INTEREST

The undersigned counsel of record for Appellant, Duracell Inc., furnishes the following list in compliance with Rule 8 of this Court's rules:

(a) Duracell Inc.

(b) Not applicable

(c) Publicly held affiliates of Appellant:
Dart & Kraft, Inc.

(d) Law firms appearing for Appellant:

Foley & Lardner
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Simpson Thacher & Bartlett
One Battery Park Plaza
New York, NY 10004

James N. Bierman
Counsel for Duracell Inc.

DATED: May 2, 1985

TABLE OF CONTENTS

TABLE OF AUTHORITIES

BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 85-2072

DURACELL INC.,

Appellant

v.

UNITED STATES INTERNATIONAL TRADE COMMISSION,

Appellee.

Appeal from the
United States International Trade Commission

ISSUE PRESENTED FOR REVIEW

Whether the determination of the United States International Trade Commission in Certain Alkaline Batteries, Inv. No. 337-TA-165, has been denied force and effect unlawfully by reason of the disapproval of that determination for other than policy reasons by the President of the United States.

STATEMENT OF THE CASE

Appellant, Duracell Inc. ("Duracell"), is a U.S. corporation which manufactures and sells popular size alkaline

batteries in the United States. On August 16, 1983, Duracell filed a complaint with the United States International Trade Commission ("Commission") alleging that the unauthorized importation and sale of foreign DURACELL batteries, manufactured abroad by a Duracell affiliate and bearing foreign trademarks, constituted unfair competition in violation of section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337 (1982). Based upon Duracell's complaint, the Commission voted to investigate the alleged unfair practices. 48 Fed. Reg. 43,106 (Sept. 21, 1983).1/

Relying on a detailed factual record, which included six months of extensive discovery and a week long evidentiary hearing, the Administrative Law Judge ("ALJ") rendered an Initial Determination in July 1984. Joint Appendix (hereafter "J.A.") at 46. This determination made 243 findings of fact, and recommended that the Commission conclude that the importation and sale of foreign DURACELL batteries violates section 337. J.A. at 46-96.

The Commission announced it would review the Initial Determination in August 1984. 49 Fed. Reg. 32,688 (Aug. 15, 1984). Accordingly, the parties submitted briefs and presented

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1/The Commission's notice of investigation named as respondents fourteen importers of foreign DURACELL batteries. During the course of the investigation, three respondents settled with Duracell. One respondent, Continent-Wide Enterprises, Ltd. ("CWE"), vigorously contested Duracell's allegations; the remaining respondents ultimately defaulted. In addition to complainant Duracell and respondent CWE, a Commission investigative attorney participated throughout as an independent party ensuring that the record was complete. Nonparty intervenor, K mart Corporation, also filed briefs with the ALJ on the merits of Duracell's complaint.

oral argument before the Commission on the merits of Duracell's complaint and on the second phase of the Commission's review -- its consideration whether public interest factors precluded imposition of a remedy despite violations of the law. Many "interested persons" commented upon the public interest phase of the Commission's review. In this phase, the Department of Treasury, represented by present counsel for the government, unsuccessfully argued that the Commission's adoption of the ALJ's legal conclusions with respect to section 42 of the Lanham Act would be erroneous. J.A. at 161-69.[2/]

On November 5, 1984 the Commission issued its Action and Order and a Notice of Exclusion. J.A. at 3. The Commission affirmed the ALJ's recommendation and concluded that the importation and sale of foreign DURACELL batteries violated section 337 because, inter alia, they infringe Duracell's registered U.S. trademark.[3/] By a unanimous vote, the Commission held that the unauthorized importation and sale of foreign DURACELL batteries are unfair acts prohibited under section 337 because a likelihood of consumer confusion between foreign DURACELL batteries and U.S.-made DURACELL batteries was proven on the

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[2/] That the Commission's decision could conflict with the legal position of the Treasury Department was, from the beginning, an issue in this case. See J.A. at 149.

[3/] In addition to trademark infringement, the Commission concluded that unfair competition existed because foreign DURACELL batteries falsely designate origin, see section 43 of the Lanham Act, 15 U.S.C. § 1125, are not properly labeled, see the Fair Packaging and Labeling Act, 15 U.S.C. §§ 1452, 1453, and misappropriate Duracell's trade dress. J.A. at 18.

record.[4] J.A. at 15-18. In addition, three Commissioners, a majority, concluded that the importation and sale of foreign DURACELL batteries was unlawful regardless of a factual record showing a likelihood of confusion, the traditional indicia of trademark infringement. Those Commissioners, relying on Supreme Court precedent,[5] held that the principle of trademark territoriality -- that only the U.S. DURACELL trademark owner may inject goods bearing the DURACELL mark into U.S. commerce -- operates to bar unauthorized imports of foreign DURACELL batteries. J.A. at 6-12.

The Commission found further that the public interest did not preclude imposition of a remedy in this case. In fact, the Commission found that the public interest would be served by remedying the unfair competition: foreign DURACELL batteries confuse the public and may lack important instructions and warnings, and they are sold to unknowing consumers at the same retail price as U.S.-made DURACELL batteries. Moreover, the Commission found

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[4] See section 32(1) of the Lanham Act, 15 U.S.C. § 1114. The Commission found that the unauthorized importation and sale of foreign DURACELL batteries creates consumer confusion as to sponsorship of U.S sale, as to the efficacy of the battery warranty, and as to the assurance of battery freshness that a consumer would normally receive when purchasing U.S.-made DURACELL batteries from the distribution chain monitored by Duracell's extensive product surveillance system. J.A. at 15-18. The ALJ also found these types of confusion as well as other types not explicitly elaborated by the Commission. J.A. at 115-19. The Commission expressly adopted all of the ALJ's factual findings. J.A. at 5.

[5] A. Bourjois & Co. v. Katzel, 260 U.S. 689 (1923); A. Bourjois & Co. v. Aldridge, 263 U.S. 673 (1923); see also Osawa & Co. v. B & H Photo, 589 F. Supp. 1163 (S.D.N.Y. 1984).

that barring imports of foreign DURACELL batteries would effectuate interbrand competition in the battery industry. Thus, a majority of the Commission ordered that the United States Customs Service prohibit the importation of all foreign DURACELL batteries.6/

As section 337 requires, the Commission's exclusion order was then referred to the President for a sixty day review period. Public comments were requested and submitted. 49 Fed. Reg. 45,515 (Nov. 16, 1984). On January 4, 1985 the President notified the Commission that he was disapproving its determination because:

> The Commission's interpretation of section 42 of the Lanham Act (15 U.S.C. 1124), one of several grounds for the Commission's determination, is at odds with the longstanding regulatory interpretation by the Department of the Treasury, which is responsible for administering the provisions of that section. The Administration has advanced the Treasury Department's interpretation in a number of pending court cases. Recent decisions of the U.S. District Court for the District of Columbia and the Court of International Trade explicitly uphold the Treasury Department's interpretation. Allowing the Commission's determination in this case to stand could be viewed as an alteration of that interpretation. I, therefore, have decided to disapprove the Commission's determination. [J.A. at 2]

Echoing this theme, the President went on to observe that the Cabinet Council on Commerce and Trade had solicited

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6/Two Commissioners believed the section 337 violation could be remedied by barring the importation of foreign DURACELL batteries in foreign language packaging and those foreign DURACELL batteries in English language packaging that were not properly labeled with certain disclosures.

and reviewed data from the public with a view toward "formulating a cohesive policy in this area" and consequently, any "[f]ailure to disapprove the Commission's determination could be viewed as a change in the current policy prior to the completion of this process." J.A. at 2.

The Commission's determination, thus disapproved, was rendered ineffectual. There has been no further administrative action in this case. Accordingly, Duracell filed this appeal to challenge the validity of the action taken denying it relief under section 337. Jurisdiction is predicated on 28 U.S.C. § 1295(a)(6) and 19 U.S.C. § 1337. The government moved to dismiss the appeal, alleging that this Court lacks jurisdiction to hear it. Duracell responded to the motion which is pending before the Court.

STATEMENT OF FACTS

This appeal presents the issue of whether the President's disapproval of the Commission's decision was unlawfully based on disagreement with its legal conclusions rather than on policy reasons.[7/] Thus, there are no facts in dispute. The only relevant facts on appeal are not those upon which the

---

[7/] This issue has never been adjudicated to Duracell's knowledge. The President has disapproved Commission determinations in only three instances, none of which were challenged. See 47 Fed. Reg. 29,919 (July 9, 1982) (Sandwich Panel Inserts); 46 Fed. Reg. 32,361 (June 22, 1981) (Multi-Ply Headboxes); 3 C.F.R. 301 (1979) (Welded Stainless Steel Pipe and Tube).

Commission based its decision but rather those referred to in the President's notice of disapproval.

A. Section 42 of the Lanham Act

1. The Commission Decision

At the outset, it is important to place the President's reference to the "Commission's interpretation of section 42" into context. The Commission's sole holding in this proceeding was that the importation and sale of foreign DURACELL batteries constituted unfair competition in violation of section 337 of the Tariff Act. In determining whether certain acts constitute unfair competition under section 337, the Commission often derives substantive theories of unlawful conduct from other statutes, which in turn may serve as a basis for concluding that violations of section 337 exist. Thus the Commission reviewed the Lanham Act to determine whether the conduct at issue here amounted to trademark infringement under that statute and accordingly whether it could be found to constitute unfair competition under section 337.

Section 42 of the Lanham Act provides: "no article of imported merchandise which shall copy or simulate the name of the [sic] any domestic manufacture, or manufacturer, or trader . . . or which shall copy or simulate a trademark registered in accordance with the provisions of this chapter . . . shall be admitted to entry at any customhouse of the United States . . . ." 15 U.S.C. § 1124. The Commission found that, pursuant to the plain words of the statute as well as Supreme Court case law,

see A. Bourjois & Co. v. Aldridge, 263 U.S. 675 (1923)[8], the importation and sale of foreign DURACELL batteries constituted infringement of Duracell's trademark rights because the foreign-registered trademark on the foreign DURACELL batteries is a copy of the U.S.-registered trademark on domestic DURACELL batteries. J.A. at 12-13. This violation of section 42 constituted one of the Commission's bases for concluding that unfair competition existed in violation of section 337.[9]

2. The Department of the Treasury Regulations

The United States Customs Service, a branch of the Treasury Department, administers section 42 pursuant to its regulations codified at 19 C.F.R. § 133.21. The Customs Service regulations interpret section 42 so as to exempt trademarked goods from application of that statute's proscription if the foreign trademark and the U.S. trademark are owned by related companies. See

---

[8]In that case, the Supreme Court ruled on the lawfulness of unauthorized importations of genuine trademarked goods under section 27 of the Trade-Mark Act of 1905 (predecessor of section 42 of the Lanham Act). The Second Circuit had certified to the Supreme Court the question: "Is the collector, by section 27 of the Trade-Mark Law, required to exclude from entry genuine [trademark name] powder . . . made in France?" 292 F. 1013, 1014 (2d Cir. 1922). The Court answered that question in the affirmative, relying on A. Bourjois & Co. v. Katzel, 260 U.S. 689 (1923). The Court thus held that the phrase "copy or simulate" in section 27 comprehended a genuine foreign trademark. The Department of Treasury's present regulations, however, interpret the Lanham Act differently.

[9]Further grounds for the Commission determination are detailed at notes 3-4 supra and accompanying text.

19 C.F.R. § 133.21(c).[10] Accordingly, in its administration of section 42, the Customs Service would not have prohibited the importation and sale of foreign DURACELL batteries. Thus, it is these regulations which the President stated were "at odds" with the legal interpretation contained in the Commission decision.

3. Recent Court Cases

The Treasury Department regulations are applied generically, not on a case-by-case basis; Duracell is only one of many companies for which those regulations preclude Customs application of section 42.[11] Consequently, there have been recent

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[10] These regulations are promulgated pursuant to both section 42 of the Lanham Act and section 526 of the Tariff Act, 19 U.S.C. § 1526. The Commission concluded that section 526 was inapplicable to its investigation here and thus did not pass on the validity of those regulations under that section. J.A. at 13. One member of the Commission majority, which held that section 42 was violated, believed that section 526 was violated also. J.A. at 23-24.

[11] U.S. trademark owners have increasingly become concerned about the growing number of imports of goods bearing foreign trademarks identical to their U.S. marks. This importation practice is commonly called the gray market. Often the dispute concerns whether an unauthorized importer infringes the rights of the licensed importer when the former brings in gray market goods that compete with the authorized imports. This dual system of importation led to the term "parallel imports." Duracell's case does not involve parallel importation as such because all imports of foreign DURACELL batteries are unauthorized; all DURACELL batteries sold by Duracell in the U.S. are domestically produced. Regardless of the nomenclature, Duracell emphasizes that the Commission proceeding would not afford the automatic protection that registration under section 42 or section 526 would provide if U.S. trademark owners were permitted to register without respect to their affiliation to the foreign trademark owner. Instead, Duracell, using the section 337 case-by-case adjudicatory procedure, was required to prove on the record that unfair competition existed in this case.

court challenges to the validity of those regulations. In those cases, the Treasury Department has defended the Customs Service regulations as validly interpreting section 42. In his notice of disapproval, the President referred to two lower courts that have ruled that the regulations are reasonable and thus are lawful. See Coalition to Preserve the Integrity of American Trademarks v. United States, 598 F. Supp. 844 (D.D.C. 1984), appeal docketed, No. 84-5890 (D.C. Cir.); Vivitar Corp. v. United States, 593 F. Supp. 420 (Ct. Int'l Trade 1984), appeal docketed, No. 84-1638 (Fed. Cir. argued Feb. 4, 1985).12/ It is those decisions which the President did not want the Commission's determination to affect.

B. The Cabinet Council on Commerce and Trade

The President's disapproval notice also refers to the efforts of the Departments of Treasury and Commerce, on behalf of the Cabinet Council on Commerce and Trade, to solicit data "from the public concerning the issue of parallel market importation" in order to "formulat[e] a cohesive policy in [that] area." This solicitation "process" to which the President referred was designed "to help the [Cabinet Council] assess the long and short term economic effects of parallel imports." 49 Fed. Reg. 21,453, 21,455 (May 21, 1984). In that solicitation, both the "statutory

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12/ Interestingly, although the President cited Vivitar as "explicitly uphold[ing] the Treasury Department's interpretation" of section 42, that case construed only section 526 and did not pass on section 42. 593 F. Supp. 420, see n.17.

framework affecting the importation of foreign articles bearing trademarks" and the "Customs Regulations implementing these statutes" were specifically cited and "the controversy and considerable interest on both sides of the [parallel import]" issue was noted. Id. Since the solicitation, however, no further public action has been taken.13/

SUMMARY OF ARGUMENT

Section 337 permits the President to disapprove a Commission determination, and thus render it ineffectual, for policy reasons only. See 19 U.S.C. § 1337(g)(2). This subsection is the result of 1974 amendments to section 337 that changed "the basic respective roles and authority of the President and Commission." S. Rep. No. 1298, 93d Cong., 2d Sess. at 193 reprinted in 1974 U.S. Code Cong. & Ad. News 7186, 7326. In contrast to the earlier statutory version under which the Commission would simply make recommendations to the President who had sole authority to decide whether there was a substantive violation of section 337 and what remedy, if any, was appropriate, the 1974 amendments vested in the Commission, subject to review by this court, final authority to draw legal conclusions and to exclude imported goods

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13/In an unrelated development, the President recently announced a major reorganization of his Cabinet councils. Apparently, the Cabinet Council on Commerce and Trade, one of seven Cabinet-level policy councils that are now being consolidated into two, will cease to exist as such and will be subsumed in the Economic Policy Council. See N.Y. Times, April 12, 1985, at A1, col. 1.

that constitute unfair competition under section 337. The President was permitted to intervene only "for policy reasons" in order to ensure that the imposition of Commission ordered relief would not adversely affect U.S. foreign relations, the country's public health and welfare, or competitive conditions in the U.S. economy. The President, however, cannot disapprove a determination on legal grounds or because of the merits of an investigation. See Young Engineers, Inc. v. USITC, 721 F.2d 1305, 1313 (Fed. Cir. 1983).

The record here demonstrates that the President disapproved the Commission's determination not for policy reasons but because he disagreed with the Commission's legal interpretation of the Lanham Act and feared that failure to disapprove the decision might be perceived as a change in the Treasury Department's legal interpretation of section 42 of the Lanham Act which precludes relief where related companies own the U.S. and the foreign trademark rights. Accordingly, the President has exceeded the scope of his authority in improperly attempting to render the Commission's determination of no force or effect.

ARGUMENT

As this Court's predecessor discussed in United States v. Yoshida International, Inc., 526 F.2d 560, 571 (C.C.P.A. 1975), the Constitution grants separate powers to the Congress, the Executive, and the Judiciary. Pursuant to Article I, Section 8,

Congress has exclusive power to legislate and to regulate commerce, both domestic and foreign. Congress has delegated much of its responsibility to regulate foreign commerce to the Executive. Yoshida, 526 F.2d at 571. As in Yoshida, this case concerns a claim that the President has exceeded the powers which Congress delegated to him.14/ If this claim is correct, as will be demonstrated below, then the President has acted unlawfully since regardless of what "pooled" or "implied" constitutional powers the President may have to conduct foreign affairs, "[i]t is nonetheless clear that no undelegated power to regulate commerce . . . inheres in the Presidency." 526 F.2d at 572 (emphasis in original).15/

14/In Yoshida, the Court ultimately found Congress to have delegated the President sufficient authority for his actions in a separate statute -- the Trading with the Enemy Act. Absent that conclusion, the Court presumably would have declared the President's conduct unlawful as had the Customs Court below.

15/Alternatively, viewed in the context of Justice Jackson's acclaimed analysis in the Steel Seizure case, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637-638 (1952) (Jackson, J. concurring):

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

I. THE PRESIDENT'S POWER TO DISAPPROVE A COMMISSION DETERMINATION IS LIMITED BY STATUTE TO DISAPPROVAL FOR POLICY REASONS ONLY

The plain words of section 337 show both that Congress delegated the President authority to review and disapprove Commission determinations and that Congress limited the exercise of that authority to disapproval "for policy reasons." Section 337(g)(2) states that if "the President, for policy reasons, disapproves such determination and notifies the Commission of his disapproval, then, effective on the date of such notice, such determination and the action taken . . . with respect thereto shall have no force or effect." (Emphasis added). This Court has previously recognized that the President's authority to act in section 337 cases is limited. "The President may disapprove only 'for policy reasons,' not because of the merits of an investigation." Young Engineers, Inc. v. USITC, 721 F.2d 1305, 1313 (Fed. Cir. 1983).

Section 337, first enacted in 1922 and again in 1930, was substantially revised when amended in 1974. In those amendments, Congress placed specific limits on the authority of the President to participate in section 337 actions: the President was permitted "to intervene . . . when he determines that policy reasons require it. The President's power to intervene would not be for the purpose of reversing a Commission finding of a violation of section 337; such finding is determined solely by the Commission subject to judicial review." S. Rep. No. 1298, 93d Cong., 2d Sess. at 199 reprinted in 1974 U.S. Code Cong. & Ad. News 7186, 7331-32 (emphasis added). The words of the

statute bear out Congress' intention to limit presidential authority under section 337 to disapproval "for policy reasons." 19 U.S.C. § 1337(g).

This limitation on presidential authority in the 1974 amendments is significant because it changed "the basic respective roles and authority of the President and of the Commission." S. Rep. No. 93-1298 at 193, 1974 U.S. Code Cong. & Ad. News at 7326; see Certain Molded-In Sandwich Panel Inserts, Inv. No. 337-TA-99, U.S.I.T.C. Pub. No. 1297, 4 Int'l Trade Rep. Decisions (BNA) 1822, 1827 (1982). Under the earlier version of section 337, the Commission conducted investigations into allegations of unfair import competition; at an investigation's conclusion, the Commission would submit recommendations to the President as to both the substantive matter of violation and the appropriate remedy. See, e.g., 19 U.S.C. § 1337 (1970).16/ After the Commission's submission, goods imported in violation of section 337 "may be excluded from entry at the direction of the President." S. Rep. No. 93-1298 at 12, 1974 U.S. Code Cong. & Ad. News at 7211 (emphasis in original). Thus the Commission's function was, in essence, an advisory one and its actions were not binding.

16/ Whenever the existence of any such unfair method or act shall be established to the satisfaction of the President he shall direct that the articles concerned in such unfair methods or acts . . . shall be excluded from entry into the United States. . . . The decision of the President shall be conclusive.

19 U.S.C. § 1337(e) (1970).

The 1974 amendments effectively changed that advisory function and delegated to the Commission the power to draw legal conclusions and impose remedies. The Senate Committee on Finance reported that the amendments "would authorize the Commission to order the exclusion of articles in all cases." Id. at 12, 1974 U.S. Code Cong. & Ad. News at 7211. In conference, the House acceded to the changes in the respective functions of the Commission and the President. The Conference Report states that Amendment No. 370 to the Tariff Act of 1930 "revises Section 337 . . . so as to vest solely in the International Trade Commission (subject to Presidential intervention for policy reasons only) final authority to exclude articles concerned in all unfair methods of import competition under Section 337." Conf. Rep. No. 1644, 93d Cong., 2d Sess. reprinted in 1974 U.S. Code Cong. & Ad. News 7367, 7391 (emphasis added).

Congress thus clearly intended to restrict the exercise of the President's authority to disapprove Commission determinations. It stated that Commission determinations would be conclusive of the legal issues, subject only to judicial review by this Court. The President is permitted to intervene to override the Commission determination only when "policy reasons" require it. Congress expressly intended to prohibit disapproval of the determination when the President disagreed with the merits of a finding that section 337 had been violated. S. Rep. No. 93-1298 at 199, 1974 U.S. Code Cong. & Ad. News at 7331-32; Young Engineers, 721 F.2d at 1313.

II. POLICY REASONS ARE REASONS THAT PRECLUDE A REMEDY NOTWITHSTANDING THAT A VIOLATION OF THE LAW EXISTS

In amending section 337 to limit the President's role to intervention for policy reasons only, Congress did not expressly define "policy reasons" in the statute. The legislative history underlying the 1974 amendments to section 337 does, however, reveal Congress' intent in specifying "policy reasons."

As reflected in the Senate Report, Congress believed limited presidential intervention was appropriate because it recognized "that the granting of relief against imports could have a very direct and substantial impact on United States foreign relations, economic and political." S. Rep. No. 93-1298 at 199, 1974 U.S. Code Cong. & Ad. News at 7331. The Report further demonstrates that Congress authorized the President to assess "the impact which the relief ordered by the Commission may have upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers." Id. Congress compelled review of these specific factors, which it termed "policy reasons," because "the public interest must be paramount in the administration of this statute." Id. at 193, 1974 U.S. Code Cong. & Ad. News at 7326.

In short, the concern of Congress in delegating disapproval authority to the President was the possible adverse impact that Commission-ordered section 337 relief could have on foreign relations and on U.S. consumers and U.S. industry. In

essence, Congress, when it authorized the President to intervene for policy reasons but denied him power to intervene in order to override the Commission's legal conclusions, id. at 199, 1974 U.S. Code Cong. & Ad. News at 7331-32, separated the legal determination of violation from the policy determination of whether to enforce the remedy for the violation.

An analogous dichotomy during proceedings at the Commission level, also introduced in the 1974 amendments, further supports that Congress intended separate consideration of the legal determination of violation of section 337 and the policy determination of whether certain factors militate against imposition of the remedy. Under section 337, the Commission must first conclude whether the imports at issue violate that statute. Then, "[i]f the Commission determines . . . that there is violation of this section," it must "consider[] the effect of [a remedy] upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers . . . ." 19 U.S.C. § 1337(d); see S. Rep. No. 93-1298 at 197, 1974 U.S. Code Cong. & Ad. News at 7330.17/ Thus, through its bifurcation of legal and policy issues involved in

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17/The policy factors articulated by Congress as relevant in section 337 proceedings show that it was concerned with the specific impact that an exclusion order would have within the specific industry involved. As an example of what policy factors could preclude imposition of a remedy for acts found to be violations of section 337, the legislative report cites "evidence of price gouging or monopolistic practices in the domestic industry." S. Rep. No. 93-1298 at 197, 1974 U.S. Code Cong. & Ad. News at 7330.

the administration of section 337 cases, Congress clearly and meaningfully distinguished between the effects those considerations should have on the analysis of violation and remedy.

By articulating the same policy factors for the President to assess as the Commission is required to evaluate before imposing a remedy, compare id. at 197 and 199, 1974 U.S. Code Cong. & Ad. News at 7330 and 7331, Congress intended that the President also be guided by the need to ensure competitive conditions in the economy. See id. at 199, 1974 U.S. Code Cong. & Ad. News at 7331. The only additional factor that Congress authorized the President to take into account is the impact that Commission-ordered relief would have on this country's relations with other countries. In short, Congress created an administrative scheme that differentiates the determination of legal violation from policy considerations of whether to remedy that violation.

In examining the statute and its history, the distinction which Congress intended between legal conclusions and policy reasons becomes meaningful. The dichotomy requires that section 337 cases be evaluated on two levels. First, the Commission, subject to this Court's review, concludes whether the acts at issue constitute unfair competition in violation of section 337. Next, if violations have been found to exist, the Commission and then the President independently determine whether, despite the violation, the remedy should not be implemented because policy reasons weigh against implementation. Duracell's

contention here is that permitting the President's disapproval in this case to stand would render meaningless the purposeful dichotomy Congress intended. Indeed, as is next shown, the President's disapproval here was unlawfully based on "the merits of the investigation." See Young Engineers, 721 F.2d at 1313.

III. THE REASON GIVEN BY THE PRESIDENT FOR HIS DISAPPROVAL OF THE COMMISSION'S DETERMINATION IS NOT A POLICY REASON

The President's notice of disapproval, J.A. at 3, is one typewritten page consisting of four paragraphs. In the first two paragraphs, the President describes the procedural setting of the matter and the statutory basis for his review. In the third and fourth paragraphs of the notice, the President explains the reason for his disapproval. A review of such reason makes it evident that the President did not disapprove the Commission's determination for policy reasons. Rather, as is stated in the notice, the President disapproved the determination so that it would not appear that there was any change or alteration in the Treasury Department's legal interpretation of section 42 of the Lanham Act which precludes relief in cases where related companies own the U.S. and foreign trademarks at issue.

A. Disapproval Based On Disagreement With Legal Conclusions Is Not A Policy Reason Within The Meaning Of Section 337

The President's notice of disapproval expressly states that "[t]he Commission's interpretation of section 42 of the

Lanham Act . . . is at odds with the long-standing regulatory interpretation" given that statute by the executive branch through Treasury Department regulations promulgated under section 42. The President goes on to state that his administration has advocated the Treasury Department's interpretation in pending court cases including two cases where recent decisions "explicitly uphold the Treasury Department's interpretation."18/ The President then decides to disapprove because he concludes that his failure to disapprove a Commission determination based in part upon a legal conclusion with which his administration disagrees, could be construed as altering the administration's legal position.

The President reiterates this theme in the final paragraph of the notice, stating that his administration is trying to develop a cohesive parallel import policy and that failure to disapprove the Commission's determination could be viewed as a change in the current policy prior to the completion of this process.

In essence, the President disapproved the Commission determination in order to vitiate any precedential effect the Commission's determination might have and thereby protect the adversarial position that his administration is advocating in the courts. That a Commission interpretation of the trademark

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18/See Coalition to Preserve the Integrity of American Trademarks v. United States, 598 F. Supp. 844 (D.D.C. 1984), appeal docketed, No. 84-5890 (D.C. Cir.); Vivitar Corp. v. United States, 593 F. Supp. 420 (Ct. Int'l Trade 1984), appeal docketed, No. 84-1638 (Fed. Cir. argued Feb. 4, 1985).

laws might be inconsistent with the Treasury Department's interpretation and thus be legal authority for others to argue that the latter interpretation is invalid has from the outset of this case concerned both the Treasury Department and participants in the gray market.19/ The President, persuaded by the Treasury Department's legal interpretation, disapproved in order to prevent a contrary legal conclusion from becoming effective.20/

The President's disapproval of the Commission's decision for these reasons is not "for policy reasons" within the meaning of section 337. Congress expressly directed that "[t]he President's power to intervene would not be for the purpose of reversing a Commission finding of a violation of section 337."

19/At oral argument before the Commission, present counsel for the government represented the Treasury Department and argued that the Commission's adoption of the ALJ's legal conclusions would be erroneous because finding a violation of section 42 (or section 526 of the Tariff Act) would be inconsistent with the Treasury Department's position. Counsel stated that the Treasury Department's "position is based on legal reasons" and later that its position "is based strictly on legal argument." J.A. at 161-164. Earlier in the Commission proceeding, CWE, a respondent below, had argued for summary determination of the case based, in part, on the Treasury Department's regulations. See J.A. at 150-57.

20/The President cannot deprive this Court of jurisdiction to review the law of the case by disapproving a determination in order to prevent this Court from ultimately passing on the substantive matter of violation of section 337. By his disapproval here, the President sought to prevent this Court from issuing a legal conclusion as to whether the importations of foreign DURACELL batteries constitute a violation of section 337. If the Court "were to permit the President to determine the appropriateness of judicial review, [it] would abdicate [its] constitutional function." Braniff Airways, Inc. v. CAB (Chicago-Montreal), 581 F.2d 846, 851 (D.C. Cir. 1978); see also Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792).

S. Rep. No. 93-1298 at 199, 1974 U.S. Code Cong. & Ad. News at 7332. Thus, even though the President believes that the Commission's interpretation of section 42 is legally erroneous, and should not be enforced, Congress did not intend that the President could disapprove it for that reason. If that were the case, the distinction that Congress carefully crafted between legal and policy reasons would be rendered meaningless.21/ Rather, by distinguishing between "legal" and "policy" reasons, Congress intended the President to disapprove only those determinations where the relief ordered would have an adverse effect on U.S. foreign relations or competitive conditions. The President never suggested that the relief ordered here would have such effect. Rather, the President disapproved because he disagreed with the Commission's finding that importations of genuine trademarked articles produced by a company related to the U.S. trademark owner could constitute trademark infringement under section 42 and, consequently, unfair competition under section 337.

Ironically, the President's authority to disapprove -- which he exercised here in an attempt to vitiate any future ramifications from what he considered were the Commission's erroneous legal conclusions -- was intended by Congress to preclude the need for exactly that course of action. Congress painstakingly provided procedures requiring that section 337 violations be established on a case-by-case basis. Congress

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21/"To treat use of [a] phrase . . . by Congress as having been without purpose is to violate a basic rule of statutory construction." United States v. Yoshida Int'l Inc., 526 F.2d 560, 576 (C.C.P.A. 1975) (citing Ex parte Public Nat'l Bank, 278 U.S. 101, 104 (1928)).

bifurcated section 337 into: (1) a determination of whether there is a legal violation of the section and (2) a determination of whether the "public interest" and the interest of the United States make the imposition of a remedy of that violation wise or appropriate. Thus, even if application of the Commission's determination respecting section 42 of the Lanham Act would lead to a finding of a violation in some future section 337 investigation, the Commission could refuse to issue, or the President could disapprove the issuance of, a remedy if the remedy in that case would have an adverse impact on U.S. foreign relations or competitive conditions.

The final irony here is that the President's disapproval did not serve to remove the precedential value of the Commission's decision, since under section 337, presidential disapproval renders a decision of no force or effect, but not void. See Young Engineers, 721 F.2d at 1313. Moreover, as the President's disapproval notice itself acknowledged, since section 42 of the Lanham Act was only "one of several grounds" upholding the Commission's determination, the President's disapproval unlawfully rendered that entire determination ineffective notwithstanding the undisputed findings of the ALJ and the Commission, that the unfair importation of foreign DURACELL batteries caused consumer confusion and injured a U.S. industry.

Congress did not empower nor intend the President to disapprove Commission determinations simply because he disagreed with the Commission's legal or factual conclusions. In fact,

the Commission is an independent agency that derives its authority from the power delegated to it by Congress. S. Rep. No. 93-1298, 1974 U.S. Code Cong. & Ad. News at 7259; see generally 19 U.S.C. § 1330. Congress delegated to the Commission, not to the President, the power to draw legal conclusions in section 337 proceedings. Indeed the legislative history shows that in revising the Tariff Act in 1974, Congress "strongly believe[d] in the need to prevent the Commission from being transformed into . . . an agency dominated by the Executive Branch. For this reason, many of the amendments offered in this bill with regard to the Commission are directed at strengthening its independence." 1974 U.S. Code Cong. & Ad. News at 7259-7260. Since Humphrey's Executor v. United States, 295 U.S. 602 (1935), the courts have defended independent agencies against incursions of control and influence by the Executive. Recently, one court stated that "the President, as representative of the Executive, does not have a claim to control the decisionmaking of independent agencies." Consumer Energy Council of America v. FERC, 673 F.2d 425, 472 (D.C. Cir. 1982), aff'd, 103 S. Ct. 3556 (1983). This is precisely the type of executive interference that occurred here when the President substituted his legal judgment for that of the Commission. Thus, the President's role in section 337 proceedings, statutorily granted and limited, should be circumscribed to effectuate the intent of Congress in creating the Commission as an independent agency.

B. The Disapproval Notice Does Not Reflect Any Other Policy Reasons For The President's Disapproval

Although Duracell contends that the notice of disapproval unmistakably states that the President disapproved the Commission's determination because he disagreed with the Commission's legal interpretation of section 42 and he did not want to create the appearance that the administration's contrary legal position was being changed or altered, the government may attempt to suggest that the notice reflects other reasons for the President's disapproval as well.

By relying upon the reference in the final paragraph regarding the President's desire to avoid the appearance that "a change in the current policy" was being undertaken "prior to the completion of the [Cabinet Council's policy formulation] process," the government may argue that the disapproval was made pursuant to some unarticulated "current policy" and that such reason is sufficient. Yet, as indicated previously in his notice, the President acknowledges he has no policy regarding parallel market importation other than the legal interpretation adopted by the Treasury Department and advocated by it in the courts. He states that the Cabinet Council on Commerce and Trade is seeking to develop a "cohesive policy in this area." An argument based on "current policy" must fail for the reasons previously articulated in section III(A), supra, because that "current policy" is no more than the Executive Branch's legal position.

The government may also argue that the President desired to formulate a cohesive policy which once formulated might conflict with, and thus require disapproval of, the Commission determination here. This "reason" is not what Congress intended to constitute a policy reason when drafting section 337 and is an impermissible basis upon which to deny force and effect to a Commission determination. Again, Congress was concerned that a Commission remedy might damage foreign relations, hurt U.S. consumers, or put U.S. industry at a competitive disadvantage. Accordingly, Congress provided the President sixty days to review the Commission's decision and to disapprove it if he believed the ordered remedy would have such adverse effects.

Here, establishing a lengthy and indefinite policy formulation process and then disapproving a Commission determination so as not to preempt the conclusions of the policy-making process is not what Congress intended or provided. Such an asserted basis for disapproval directly conflicts with the expedited nature of section 337 proceedings. Congress designed the statutory scheme, by providing specific time limits under section 337, to place paramount importance on ensuring that alleged unfair acts in importations be efficiently and quickly investigated, adjudicated, and determined. For example, Congress instructed the Commission to conclude an investigation and make a determination "at the earliest practicable time, but not later than one year (18 months in more complicated cases) after the date of publication of notice of such investigation." 19 U.S.C. § 1337(b)(1).

Congress further reflected its concern for prompt disposition of actions pursuant to section 337 by also placing a strict deadline on the time in which the President may intervene to override a Commission determination. Congress provided that a Commission determination is without force or effect "[i]f, before the close of the 60-day period beginning on the day after the day on which he receives a copy of such determination, the President, for policy reasons, disapproves such determination. . . ." 19 U.S.C. § 1337(g)(2).

By imposing these specific time limits, Congress anticipated that section 337 should act as a vehicle for prompt resolution of each specific unfair competition dispute in import trade brought before the Commission.22/ If the President could rely on the possibility that his administration might at some point in the future formulate a policy that could address situations comparable to that facing the complainant in the particular 337 action at issue, the intent of Congress in requiring the President to decide within sixty days whether "overriding national interests" require disapproval would be frustrated. Concluding that such a basis is permissible would ignore the limitations that Congress expressly imposed by statute on the President because it would permit the President to disapprove for any

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22/See Note, Litigating Unfair Trade Practices Under Section 337(a) of the Tariff Act of 1930, 16 Law & Pol'y Int'l Bus. 597, 600 n.15 (1984) "Legislative history indicates Commission responsibility for enforcing section 337 was designed to obviate the delay in relief to American manufacturers inherent in prolonged litigation."

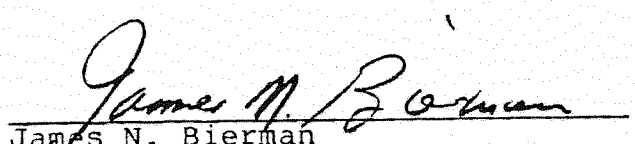
reason, existent or nonexistent. Yet as shown above, Congress intended that the President's power to intervene in section 337 cases be specifically limited.

CONCLUSION

The United States International Trade Commission concluded that the importation and sale of foreign DURACELL batteries violates section 337 of the Tariff Act and ordered them excluded from entry into the United States because they infringe Duracell's registered U.S trademark and misappropriate its trade dress. Pursuant to section 337(g)(2), the Commission determination was sent to the President for review "for policy reasons" that might necessitate disapproval. Yet the President disapproved the Commission's determination not because he found that the exclusion of foreign DURACELL batteries would hurt consumers, hurt the U.S. economy, or hurt U.S. foreign relations, but because the President believed one of the grounds supporting the Commission's determination -- its legal interpretation of section 42 of the Lanham Act -- was inconsistent with the legal interpretation which the Treasury Department had placed on that statute and has advanced in the courts. Thus, the President's disapproval was not made "for policy reasons" and as such was unlawful. Because the Commission's determination was not lawfully disapproved within the

sixty day time period, it has not been rendered ineffectual by the President, and Duracell should be accorded the relief ordered by the Commission.

Respectfully submitted,



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Dated: May 2, 1985

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief for Appellant and Joint Appendix have this 2nd day of May, 1985 been served on the following:

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