



# A Brief History of Tea: The Rise and Fall of the Tea Importation Act

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A Brief History of Tea:  
The Rise and Fall of the Tea Importation Act

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## Introduction

In 1996, Congress passed the bipartisan Federal Tea Tasters Repeal Act,<sup>1</sup> repealing the Tea Importation Act,<sup>2</sup> a relatively obscure 99 year-old piece of legislation. Passed in 1897, the Tea Act prohibited importation of tea into the United States that failed to meet government standards for quality, purity, and fitness for consumption.<sup>3</sup>

At the time of the repeal, the Food and Drug Administration enforced the Tea Act, pursuant to a delegation of authority from the Secretary of Health and Human Services. The entire regulatory program cost taxpayers less than \$200,000 per year;<sup>4</sup> although the inspection program was ambitious, it was supported largely by industry in the form of user fees.<sup>5</sup>

The Tea Act authorized the FDA to appoint a Board of Tea Experts, whose job it was to set federal standards of quality, purity, and fitness for consumption.<sup>6</sup> The FDA was also responsible for inspecting each and every lot of tea entering the country,<sup>7</sup> and for providing administrative adjudication by an appointed Board of Tea Appeals.<sup>8</sup> Although the Federal Tea Tasters Repeal Act of 1996 ended this regulatory program, FDA retains the power to regulate the safety and purity of tea under the Federal Food, Drug, and Cosmetic Act of 1938.<sup>9</sup>

The goal of this paper is to provide a general history of the Tea Importation Act of 1897. It focuses on the

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<sup>1</sup>P.L. 104-128, 110 Stat. 1198 (April 9, 1996).

<sup>2</sup>29 Stat. 604 (March 2, 1897) codified at 21 U.S.C. § 41, *et seq.*, repealed by 110 Stat. 1198 (April 9, 1996). This is the Act's official short title, as provided for by 57 Stat. 499 (July 12, 1943). However, the Act has been known by many other names, including the Impure Tea Act, the Impure Tea Importation Act, the Tea Act, and the Tea Inspection Act.

<sup>3</sup>Tea Importation Act § 1, 21 U.S.C. § 41 (1996).

<sup>4</sup>The precise figure is debated, but no estimate exceeds \$200,000, the total cost of the program.

<sup>5</sup>Tea Importation Act § 13, 21 U.S.C. § 46(a) (1996).

<sup>6</sup>Tea Importation Act §§ 2-3, 21 U.S.C. § 42-43 (1996).

<sup>7</sup>Tea Importation Act § 4, 21 U.S.C. § 44 (1996).

<sup>8</sup>Tea Importation Act § 6, 21 U.S.C. § 46 (1996).

<sup>9</sup>21 U.S.C. §§ 301 *et seq.*

Act's legislative scheme, the Act's antecedents and amendments, and its legislative history. Special attention is paid to a twenty-year period of litigation early in the Act's history, from 1898 to 1918, challenging the Act and its enforcement under the Constitution. However, enforcement practices of the various agencies charged with the Act's administration are not addressed by the paper, except when significant to litigation or the legislative process.

### A Few Interesting Notes about Tea

According to legend, tea was discovered quite by accident in 2737 B.C. by Shen Nung, the Emperor of China.<sup>10</sup> With such illustrious beginnings, it is no surprise that tea has a special place in history. As the legend goes, the Emperor had a practice of drinking boiled water, because he believed that the beverage promoted good health. One day, the Emperor was sitting outside, boiling his drinking water over an open fire. By chance, a few leaves from a nearby *camellia sinesis* fell into the hot water, and steeped, producing the world's first serving of tea. The Emperor tried the resulting brew, and declared that it produced vigor of body, contentment of mind, and determination of purpose.<sup>11</sup> Today, tea remains one of the most popular beverages in the world, second only to water.<sup>12</sup>

However, Americans too have made their mark on tea history. Although the popularity of tea in the coffee-

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<sup>10</sup>See Marian Segal, *Tea: A Story of Serendipity*, (last modified May 6, 1998; visited April 14, 2000) [http://www.fda.gov/fdac/features/296\\_tea.html](http://www.fda.gov/fdac/features/296_tea.html). Segal is a member of the FDA's public relations staff. *Id.* The New York City-based Tea Council of the U.S.A provided most of Segal's statistics and historical information. *Id.*

<sup>11</sup>*Id.*

<sup>12</sup>*Id.*

drinking United States has decreased over the last century, contemporary Americans continue to consume vast quantities of the beverage.<sup>13</sup> Though Americans drink their fair share of tea, however, their methods of doing so are “unique” among the world’s nations in that fully four-fifths of all tea consumed by Americans is iced.<sup>14</sup>

While credit for the discovery of tea may legitimately go to Emperor Shen Nung, iced tea is a thoroughly American variation, invented in 1904 at the Louisiana State Purchase Exposition in St. Louis, Missouri. The weather at the Exposition was hot enough that one beverage stand, the Far East Tea House, serving hot tea, was unable to lure any customers. In a desperate attempt to salvage the day, the staff of the Far East Tea House started pouring the unwanted tea over ice. This “iced tea” quickly became the beverage of choice at the Exposition.<sup>15</sup> Today, canned and bottled iced tea is one of the fastest growing products on supermarket shelves.<sup>16</sup>

The innovation of the tea bag is also properly credited to American capitalism. In the same year that iced tea made its debut, a Boston retailer hit upon a method of providing small samples of his teas to prospective customers. He sent out single servings of various teas in small silk pouches, and the tea bag was born. Because tea bags were conveniently pre-measured and easy to dispose of, they eventually came to dominate the market, although in a more economical paper incarnation.<sup>17</sup> Today in America, nearly all freshly brewed tea is prepared from tea bags.<sup>18</sup>

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<sup>13</sup> *Id.* In 1994, American drank 2.25 billion gallons of tea. *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* In 1994, 60% of all tea consumed in America came from tea bags, while only 1% was brewed from loose leaves. The remainder was prepared using instant and iced-tea mixes, indicating the importance of convenience to the American tea market. *Id.*

Historically, most tea imported into the United States came from China and Japan.<sup>19</sup> However, during World War II, the emphasis switched to India and Ceylon, as commercial relations with China and Japan were curtailed.<sup>20</sup> Today, the majority of tea entering the nation originates in Argentina, China, and Java.<sup>21</sup> Also note that significant quantities of tea are produced domestically, in the Southern states of the Union. Tea comes in three basic varieties: Green, Oolong, and Black.<sup>22</sup> Currently, the most popular in the United States is black, although that was not always the case.<sup>23</sup> All three types are prepared from the same plant; only the method of preparation differs. The greatest difference between the three methods lies in the varying amount of fermentation: Tea leaves used to make black tea are withered, rolled in special machines to partially release their natural juices, left to ferment in a climate-controlled environment, and then oven dried. Oolong tea goes through the same processes as black tea, except that the fermentation process is substantially shorter. Leaves used to make green tea are not fermented at all. In fact, they are heated immediately after picking in order to prevent fermentation; then they are rolled and dried.<sup>24</sup>

Other terms familiar to the reader, such as Orange Pekoe, describe the size<sup>25</sup> and age<sup>26</sup> of the leaves. Strictly

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<sup>19</sup>*Id.*

<sup>20</sup>*Id.*

<sup>21</sup>*Id.* During the Korean War, uncertainties about reliable tea supplies resurfaced. Argentina became an important source, as Argentina was geographically and politically removed from the conflict and tea could be grown very quickly in the South American climate. Although Argentina produces teas of only average quality, they are especially suited to being served iced, which partially accounts for the continuing popularity of Argentinean tea in United States markets. *Id.*

<sup>22</sup>*Id.*

<sup>23</sup>*Id.* Notably, it is suggested that World War II accounts for the prevalent use of black tea in the United States. Prior to the War, only 40% of tea consumed by Americans was black. Another 40% was green, and the remaining 20% was oolong. However, China and Japan are the major producers of green and oolong tea, and these sources were shut off during the war. However, trade routes to India, which produces primarily black tea, remained open. Due to relative availability, and possibly due in part to anti-Asian sentiments on the part of tea drinkers in the United States, by the end of the War, nearly 99% of tea consumed in America was black. Although green and oolong teas have regained some of their former popularity, this pattern of consumption remains largely intact. *Id.*

<sup>24</sup>*Id.*

<sup>25</sup>*Id.* In terms of size, larger leaves are referred to as orange pekoe, pekoe, and pekoe souchong. Smaller and broken leaves (from largest to smallest) are called broken orange pekoe, broken pekoe souchong, broken orange pekoe fannings, and fines. Fines are also referred to as “tea dust.” *Id.*

<sup>26</sup>Similar terms are used to describe the age of the leaf. From youngest to oldest, the terms used are flowery pekoe, orange pekoe, pekoe, souchong 1<sup>st</sup>, souchong 2<sup>nd</sup>, Congou, and Bohea. Many teas utilize leaves of different ages, and common combinations have their own names, derived from the terms referring to age, e.g., tea made from souchong and younger leaves is called Pekoe Souchong. U.S. Department of Agriculture, Division of Chemistry, Bulletin No. 13, Foods and Food Adulterants, Part VII – Tea, Coffee, and Cocoa Preparations 876 (1892).

speaking, most of these qualitative terms should be applied only to black tea.<sup>27</sup> However, it is not unheard of for the terms to be used to describe oolong teas.<sup>28</sup>

## Early Tea Regulation in England

In contrast to the later American Tea Importation Act, early British legislation was not aimed primarily at prohibiting the importation of impure tea. Rather, the first British laws proscribed the very act of adulteration. Probably due to enforcement difficulties, subsequent laws targeted ancillary activity. Perhaps the early British approach is explained by a perception that adulteration was more of a local problem than an international one.<sup>29</sup> It may also be partially attributed to the fact that the only importers of tea at the time were Crown-chartered businesses.<sup>30</sup>

Although not easy for us to intuit today, historically, the English crown had a special interest in regulating the purity of tea. This is not merely because the crown had an interest in the health of its subjects, although health concerns certainly provided some motivation for prohibiting adulteration.<sup>31</sup> It is likely that the stronger motivation for government involvement came from a desire to protect tax revenues.<sup>32</sup> Reliable

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<sup>27</sup>Segal, *supra*, note 10. The terms “fannings” and “fines” are generally applicable. *Id.*

<sup>28</sup>*Id.*

<sup>29</sup>This view is to be contrasted with the late 19<sup>th</sup> century American perception that adulteration was primarily the fault of the ultimate suppliers, the majority of whom at that time were Chinese wholesalers. There is some reason to believe that America received tea of far lower quality than did England. However, this is not to suggest that significant adulteration did not occur once teas reached the American market. It is not inconceivable that the 19<sup>th</sup> century American view was colored by prejudice against China and Chinese nationals.

<sup>30</sup>See F. Leslie Hart, *Adulteration of Food Before 1906*, 7 FDC L.J. 5, 12 (1952). These companies had government-sanctioned monopolies. *Id.*

<sup>31</sup>See *id.*; see also 17 Geo. 3, c. 29., § 1 (1730), citing “the prejudice of the health of His Majesty’s subjects” as a reason for the legislation. *Id.* This and the following English statutes are as taken from Douglas C. Bartley, *Adulteration of Food, Statutes, Cases and Regulations*, Fourth edition, 1-12, (1929).

<sup>32</sup>See Hart, *supra* note 30, at 12 (stating, “Increase in public revenue was of more importance than an increase in public health.”); see also 17 Geo. 3, c. 29., § 1 (1730) (citing “the diminution of the revenue,” as another reason for the legislation).

enforcement of tea taxes depended on regulating the purity of tea.

In England, tea was a perfect subject for taxation. First, although tea is relatively inexpensive in our economy, at that time it was considered a luxury product.<sup>33</sup> Excise taxes on luxury items assured that government revenues came from those who had the funds to supply them.<sup>34</sup> The crown received its revenues out of the discretionary income of the upper classes, and the poor did not suffer extreme tax burdens. Second, tea could not be grown domestically. It had to be imported, necessarily passing through one of a limited number of ports. Evasion of the tax was difficult, since it could be assessed at the point of entry.

Unfortunately, the tax scheme exacerbated the problem of adulterated tea in English markets.<sup>35</sup> The practice was already common, as the economic incentives were undeniable. Dishonest importers and merchants could realize higher profits by adulterating tea and selling it at competitive prices. Tea was often adulterated at its eastern source, but adulteration also occurred once the tea reached the local market.<sup>36</sup> As tea was sold to local merchants by weight, importers increased its density with the admixture of iron filings, clay, and gypsum.<sup>37</sup> In their turn, the local merchants further adulterated the tea by mixing in exhausted tea leaves<sup>38</sup> and the leaves of foreign plants.<sup>39</sup> There was a great demand for inexpensive tea, and consumers, unaware of the fraud, were ready and willing to buy the “tea” at competitive prices. This adulteration was extremely difficult to detect.

This pre-existing incentive to adulterate tea was further compounded by a desire to avoid paying the crown

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Other purposes included preventing “the injury and destruction of great quantities of timber, woods, and underwoods,... the ruin of the fair trader, and... the encouragement of idleness...” *Id.*

<sup>33</sup>Hart, *supra* note 30, at 12.

<sup>34</sup>*Id.* at 13. Although Hart is discussing taxes on coffee at this point in his article, the principle remains the same.

<sup>35</sup>*Id.* at 17 (stating, “Tea, being subject to an excise tax, was particularly subject to adulteration.”)

<sup>36</sup>*Id.* at 12, *citing* Ukers, *All About Tea* (1935).

<sup>37</sup>*Id.*

<sup>38</sup>*Id.* The previously used tea leaves could be purchased in quantity from hotels and coffee-houses. *Id.* Exhausted leaves were sometimes treated with the bitter extracts of elder and catechu (terra japonica) in order to impart flavor. *Id.* They could also be dyed with catechu, molasses, clay, logwood, and other ingredients in order to improve their color. *See* 4 Geo. 2, c. 14 § 11 (1730). This process was referred to as “sophisticating” tea. *Id.*

<sup>39</sup>*Id.* Commonly used foreign leaves included licorice, sloe, ash, and elder. *See* 17 Geo. 3, c. 29 § 1 (1776). These foreign leaves were processed in the same way as exhausted leaves. *Id.*

its cut.<sup>40</sup> Tea was taxed as a luxury product, but the leaves commonly used to adulterate tea were not subject to duties. Although selling a mixture of tea and other leaves may not technically been an illegal tax evasion, adulterated tea was effectively taxed at a lower rate than pure tea. Since consumers generally believed they were buying pure tea, the actual demand for tea on the English market was lower than it would have been absent the adulteration. Obviously, the less tea imported into the nation, the lower the revenue collected by the crown on through its tax scheme. Therefore, the English government therefore had a significant fiscal interest in maintaining the purity of tea sold in its markets.

The English government attempted to counter the practice by enacting laws prohibiting the adulterated tea. In 1724, during the reign of George I, a law was passed which forbid mixing tea with any other substance.<sup>41</sup> The penalties were forfeiture of the adulterated tea and a fine of one hundred pounds.<sup>42</sup> However, this law only dealt with the manufacture of adulterated product; it did not, for example, penalize selling impure tea.<sup>43</sup>

George II strengthened the law a few years later in 1730.<sup>44</sup> In addition to the previous prohibition, the new law forbid dealers in tea to sell adulterated tea.<sup>45</sup> A dealer's possession of adulterated tea or of non-tea leaves commonly used to adulterate tea also subjected him to penalties under the law.<sup>46</sup> For every pound of adulterated or imitation tea, the dealer had to pay ten pounds.<sup>47</sup> This fee structure guaranteed that those convicted of the most egregious offenses paid the largest penalties.

Decades later, the English found that disturbing amounts of adulterated tea remained in their markets.

Although the prohibitions in the previous laws were fairly comprehensive, only tea dealers could be convicted

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<sup>40</sup>Hart, *supra* note 30, at 17.

<sup>41</sup>*Id.* at 12; *see also* 11 Geo. 1, c. 30 (1724).

<sup>42</sup>*See* 11 Geo. 1, c. 30 (1724).

<sup>43</sup>*Id.*

<sup>44</sup>Hart, *supra* note 30, at 12; *see also* 4 Geo. 2, c. 14 (1730).

<sup>45</sup>*See* 4 Geo. 2, c. 14 § 11. In an effort to include as much undesirable activity as possible in the scope of the prohibition, the Act forbid dealers in tea to “sell and vend, or utter, offer, or expose to sale” adulterated tea. *Id.*

<sup>46</sup>*Id.*

<sup>47</sup>*Id.*

of the majority of offenses.<sup>48</sup> This left a gaping whole in the enforcement scheme; anyone who wasn't a dealer in tea was free to manufacture imitation tea and tea 'stretchers' from non-tea leaves.<sup>49</sup> They were also free to sell it to tea dealers, who would subsequently mix the imitation leaves with actual tea, and sell the mixture as pure.<sup>50</sup> Apparently, the practice was so widespread that the gathering of huge quantities of leaves endangered the health of English forests.<sup>51</sup>

In 1776,<sup>52</sup> an additional law was passed to combat the problem.<sup>53</sup> Non-dealers were now subject to the same prohibitions as dealers.<sup>54</sup> However, the penalty was lower; offenders were fined five pounds for every pound of adulterated or imitation tea, rather than the ten pounds fine to which dealers were subject.<sup>55</sup> An additional measure was aimed at the production of imitation tea: the Act provided penalties for possession of more than six pounds of leaves of *any kind* if the possessor was unable to satisfactorily prove he had permission to gather the leaves from the trees' owner.<sup>56</sup>

## Federal Regulation of Tea in the United States

Though tea is not the contemporary beverage of choice, it was of the utmost importance to 19<sup>th</sup> century American society. However, as in England, the importance of tea in American culture did nothing to protect

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<sup>48</sup>The prohibition of adulteration was generally applicable under 11 Geo. 1, c. 30 (1724), but penalties under 4 Geo. 2, c. 14 (1730) only applied to dealers.

<sup>49</sup>See 17 Geo. 3, c. 29, § 1 (1776).

<sup>50</sup>*Id.* Though previous laws made this sale criminal, apparently the incentive and ease with which tea could be adulterated overcame good citizenship.

<sup>51</sup>*Id.* (citing "the injury and destruction of great quantities of timber, woods, and underwoods," as a motivating factor in the passage of the legislation).

<sup>52</sup>See Bartley, *supra* note 31, at vii; *but see* Hart, *supra* note 30, at 13 (referring to the Act as a 1777 law).

<sup>53</sup>17 Geo. 3, c. 29, § 1 (1776).

<sup>54</sup>*Id.*

<sup>55</sup>*Id.*

<sup>56</sup>*Id.* § 2.

the public from the evils of the laissez-faire marketplace. In fact, the American market subjected consumers to many of the same problems suffered by English consumers.

As in England, adulteration of tea was commonplace and occurred in several forms. Tea leaves would be mixed with the leaves of other plants and sold as pure tea.<sup>57</sup> Previously used tea leaves would be sold as new.<sup>58</sup> Consumers expected that particular teas would be colored – or “faced” - to improve their aesthetic appearance,<sup>59</sup> but coloring was also used to disguise inferior quality and the presence of foreign leaves.<sup>60</sup> Additionally, facing tea was a common method of increasing its weight and therefore its price.<sup>61</sup> Though many facing substances were relatively safe for human consumption, others were not.<sup>62</sup>

Therefore, purchasing tea was a gamble, for health reasons as well as economic ones. But impure tea was not the only - nor the greatest - threat to the health and safety of the American consumer in the late 19<sup>th</sup> century. So the question arises as to why regulation of imported tea became a congressional imperative in 1883, prior to extensive federal involvement in the regulation of food in general.<sup>63</sup> However, it is not so strange as it sounds to us that tea would be the first subject of federal food regulation.<sup>64</sup>

First, it must be understood that the vast majority of tea consumed in the United States was imported. While it is unclear what proportion of this adulteration occurred domestically, there is no question that a great deal of the tea entering the country was unacceptable.<sup>65</sup> Contemporary wisdom blamed foreign

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<sup>57</sup>22 Stat. 451 § 1 (March 2, 1883), repealed by 29 Stat. 604 § 12 (March 2, 1897).

<sup>58</sup>*Id.*

<sup>59</sup>Thomas Taylor, Report of the Microscopist, First Report of the Secretary of Agriculture 194-5 (1889). Particularly, green teas from Japan were expected to be color enhanced. *Id.* at 194. Demand for colored teas was a relatively recent phenomenon, beginning in around 1870. *Id.*

<sup>60</sup>*Id.* at 195. Taylor notes that American tea dealers favored colored teas because, “in teas so colored coarse leaves may pass undetected.” *Id.* Additionally, Taylor partially attributes the decreased quality in Japanese green tea to cultural misunderstanding. He asserts that the American demand for colored tea lead the Japanese, “who value tea for its fragrance and delicacy” to “naturally conclude that the quality of the leaf which is subjected to such treatment [i.e., coloring] is not important.” *Id.*

<sup>61</sup>*See* *Macy v. Browne*, 215 F. 456, 459 (S.D.N.Y. 1914).

<sup>62</sup>Taylor, *supra* note 59, at 195; *see also* U.S. Department of Agriculture, Division of Chemistry, Bulletin No. 13, *supra* note 26, at 886; *see also* H. Rep. No. 54-3029, at 1 (1897) (stating that imported teas were “injurious to health” and “deleterious”).

<sup>63</sup>The first general federal food legislation was the Food and Drugs Act, passed in 1906. Hutt and Merrill, *Food and Drug Law, Cases and Materials*, Second Edition, 4 (1991).

<sup>64</sup>*Id.*; *see also* H.W. Schultz, Ph.D., *Food Law Handbook* 333 (1981).

<sup>65</sup>F. K. Killingsworth, *Import Control*, 2 FDC L.J. 498, 500 (1947).

importers for the bulk of the problem. Reportedly, the most egregious of the offenders were Chinese wholesalers, who purportedly viewed America as a dumping ground for the world's worst tea.<sup>66</sup> However correct or incorrect that perception, it can not be denied that vast quantities of imported tea was adulterated in one fashion or another. Targeting adulterated tea as it crossed the border was considered an effective strategy for improving the purity of tea as it reached the consumer.

Further, the power to regulate imports was squarely within Congress's Article I Section 8 plenary power to regulate commerce with foreign nations. In contrast, for Congress to effectively regulate foods in general would require exercise of the interstate commerce power. As most food consumed in the United States at the time was not imported, but produced domestically, the foreign commerce power could have little effect on the nation's food supply.

Even if Congress were to pass a law regarding the food safety pursuant to the interstate commerce power, a large proportion of the market would remain unregulated, as the commerce power would not have reached locally grown and processed foods. In the 1880's, the reach of the commerce power was limited. The national economy was far less integrated that it is today, and the reach of the commerce power is largely dependent on the economic interaction between states. As the economy became increasingly nationalized, Congress's power under the commerce clause expanded. The contemporary commerce clause has few limits.

Under 19<sup>th</sup> century circumstances, states were the natural defenders of the food supply. However, most states were in no position to regulate imports.<sup>67</sup> Therefore, if regulation of imported tea was desirable, it was only natural that the federal government should step into the breach. In addition to the constitutional power to deal effectively with the problem, Congress also had practical experience with import legislation,

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<sup>66</sup>Terence Samuel, *To the Bitter End, Congress is eliminating government's official tea taster*, The Dallas Morning News, April 21, 1996, at 1A.

<sup>67</sup>*But see Fraudulent Butter and Adulterated Tea*, The Central Law Journal, Vol. 21, No. 8, 142. Apparently in New York (the port of entry for most imported tea at that time), distribution of adulterated tea could be enjoined as a nuisance, providing the adulteration was severe. *Id.*

having passed similar regulatory programs relating to imported medicines.<sup>68</sup> Perhaps most significantly, the executive branch already has institutions in place with the capacity to carry out an ambitious inspection program: U.S. Customs under the Department of the Treasury was available to take on the task of enforcement.

### 1883: Congress's First Attempt

In 1883, Congress passed “An act to prevent the importation of adulterated and spurious Teas.”<sup>69</sup> The Act prohibited the importation of teas adulterated with foreign or exhausted leaves, as well as teas that were unfit for use due to the “admixture of chemicals or other deleterious substances.”<sup>70</sup> The Secretary of the Treasury was given authority to promulgate appropriate regulations in order to enforce the prohibition.<sup>71</sup> Upon arriving in the country, all shipments of tea were warehoused to await inspection.<sup>72</sup> The importer was to submit a sample of tea of every line item in his invoice to be examined along with a signed written statement that the samples represented the true quality of the lot.<sup>73</sup> If an examiner had reason to believe the importer falsified his samples, the examiner had three days to examine the lots themselves.<sup>74</sup> Importers were required to give bond that the tea would not be removed from the warehouse unless and until it passed an examination by customs officials for purity and fitness for consumption.<sup>75</sup>

At some ports, inspections were made by ‘duly qualified appraisers,’ but at smaller ports a qualified appraiser

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<sup>68</sup>Letter from the Treasury Department (January 15<sup>th</sup> 1883) as reprinted in H. Rep. No. 47-1927, at 1 (1883).

<sup>69</sup>22 Stat. 451 (March 2, 1883), repealed by 29 Stat. 604 § 12 (March 2, 1897).

<sup>70</sup>*Id.* § 1.

<sup>71</sup>*Id.* § 8. U.S. Customs was (and is) a branch of the Treasury department. At the time, no other federal agency was competent to enforce the inspection program. As the Secretary of the Treasury had the ultimate responsibility for enforcement of the 1883 Act, granting the Secretary rulemaking authority was not incongruous.

<sup>72</sup>*Id.* § 2.

<sup>73</sup>*Id.*

<sup>74</sup>*Id.*

<sup>75</sup>*Id.*

might not be available.<sup>76</sup> In these circumstances, the same officials responsible for collecting duties examined teas.<sup>77</sup> Once the tea passed inspection, it would be immediately released from the control of the customs authorities.<sup>78</sup> In the event that an importer was unhappy with the result of the inspection, he could call for a re-examination.<sup>79</sup> Additionally, on the importer's request, disputes over examination results were referred to arbitration to a committee of three experts.<sup>80</sup> However, once a lot of tea was ultimately rejected, it had to be re-exported within six months.<sup>81</sup> If the importer instead abandoned his tea at the warehouse, customs would destroy the tea after six months.<sup>82</sup>

A Congressional concern for consumer protection partially explains the passages of the Act.<sup>83</sup> Britain had recently passed a similar law, which contributed to the House Committee on Ways and Means' favorable report.<sup>84</sup> However, the strongest motivation appears to have been an appeal by the American tea industry for federal protection from foreign tea interests.<sup>85</sup> In fact, the 1883 Act was drafted by American importers and dealers, who lobbied heavily for its passage.<sup>86</sup> Further, Ways and Means consulted with industry associations before recommending the bill's passage<sup>87</sup> and expressed a desire to prevent any serious inconvenience to

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<sup>76</sup>*Id.* § 5.

<sup>77</sup>*Id.*

<sup>78</sup>*Id.* § 2.

<sup>79</sup>*Id.* § 3.

<sup>80</sup>*Id.* § 4.

<sup>81</sup>*Id.*

<sup>82</sup>*Id.*

<sup>83</sup>H. Rep. No. 47-1927, at 1 (1883), stating, "The necessity of such legislation as will fully protect the consumers of teas in this country against teas which have been deprived of their 'proper quality, strength, or virtue, by steeping, infusion, decoction, or other means' cannot be questioned...." *Id.*

<sup>84</sup>*Id.* In fact, some of the language utilized in the 1883 Act was borrowed from the British legislation, General Statutes of Great Britain, 38 Victoria 583. *Id.*

<sup>85</sup>Killingsworth, *supra* note 65, at 502.

<sup>86</sup>Letter from the Importers and Grocers' Exchange of New York to A.P. Ketchum, Chief Appraiser of the New York Custom-House (written between Jan. 30 and Feb. 13, 1884), as re-printed in H.R. Ex. Doc. 61, Part 2, 2 (1884). The letter states, "The act approved March 2, 1883, was prepared by the importers and dealers in tea generally, and was urged upon Congress by them for their own protection as well as for the protection of the consumer." *Id.*

<sup>87</sup>H. Rep. No. 47-1927, at 1 (1883) (stating, "The bill as reported has been examined by the executive committee of tea trade of New York City and the Board of Trade of Philadelphia, and likewise by others engaged in the tea trade in other sections, and meets with a unanimous indorsement [sic] as far as your committee is informed").

American tea dealers.<sup>88</sup>

In the fullness of time, Congress's first attempt to regulate tea imports was widely considered unsuccessful. First, the Act failed to protect consumers from adulterated tea. Second, while it may have offered American industry some protection from foreign interests, enforcement of the Act caused significant injury to American businesses. It became apparent that the regulatory scheme was fraught with opportunities for slipups and for arbitrary enforcement.

### Attempts to amend the 1883 Act fail

Within a year, it became clear that the regulatory scheme required legislative adjustment. In early 1884, draft legislation was proposed by the Secretary of the Treasury.<sup>89</sup> While the 1883 Act had “worked a great public benefit in the exclusion of worthless stuff heretofore imported and sold as tea,” amendment was necessary “so as to cure the defects which experience [had] shown to exist in its execution.”<sup>90</sup>

Among the proposed improvements was provision for special examiners at the ports of San Francisco and Chicago, ports of entry for large amounts of tea.<sup>91</sup> While it is not clear from the legislative history, there are suggestions that only the port of New York had a qualified examiner. This would explain the inclusion of a salary raise only for the New York examiner.<sup>92</sup> Certainly it would be of great concern if revenue collectors untrained in examining tea inspected the large amounts of tea entering the country through San Francisco

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<sup>88</sup> *Id.*

<sup>89</sup> H. Rep. No. 48-665 (1884).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* However, the raise could also be explained by the fact that the largest amount of tea entered the United States through the port of New York. *Id.*

and Chicago.

Additionally, the arbitration process would be improved by providing that differences of opinion as to a tea's quality and purity among the board of arbitrators could be resolved by "appeal to chemical analysis."<sup>93</sup> While the 1883 Act did not actually forbid such testing, not did it specifically provide for any kind of scientific analysis. Though the contemporary legislative history does not detail the reasoning behind this amendment, later complaints about the arbitration process indicate that its results were based on little more than the arbitrators' subjective opinions.<sup>94</sup> Any kind of objective standard would streamline the arbitration process as well as increasing its fairness.

The substantive prohibitions were also to be tightened. First, an attempt to provide an enforcement standard for the prohibition of tea "adulterated with spurious leaf"<sup>95</sup> was proposed. Tea containing more than 8% ash was to be forbidden entry.<sup>96</sup> Under the 1883 Act, examiners had discretion to decide how much adulteration was 'too much.'

Second, tea dust, which could be "used only for adulteration"<sup>97</sup> was to be excluded, in order to reduce the possibility of adulteration after inspection by customs. While tea dust by definition was supposed to be composed of very fine particles of tea leaves, most material imported as "tea dust" had very little actual tea in it.<sup>98</sup> As impurities in tea dust were extremely difficult to detect,<sup>99</sup> absent a blanket prohibition of tea dust, examination by customs officials could do nothing to prevent the entry of the false article. As a result, it was extremely easy for dishonest dealers to adulterate their tea locally.

The draft legislation was circulated to the industry, which generally supported the amendment.<sup>100</sup> However,

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<sup>93</sup> *Id.*

<sup>94</sup> H. Rep. No. 54-1529, 2 (1897).

<sup>95</sup> 22 Stat. 451, *supra* note 69, § 1.

<sup>96</sup> Letter from the Importers and Grocers' Exchange of New York, *supra* note 86.

<sup>97</sup> H. Rep. No 48-665 (1884). Note that this was before tea dust and tea sweepings were commonly used as raw materials in the manufacturing of caffeine and theine.

<sup>98</sup> Taylor, *supra* note 59, at 194. Taylor found that most tea dust consisted mainly of "raspberry leaves or other worthless substance purposely reduced to a fine powder to make detection difficult." *Id.*

<sup>99</sup> *Id.* Taylor, in 1889, was able to detect adulterations in tea dust with difficulty, and only with the use of a microscope. *Id.*

<sup>100</sup> Letter from the Importers and Grocers' Exchange of New York, *supra* note 86. The writers generally "approve of the

at least some industry members were unconvinced that the legislation was necessary.<sup>101</sup> One provision in particular, the percentage limitation on teas adulterated with ash leaves, inspired protest from the tea trade.<sup>102</sup> The House Committee on Ways and Means unanimously recommended passage, but in reporting the bill to Congress, the committee suggested that the ash limitation be deleted:

If the law be amended as proposed by the bill herewith submitted, the committee are of opinion that exhausted, adulterated, and poisonous teas will not hereafter find their way to the United States as they have heretofore done, and that the public health will thereby be greatly promoted.<sup>103</sup>

However, the House did not pass the legislation.<sup>104</sup>

A second attempt to amend the Tea Importation Act was made six years later, in 1890.<sup>105</sup> In reporting the bill to the House, the Committee on Ways and Means once again focussed attention on the problems presented by the importation of tea dust. Strong language was addressed to this particular failing of the 1883 Act:

This law is now evaded by the importation in large quantities of “tea-dust,” which is afterwards mingled with tea, and the admixture sold to our people as the pure article. This tea is full of dirt and deleterious substances, and its importation and sale as an article of food is a fraud upon all consumers.<sup>106</sup>

Two other alterations in the regulatory scheme were included in the House bill. First, under the 1883 Act, the samples to be inspected were not drawn by customs officials, but by the importers themselves.<sup>107</sup> The new legislation would have closed this opportunity to evade thorough inspection of imported tea. Under the proposed amendments... ” *Id.*

<sup>101</sup>*Id.* The letter states, “experience has proved that the safeguards imposed by the present act are amply sufficient, if the provisions thereof are strictly and honestly administered...” *Id.*

<sup>102</sup>Letter from A.P. Ketchum, Chief Appraiser of the New York Custom House (Feb. 4, 1884), as reprinted in Ex. Doc. 48-61, Part 2 (1884). Ketchum writes, “The opposition... to the fifth section of the proposed act, seems to be practically unanimous and certainly is very earnest.” *Id.* Notably, Ketchum also urges that industry members “should receive the fullest consideration in respect to any suggestions which they have to make with regard to any change in the existing tea law.” *Id.*

<sup>104</sup>A related bill, S. 2037, passed the Senate but was not voted on in the House. 48 Cong. Rec. S5334.

<sup>105</sup>See H. Rep. No. 51-2317 (1890) (reporting on H. R. 16720, an amended version of H. R. 8744).

<sup>107</sup>22 Stat. 451, *supra* note 69, § 2.

proposed amendment, customs examiners would take the samples.<sup>108</sup> Second, the composition of the arbitration boards was to be changed, “the present requirement of the statute not being entirely satisfactory.”<sup>109</sup> All three amendments received approval from the Acting Secretary of the Treasury.<sup>110</sup> Though the Committee on Ways and Means reported favorably on the bill as amended,<sup>111</sup> as with the earlier reform attempt, the legislation did not pass the House. To a certain degree, both of these failures can be attributed to the relative indifference on the part of industry. The Americans in the tea trade did not object to the draft legislation as reported to Congress, but neither did the bills receive the more intense lobbying effort behind the 1883 Act.

### **1897: An enduring regulatory program is enacted**

On March 2, 1897, fourteen years to the day after the 1883 Act became law, Congress enacted “An Act To prevent the importation of impure and unwholesome tea.”<sup>112</sup> This new Tea Importation Act constituted an overhaul of the 1883 Act’s regulatory system. In fact, the 1897 Act repealed the 1883 Act as a whole<sup>113</sup> and started with a clean slate, instituting several major changes in the regulatory scheme. Some of these changes were the very similar to reforms proposed in 1884 and 1890.

First, the substantive prohibitions were tightened; tea would be examined for “quality”<sup>114</sup> as well as for

<sup>108</sup>H. Rep. No. 51-2317, at 1 (1890), quoting a letter from Acting Secretary of the Treasury Batcheller.

<sup>109</sup>*Id.* The committee report does not specify the changes to be made.

<sup>110</sup>*Id.* The report quotes Batcheller, who suggested changes in the proposed legislation. *Id.* The original bill, H.R. 8744, provided for the appointment of additional tea examiners, which the Secretary thought unnecessary. *Id.* Additionally, the bill would have changed the source of the examiners’ salaries, which would have been drawn from the appropriation to customs for collecting revenues. *Id.* The Secretary thought this change inappropriate, as tea inspections had little to do with revenue collection. *Id.* The Committee adopted the changes suggested by the Secretary, and the bill as amended was reported as H.R. 16720. *Id.*

<sup>111</sup>*Id.*

<sup>112</sup>29 Stat. 604, *supra* note 2.

<sup>113</sup>*Id.* § 12.

<sup>114</sup>*Id.* §§ 1, 3.

“purity”<sup>115</sup> and “fitness for consumption.”<sup>116</sup> The motivation behind this provision was not discussed in either the House or the Senate Committee reports. However, it can be surmised that this was an attempt to improve the quality of teas available to the American consumer. Additionally, it is likely that the provision worked to protect certain American tea dealers from having to compete with low quality (and low cost) product.

Second, the Secretary of the Treasury was given the authority to adopt federal standards for what tea would be allowed into the United States.<sup>117</sup> Under the new law, the Secretary appointed a seven-member board of experts in teas, later to be known as the Board of Tea Experts, who would recommend standards to the Secretary.<sup>118</sup> These seven individuals served for one-year terms, and were at all times subject to removal by the Secretary.<sup>119</sup> Each expert received a \$50 per year salary, to be paid out of the portion of the customs budgets allocated for the collection of duties.<sup>120</sup>

Under the Board of Tea Experts’ recommendation, the Secretary of the Treasury would adopt uniform standards of purity, quality, and fitness for consumption for all varieties of tea imported into the country.<sup>121</sup> Samples conforming to each of the standards would be placed at customs in New York, San Francisco, Chicago, and other places as the Secretary saw fit.<sup>122</sup> Importers and dealers in tea were entitled to duplicate samples at cost.<sup>123</sup>

The lack of standards under the 1883 Act had been one of its greatest flaws. Because there were no standards, consistent enforcement of the 1883 Act was impossible. Examiners, whether “duly qualified”<sup>124</sup> or

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<sup>115</sup> *Id.*; see also 22 Stat. 451, *supra* note 69, § 2.

<sup>116</sup> 29 Stat. 604, *supra* note 2, §§ 1, 3; see also 22 Stat. 451, *supra* note 69, § 2.

<sup>117</sup> 29 Stat. 604, *supra* note 2, § 3.

<sup>118</sup> *Id.* § 2.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* § 3.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> 22 Stat. 451, *supra* note 69, § 5.

not, had only their subjective “momentary impressions” to guide their determinations.<sup>125</sup> Impure and even dangerous tea was released to the United States market and purchased by consumers.<sup>126</sup> The lack of standards presented problems for importers as well: “Importers have imported the same grade of tea admitted during the previous season and found, to their consternation, that in the second season it was excluded, no reason being given beyond the inspector’s or the arbitrator’s impressions...”<sup>127</sup> Importers could not rely on past experience; every shipment of tea to the United States became a gamble. In summary, “The public are suffering; the importers are suffering; and all because there is no standard or guide...”<sup>128</sup>

Third, the arbitration process of the 1883 Act was scrapped entirely and an administrative appellate procedure was put in its place.<sup>129</sup> The Secretary was to designate a board of three United States general appraisers to sit as an appellate body.<sup>130</sup> This Board of General Appraisers, to be known in later years as the Board of Tea Appeals, were not expected to be tea experts themselves; they were furnished with the statutory authority to obtain the advice of “persons skilled in the examination of teas.”<sup>131</sup> When such expert advice was utilized, the expert was to be paid a “compensation not exceeding five dollars” for a single case.<sup>132</sup> Unlike under the 1883 Act, the right to appeal was provided to the collector of the port, as well as the importer.<sup>133</sup>

The arbitration provisions under the 1883 Act were especially troublesome to importers and legislators alike. The arbitration boards were composed of three members, one chosen by the government, one chosen by the importer, with these two to come to a mutual decision on the third.<sup>134</sup> While arbitration might have seemed an amicable way of resolving conflict, in practice, “The arbitrations [were] in many cases a farce, and always

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<sup>125</sup>S. Rep. No. 54-1527, at 2 (1897).

<sup>126</sup>H. Rep. No. 54-3029 (1897).

<sup>127</sup>S. Rep. No. 54-1527, at 2 (1897).

<sup>128</sup>*Id.*

<sup>129</sup>29 Stat. 604, *supra* note 2, § 6.

<sup>130</sup>*Id.*

<sup>131</sup>*Id.* § 8.

<sup>132</sup>*Id.*

<sup>133</sup>*Id.* § 6.

<sup>134</sup>22 Stat. 451, *supra* note 69, § 4.

variable and uncertain.”<sup>135</sup>

In most disputes, the government would choose a strict arbitrator and the importer would choose a lenient arbitrator.<sup>136</sup> Choosing the third arbitrator could take up to a month.<sup>137</sup> This was because the arbitrators, like the examiners, were left without objective guidance - almost invariably ended in a two to three vote based on opinion alone, with the third arbitrator’s vote being determinative.<sup>138</sup> Thus, the selection of the third arbitrator was often more important to the result than the quality of the tea.

Because the arbitrators’ determinations were discretionary, they were unreviewable.<sup>139</sup> As there was no “danger of being proven dishonest,” the entire system was rife with opportunities for inspectors and arbitrators to act on the basis of favoritism rather than the quality of the tea.<sup>140</sup> The unfairness of the arbitration process under the 1883 Act contributed to the bankruptcy of at least one respected importer, which likely contributed to the industry position in favor of increased regulation.<sup>141</sup> In summarizing the problems, the Committee on Commerce reported, “The consequences of the present law are that thousands of dollars are lost unjustly to strictly honest importers every year, while millions of pounds of tea unfit for use are being constantly admitted...”<sup>142</sup>

Fourth, to further standardized enforcement, the 1897 Act improved the inspection procedure with several minor alterations. Recall that under the 1883 Act, if the port of entry lacked a qualified examiner, any customs official was free to conduct the tea examination.<sup>143</sup> Under the 1897 Act, if there was no qualified examiner at the port of entry, tea samples forwarded to a qualified examiner at another location.<sup>144</sup> As pro-

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<sup>135</sup>S. Rep. No. 54-1527, at 2 (1897).

<sup>136</sup>*Id.*

<sup>137</sup>*Id.*

<sup>138</sup>*Id.*

<sup>139</sup>*Id.* Also stating, “All this injustice may occur while inspectors or arbitrators are strictly honest, but without any standard or guide for their judgement. But it is difficult to estimate the disaster is any should not be honest.” *Id.*

<sup>140</sup>*Id.*

<sup>141</sup>*Id.* The house of Purdon & Wiggin offered approximately 200,000 pounds of Amoy tea for import. The tea was rejected after arbitration, “causing the house a disastrous loss, which helped to bring about their final bankruptcy.” *Id.* A short time later, another importer successfully imported a shipment twice as large of the very same grade of tea after arbitration. *Id.*

<sup>142</sup>*Id.*

<sup>143</sup>22 Stat. 451, *supra* note 69, § 5.

<sup>144</sup>29 Stat. 604, *supra* note 2, § 7.

posed in the 1890 House bill,<sup>145</sup> examiners (and arbitrators) were specifically authorized to utilize chemical analysis in evaluating tea offered for import.<sup>146</sup> Additionally, the Secretary of the Treasury was granted the discretion to have the examiner, rather than the importer, draw tea samples for inspection.<sup>147</sup> This was a compromise position between the 1883 Act and the 1890 bill. In the 1883 Act, examiners could only draw samples if they had reason to believe the samples drawn by the importer were not representative;<sup>148</sup> the 1890 bill would have required customs officials to draw the samples.<sup>149</sup>

Finally, the new Tea Importation Act imposed the penalty of forfeiture when an importer attempted to re-import previously rejected tea.<sup>150</sup> As with the 1883 Act, importers had 6 months to re-export rejected tea.<sup>151</sup> However, under the previous law, the import prohibitions could be evaded because rejected tea could be offered for import a second time without penalty. Although this practice could not be described as a common one, there were frequent reports tea being successfully re-imported, sometimes even passing inspection by the same examiner at the same port.<sup>152</sup>

After fourteen years, the failings of the 1883 Act had become clear to everyone involved. Consumers, dissatisfied with the quality of tea available on the market, were turning to other beverages in significant numbers.<sup>153</sup> Industry, too, was desperate for systemic reform<sup>154</sup> and the Secretary of the Treasury supported the movement.<sup>155</sup> The United States legislature was eager to accommodate these rapidly converging

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<sup>145</sup>H.R. 16720, 51<sup>st</sup> Cong. (1890).

<sup>146</sup>29 Stat. 604, *supra* note 2, § 7.

<sup>147</sup>*Id.* § 4.

<sup>148</sup>22 Stat. 451, *supra* note 69, § 2.

<sup>149</sup>H. Rep. No. 51-2317, at 1 (1890).

<sup>150</sup>29 Stat. 604, *supra* note 2, § 9.

<sup>151</sup>*Id.* § 6.

<sup>152</sup>S. Rep. No. 54-1527, at 2 (1897).

<sup>153</sup>*Id.* at 1, (stating, “while the per capita consumption of tea is increasing in Great Britain statistics show a decided reduction in this country”).

<sup>154</sup>*Id.* at 3. “The petition for this amendment has been signed by all the leading importers of tea in the United States, representing all the capital invested in the tea business in first hands. The petitions have been signed by all the leading importers and wholesale houses of New York, Chicago, Boston, Philadelphia, Portland, Baltimore, and San Francisco.” *Id.*

<sup>155</sup>*Id.* at 1, (stating, “The Treasury Department is fully alive to the situation and has cooperated with the committee...”).

interests. Bills were introduced in both the Senate<sup>156</sup> and the House<sup>157</sup> to deal with the issue. The House Committee on Ways and Means<sup>158</sup> and the Senate Committee on Commerce,<sup>159</sup> cooperating with the Treasury Department<sup>160</sup>, revised the proposed legislation and reported back to both Houses of Congress in favor of its passage.<sup>161</sup>

The Senate committee reported, “It is well known that the people of the United States receive on an average poorer teas than the consumers of any other civilized country. Much of the merchandise sold as tea is unwholesome and is disposed of at an enormous profit.”<sup>162</sup> Likewise, the House committee stated, “It is believed that it will do much to relieve our people of much of the worthless and deleterious stuff that is now imposed upon them. The evil is widespread, and should this bill furnish a remedy great good would result.”<sup>163</sup>

In a relatively short period of time, the Senate bill was approved by both houses of Congress and signed into law by the President. The system put in place by the 1897 Act regulated the importation of tea into the United States until its repeal in 1996 – ninety-nine years after its enactment. Although, from time to time, enforcement responsibility for the Tea Importation Act was shuffled from one administrative agency to another, the basic structures, policies, and substantive rules remained largely intact.

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<sup>156</sup>S. 3581, 54<sup>th</sup> Cong. (1897).

<sup>157</sup>H.R. 9946, 54<sup>th</sup> Cong. (1897).

<sup>158</sup>H. Rep. No. 54-3029 (1897).

<sup>159</sup>S. Rep. No. 54-1527 (1897).

<sup>160</sup>*Id.* at 1; *see also* H. Rep. No. 54-3029 (1897).

<sup>161</sup>S. Rep. No. 54-1527, at 1 (1897) (reporting favorably on S. 3725, 54<sup>th</sup> Cong. (1897)); *see also* H. Rep. No. 54-3029 (1897) (reporting in favor of H.R. 10350, 54<sup>th</sup> Cong. (1897)).

<sup>162</sup>S. Rep. No. 54-1527, at 1 (1897).

<sup>163</sup>H. Rep. No. 54-3029 (1897).

## 1898-1900: Jurisdictional bars thwart

### Importers' attempts to invalidate the 1897 Act

The earliest litigants challenging enforcement of the 1897 Tea Importation Act failed in their efforts. Instead of seeking monetary damages after tea had been destroyed by customs,<sup>164</sup> these plaintiffs sought to prevent destruction of their tea. They asked federal courts to enjoin final decisions by the Board of General Appraisers, and therefore faced jurisdiction obstacles that proved to be insurmountable.

First, the 1897 Act did not provide for judicial review of the decisions of either port examiners or the Board of General Appraisers. Federal courts found that they were unable to exercise direct review of administrative determinations under the Act. Nor were federal courts free to enjoin customs officials from enforcing such an administrative judgement. For a court to issue an injunction, it had to exercise equity jurisdiction. While the federal courts possessed equity jurisdiction, it was extremely limited: an injunction, even against unlawful government activity, was available only when remedies at law, i.e., monetary damages, were insufficient.<sup>165</sup> As the plaintiffs seeking injunctions were engaged in importing tea, invariably an economic activity, monetary damages were considered especially suited to remedy illegal seizures or destruction of tea under the Tea Importation Act.

*Sang Lung et al. v. Jackson*,<sup>166</sup> decided in 1898, was the earliest reported case involving the Tea Importation Act.<sup>167</sup> In *Sang Lung*, a federal circuit court refused to issue an injunction against Jackson, the collector for the port of San Francisco.<sup>168</sup> The plaintiffs, Chinese nationals residing in the United States, sought to keep Jackson from destroying several shipments of “canton tea” that had arrived in San Francisco shortly

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<sup>164</sup>Destruction would occur if rejected tea was not exported within six months, pursuant to 29 Stat. 604, *supra* note 2, § 6.

<sup>165</sup>This rule has subsequently been relaxed. Today courts are more willing to issue injunctions, partially due to the 1933 merger of chancery and equity jurisdiction under the Federal Rules of Civil Procedure.

<sup>166</sup>*Sang Lung et al. v. Jackson*, 85 F. 502 (C.C.N.D.Cal. 1898).

<sup>167</sup>Notably, there does not appear to have been any litigation surrounding the 1883 Act.

<sup>168</sup>*Sang Lung*, 85 F. at 508.

after the 1897 Act took effect.<sup>169</sup> The Treasury regulations in place at the time of the administrative ruling set no standard for “canton tea.”<sup>170</sup> Therefore, both the examiner and the Board of General Appraisers rejected the tea for not conforming to government standards.<sup>171</sup> The plaintiffs refused to export their tea, and Jackson was set to destroy it once the requisite six months had passed.<sup>172</sup> Before he could do so, the plaintiffs filed in suit in federal court, challenging his authority to destroy their tea, arguing that the Treasury regulations, under which the tea was rejected, were unauthorized by the Act.<sup>173</sup>

First, the court noted that the 1897 Act did not provide for judicial review of the administrative adjudication, stating, “The act of congress contemplates that the decision of the board of general appraisers shall be final, and not subject to revision by the courts.”<sup>174</sup> Thus, the court was unable to reverse the decision of the Board of General Appraisers on direct review. The court continued, explaining that the presumption of unreviewability was qualified by a limited equity jurisdiction.<sup>175</sup> If the plaintiffs could show irreparable injury by virtue of interference with a vested right, the court would issue an injunction.

The plaintiffs argued that they had a vested right to import tea not inferior to government standards.<sup>176</sup> The Treasury regulations, as interpreted, deprived them of this right, as the regulations effectively precluded tea from entering the country that was equal to government standards in quality, purity, and fitness for consumption.<sup>177</sup> The plaintiffs reasoned that they had a right to bring their tea into the country under the Tea Importation Act, and it was *this* right the regulations interfered with, not any constitutional right to property. The regulations caused them irreparable injury, as they would be precluded from bringing “canton tea” into the country, thereby destroying their business.<sup>178</sup> Interference with *this* right could not be cured

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<sup>169</sup> *Id.* at 503.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 504.

<sup>174</sup> *Id.* at 508.

<sup>175</sup> *Id.* at 507.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 503.

<sup>178</sup> *Id.*

with mere monetary damages, and therefore an injunction was proper.<sup>179</sup>

However, the court found that the plaintiffs possessed no such vested right.<sup>180</sup> It noted that the claimed right didn't exist under the Constitution, as Congress had plenary power to prohibit the importation of any class of tea it chose.<sup>181</sup> Further, Congress had used its plenary power to make the Board's decisions final and unreviewable.<sup>182</sup> Therefore, the court revealed, Congress hadn't actually prohibited the importation of tea not meeting government standards.<sup>183</sup> Rather, the Act prohibited entry of tea not receiving approval from the examiner or Board.<sup>184</sup> The determination of whether teas met government standards was entirely in the discretion of the administrative agency: "[T]he right to import tea into the United States is made by the act of congress to depend entirely upon the final judgement of the board of general appraisers...."<sup>185</sup>

In making this determination, the circuit court interpreted the Tea Importation Act differently than later courts would, and its ruling is somewhat difficult to reconcile with the later cases. The 1897 Act clearly specifies that the Secretary was supposed to fix standards for "all kinds of tea imported into the United States."<sup>186</sup> It is certainly possible that "canton tea" simply slipped through the cracks, and perhaps it could not be expected that the first set of standards would cover everything they should. However, "canton tea" was in general use across the United States and had been regularly imported from China for at least 30 years.<sup>187</sup> So, arguably, the Secretary had an enforceable statutory duty to set standards applicable to the plaintiffs' tea.

Be that as it may, the circuit court found that the only right at issue was the plaintiffs' property right in their tea. Obviously, the plaintiffs would not sustain irreparable injury by reason of the tea's destruction.<sup>188</sup>

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<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 507.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 508.

<sup>183</sup> Contrary to the statement in 29 Stat. 604, *supra* note 2, § 1.

<sup>184</sup> *Sang Lung*, 85 F. at 507.

<sup>185</sup> *Id.*

<sup>186</sup> 29 Stat. 604, *supra* note 2, § 3.

<sup>187</sup> *Sang Lung*, 85 F. at 503.

<sup>188</sup> *Id.* at 504.

If it later turned out that the collector improperly destroyed the tea, monetary damages would be a sufficient remedy: “[I]f the defendant should destroy the tea referred to in the bill,... damages would be an adequate compensation for any loss...”<sup>189</sup> Therefore, the court could not issue an injunction, as its equity jurisdiction did not extend so far, and the case was dismissed for lack of jurisdiction.<sup>190</sup>

Thus, the real issue in the case was never reached – whether tea could be properly rejected on the sole ground that there were no applicable standards. The court did not even reach the issue as to whether the Board had correctly interpreted the Treasury regulations to exclude the plaintiffs’ tea. In fact, it stated explicitly, “I do not deem it necessary to determine whether such regulations, properly construed, prohibit the admission of Canton tea, if it is not inferior in quality to either of the special standards named in such regulations.”<sup>191</sup>

In 1900, the Supreme Court had its first opportunity to consider the constitutionality of the Tea Importation Act for in the case of *Cruickshank v. Bidwell*.<sup>192</sup> In *Cruickshank*, the Supreme Court affirmed the lower court’s dismissal for lack of jurisdiction.<sup>193</sup> The lower court had denied the plaintiffs an injunction against the collector of customs at the port of New York.<sup>194</sup> The collector refused to release the tea to the plaintiffs unless they allowed him to mark the invoices and other papers relating to the teas “condemned under the laws of the United States” and gave “security satisfactory to him” that the tea would be exported.<sup>195</sup>

The plaintiffs argued that marking the teas as condemned “renders the said teas worthless for export and entry or sale in the markets of other countries...”<sup>196</sup> The fact that the importers could not gain possession of their tea in the first place, and that it would be especially marked as condemned in the second place, meant they would be unable to sell it – even for export - in the U.S. market “for the reason that dealers

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<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 508.

<sup>191</sup> *Id.* at 507.

<sup>192</sup> *Cruickshank v. Bidwell*, 176 U.S. 73 (1900).

<sup>193</sup> *Id.* at 82.

<sup>194</sup> *Id.* at 74.

<sup>195</sup> *Id.* at 78.

<sup>196</sup> *Id.*

will not purchase or handle the said goods under the cloud or threat of illegality....”<sup>197</sup> For this reason, the plaintiffs asserted that the 1897 Act was unconstitutional.<sup>198</sup>

However, the Court did not reach the merits, as the case was dismissed for lack of equity jurisdiction, on the grounds that “no tenable basis for equity interposition was shown.”<sup>199</sup> For a unanimous Court, Chief Justice Fuller wrote:

It is settled that the mere fact that a law is unconstitutional does not entitle a party to relief by injunction against proceedings in compliance therewith, but it must appear that he has no adequate remedy by the ordinary processes of the law, or that the case falls under some recognized head of equity jurisdiction.<sup>200</sup>

Although the plaintiffs claimed that they would suffer “irreparable injury” if their teas were condemned or destroyed, they offered no evidence to support the assertion.<sup>201</sup> The Court commented, “in this particular we think the bill fatally defective.”<sup>202</sup> The plaintiffs also claimed that their “right to import and deal in teas” was destroyed by the collector’s acts.<sup>203</sup> To this assertion, the Court responded, “The law does not prohibit the importation of teas coming up to the standards, and it is difficult to perceive the elements of irreparable injury in the denial of permission to import inferior teas.”<sup>204</sup>

## 1904: The Supreme Court upholds the 1897 Act.

Perhaps the most litigious person in American tea history is Mr. William J. Buttfield, who brought no less than three cases challenging the constitutionality of the 1897 Act to the Supreme Court in a single year.

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<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 82.

<sup>201</sup> *Id.* at 81.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 79.

<sup>204</sup> *Id.* at 82.

The most important of these cases is *Buttfield v. Stranahan*,<sup>205</sup> which upheld the Act as constitutional in an opinion by Justice White. The two remaining cases, *Buttfield v. United States*<sup>206</sup> and *Buttfield v. Bidwell*,<sup>207</sup> decided on the same day as *Stranahan*, were disposed of with only cursory opinions, also by Justice White. In *Stranahan*, Buttfield sued the collector of the port of New York for damages arising out of the destruction of his tea, pursuant to § 6 of the 1897 Act.<sup>208</sup> In 1902, Mr. Buttfield's firm offered several lots of tea for import.<sup>209</sup> The tea was examined at the port of New York under Treasury standards, and 8 packages were found to be inferior in quality.<sup>210</sup> The tea had not been adulterated, and was fit for consumption;<sup>211</sup> the only complaint to be made about it was that it was inferior in "cup quality", i.e., flavor.<sup>212</sup> Buttfield's firm appealed the examiner's determination to the Board of General Appraisers, but the Board affirmed that the tea was inferior to the government standard.<sup>213</sup> After this decision, Mr. Buttfield bought his partner's interest in the tea.<sup>214</sup> However, by the time Buttfield attempted to export his tea, over six months had passed and Buttfield was notified that his tea would be destroyed.<sup>215</sup>

Buttfield sued Stranahan to recover damages for the alleged wrongful seizure, removal, and destruction of his tea.<sup>216</sup> Buttfield made two arguments under the Constitution that his tea was improperly destroyed. First, he argued that the Secretary of the Treasury's standard setting authority was an unconstitutional delegation of legislative power.<sup>217</sup> Second, he argued that the 1897 Act violated due process because it did not provide importers with a hearing at any point.<sup>218</sup>

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<sup>205</sup> *Buttfield v. Stranahan*, 192 U.S. 470 (1904).

<sup>206</sup> *Buttfield v. United States*, 192 U.S. 499 (1904).

<sup>207</sup> *Buttfield v. Bidwell*, 192 U.S. 498 (1904).

<sup>208</sup> *Stranahan*, 192 U.S. at 475.

<sup>209</sup> *Id.* at 472.

<sup>210</sup> *Id.* at 474.

<sup>211</sup> *Id.* at 477.

<sup>212</sup> *Id.* at 475.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 491.

<sup>218</sup> *Id.* at 492.

In determining that the Act did not constitute an unconstitutional delegation, the Court asserted that the authority delegated to the Secretary of the Treasury was not “legislative.” Although the Secretary had some discretion, Congress had fixed a primary standard when it expressed the Act’s purpose to exclude tea “[of] inferior purity, or unfit for consumption, or presumably so because of their inferior quality.”<sup>219</sup> Therefore, the power delegated to the Secretary, even the power to promulgate regulations, was a “mere executive duty to effectuate the legislative policy declared in the statute.”<sup>220</sup>

The Court also ruled that there was no due process violation. While an importer has constitutionally protected property rights, he has no constitutional right to bring that property into the country.<sup>221</sup> The Court affirmed that the Congressional power to regulate imports was plenary, a “complete power... over foreign commerce.”<sup>222</sup> It followed that there could be no vested right to import tea, and therefore rejections of tea for importation were not subject to the limitations of the Due Process Clause.<sup>223</sup> Therefore, neither customs officials nor the Board of General Appraisers was constitutionally required to hold a hearing prior to rejecting tea under the government standards.<sup>224</sup>

The destruction of the tea, however, involved a deprivation of property and therefore was subject to due process limitations.<sup>225</sup> Nevertheless, the Court ruled that no hearing was required by the Constitution.<sup>226</sup> The Court assumed, without so holding, that the Act itself did not provide the right to a hearing.<sup>227</sup> Notice and the six months waiting period, both of which Buttfield received, were sufficient procedural protections under the Constitution.<sup>228</sup> Though Buttfield received no hearing, he was fully aware that the tea would be destroyed once he failed to export it within six months after the final decision of the Board of General

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<sup>219</sup> *Id.* at 496.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 493.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 497.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 498.

<sup>227</sup> *Id.* at 497.

<sup>228</sup> *Id.* at 498.

Appraisers.<sup>229</sup> The Tea Importation Act was found constitutional.

The rulings in *Buttfield v. United States* and *Buttfield v. Bidwell* followed directly and logically from the *Stranahan* holding. In *Buttfield v. Bidwell*, Buttfield sued a different collector at the port of New York for damages over 4 packages of tea.<sup>230</sup> Unlike in *Stranahan*, Buttfield did not allow his tea to be destroyed, but instead exported the rejected tea within the six month period allowed by the statute.<sup>231</sup>

Buttfield had argued in the Second Circuit that the statute's reference to "quality" did not mean that tea could be excluded for inferior quality alone.<sup>232</sup> Utilizing the legislative history, the Second Circuit rejected Buttfield's assertion. Congress had specifically added the word "quality" to the 1897 Act for the purpose of raising the quality of tea on the American market and protect consumers from "worthless rubbish;" the term had not been present in the 1883 Act.<sup>233</sup> *Stranahan* confirmed this reading of the statute,<sup>234</sup> rendering *Buttfield v. Bidwell* an 'easy' case.

The circumstances of *Buttfield v. United States* were, again, slightly different. As in *Buttfield v. Bidwell*, Buttfield exported several lots of tea after they was rejected under the government standards by the Board of General Appraisers.<sup>235</sup> However, unlike in the other cases, he attempted to re-import the tea.<sup>236</sup> Recall that under the 1883 Act, importers frequently did this in order to evade the importation prohibition.<sup>237</sup> The re-imported tea was forfeited and destroyed under § 9 of the 1897 Act. In a suit for damages, Buttfield's only argument was that the Act was unconstitutional.<sup>238</sup> Under *Stranahan*'s determination that the Act

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<sup>229</sup> *Id.*

<sup>230</sup> *Buttfield v. Bidwell*, 192 U.S. at 498. Note that this Bidwell is the same collector who was the defendant in *Cruickshank*, decided by the Supreme Court four years earlier.

<sup>231</sup> *Id.*

<sup>232</sup> *Buttfield v. Bidwell*, 96 F. 328, 329 (2<sup>nd</sup> Cir. 1899).

<sup>233</sup> *Id.*

<sup>234</sup> *Stranahan*, 192 U.S. at 494. The Court echoed the Second Circuit's language in describing Congress' insertion of the term "quality," stating, "the word was industriously inserted to make the act a more stringent substitute for the existing legislation." *Id.*; see also *Buttfield v. Bidwell*, 96 F. at 329.

<sup>235</sup> *Buttfield v. United States*, 192 U.S. at 500.

<sup>236</sup> *Id.*

<sup>237</sup> S. Rep. No. 54-1527, at 2 (1897).

<sup>238</sup> *Buttfield v. United States*, 192 U.S. at 500.

was indeed constitutional, the Court held for the United States in a one-paragraph opinion.

## 1908: The Tea Act is amended to exempt

### tea dust under special circumstances

In 1908, a Congress recognized a legitimate use for inferior tea products such as tea dust: the manufacturing of caffeine, theine, and other useful chemicals.<sup>239</sup> In 1884, the House Committee on Ways and Means had supported prohibiting these products entry, reporting that tea dust was “only used for adulteration.”<sup>240</sup> While the 1897 Act had not expressly provided for exclusion of tea dust, any standards the Secretary of the Treasury would fix were likely to surpass tea dust in quality. However, caffeine and theine could be produced as easily from tea dust as from tea passing government standards.<sup>241</sup> As tea dust was far less expensive than quality tea, it made economic sense for it to be imported for the limited purpose of chemical manufacture.

Twice in 1905 the Senate Committee on Commerce reported favorably on bills that would amend the act to allow entry of tea sweepings for this limited purpose. The first, S. 5600, was reported too late in the Third session of the 58<sup>th</sup> Congress to be considered.<sup>242</sup> The second, S. 1548, “a like bill” was reported early in the First session of the 59<sup>th</sup> Congress (largely by quoting the report on the previous bill).<sup>243</sup> This bill failed to

<sup>239</sup>35 Stat. 163 (May 16, 1908), codified at 21 U.S.C. § 41, substantially amended by 76 Stat. 77 (May 24, 1962), further amended by 102 Stat. 1158 (August, 23, 1988), repealed by 110 Stat. 1198 (April 9, 1996). In 1962, the language regarding the exemption was replaced with a reference to the Tariff Schedule of the United States. 76 Stat. 77. The Tariff Schedule, not included in the U.S. Code, could well have preserved the exemption, although this is not clear. In 1988, a minor change was made in statutory language to refer to the renamed Harmonized Tariff Schedule. 102 Stat. 1158.

<sup>240</sup>H. Rep. No. 48-665, *supra* note 103.

<sup>241</sup>S. Rep. No. 58-4367, at 1 (1905).

<sup>242</sup>*See* S. Rep. No. 59-7, at 1 (1905).

<sup>243</sup>*See id.*

pass the Senate as well. However, three years later in 1908 the amendment passed, despite concerns that the amendment would undermine enforcement of the 1897 Act: “The only objection would seem to lie in a possibility that these tea wastes might be sold as tea to be used as a beverage.”<sup>244</sup>

In the 1908 amendment, an exemption was created in the Tea Act to allow manufacturers to bring inferior teas, including “tea waste, tea siftings, [and] tea sweepings,” into the country.<sup>245</sup> The importers had to give bond that the inferior teas would be used “for the sole purpose of manufacturing theine, caffeine, or other chemical products whereby the identity and character of the original material is entirely destroyed or changed.”<sup>246</sup>

Notably, the Secretary of the Treasury consulted the Board of Tea Experts in considering the amendments.<sup>247</sup> A majority of the Board believed that enforcement of the Tea Act would be compromised if the amendment passed. However, the Secretary along with a minority of the Board, believed otherwise: “the minority is of the opinion that the intent and purpose of the tea act can be fully safeguarded under the proposed bill by proper departmental regulations, and I concur in this opinion...”<sup>248</sup>

Precisely why the 1908 amendment was deemed necessary is unclear. Only six months after passage of the 1897 Act, the Secretary of the Treasury had promulgated a regulation to allow these products entry for the purpose of theine and caffeine production.<sup>249</sup> However, this regulation required the raw product to be mixed

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<sup>244</sup> *Id.*

<sup>245</sup> 35 Stat. 163, *supra* note 239.

<sup>246</sup> *Id.*

<sup>247</sup> See letter of H.A. Taylor, Acting Secretary of the Treasury (Feb. 9, 1905), as printed in S. Rep. No. 59-7, *supra* note 242, at 2.

<sup>248</sup> *Id.*

<sup>249</sup> *Schaefer Alkaloid Works v. United States*, 7 U.S.Cust.App. 128, 130 (1916). The regulation was passed on August 12, 1897. *Id.* *Schaefer* did not involve enforcement of the Tea Act. Rather, it answered the question whether tea sweepings were legally “tea” for tariff purposes if they were mixed with lime and asafetida. The court found they were, and therefore subjected the product to a duty of 1 cent per pound. *Id.* at 132.

with a small amount of lime and asafetida to make “impossible the unlawful use of rejected teas.”<sup>250</sup> The amendment “made it unnecessary to mix lime and asafetida with tea sweepings in order to permit of their entry at the customhouse,”<sup>251</sup> and instead required a bond from importers.<sup>252</sup> It is possible that the 1908 amendment was passed for economic reasons, i.e., to allow tea dust to be imported more cheaply.

### Further litigation clarifies the scope of the Tea Act

*Buttfield v. United States* left open the question whether the forfeiture penalty for attempting to re-import rejected tea could be applied to an importer who was unaware that his tea had been previously examined and rejected. In 1913, a New York district court ruled that it could in *United States v. Twenty Chests of Tea*; <sup>253</sup> the forfeiture provision contained no requirement of scienter.

In *Twenty Chests of Tea*, customs officials had rejected a shipment of tea, and pursuant to § 6 of the Tea Act, the importer exported the tea to Canada.<sup>254</sup> When the importer sold the tea, he did not advise the purchaser that it had been rejected by U.S. customs.<sup>255</sup> The tea subsequently passed through the hands of several merchants, none of whom were aware that the tea was ineligible for importation into the United States.<sup>256</sup> The tea was eventually sold to Kearney Bros. Limited specifically for the purpose of importing it into the United States.<sup>257</sup> The vendor, himself unaware of the tea’s history, represented to Kearney Bros.

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<sup>250</sup>*Id.* at 130. This preparation was a common requirement; apparently the British had a similar rule. *Id.* at 132.

<sup>251</sup>*Id.* at 131.

<sup>252</sup>35 Stat. 163, *supra* note 239.

<sup>253</sup>*United States v. Twenty Chests of Tea*, 208 F. 89 (N.D.N.Y. 1913).

<sup>254</sup>*Id.* at 89.

<sup>255</sup>*Id.* at 90.

<sup>256</sup>*Id.*

<sup>257</sup>*Id.*

that the tea conformed to United States standards and was eligible for importation.<sup>258</sup>

In the forfeiture action, Kearney Bros. argued that, because they were innocent of their tea's defect, it was not subject to forfeiture.<sup>259</sup> They also asserted that the examiner who had initially rejected the tea should have stamped or labeled the packages in such a way as to make it obvious that they had been rejected.<sup>260</sup> However, the court determined that the Tea Act did not require the examiner or the collector to do mark the tea as condemned.<sup>261</sup>

Expressing a concern that customs must not be required to reexamine previously rejected tea "again and again at the same or different ports of entry,"<sup>262</sup> the court held the importers responsible for knowing the history of their tea. It stated, "When this tea was examined and rejected and sent out of the country, the owner and all who purchased from such owner thereafter were bound at their peril to know the status of such tea...."<sup>263</sup>

The court justified its position by stating that due inquiry would have revealed the tea's legal status.<sup>264</sup> It also reasoned that Kearney Bros. could have determined for themselves that the tea was not up to U.S. standards by comparing it with the government samples available from the Treasury Department.<sup>265</sup> It concluded, "On the whole, I do not see that any injustice is done importers by casting on them the responsibility...."<sup>266</sup>

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<sup>258</sup> *Id.*  
<sup>259</sup> *Id.* at 91.  
<sup>260</sup> *Id.*  
<sup>261</sup> *Id.*  
<sup>262</sup> *Id.* at 93.  
<sup>263</sup> *Id.* at 91.  
<sup>264</sup> *Id.* at 93.  
<sup>265</sup> *Id.*  
<sup>266</sup> *Id.*

While Butterfield must be considered the most active Tea Act litigant, the firm of Carter, Macy & Co., Inc. comes in a close second. Though the firm brought only one case to the Supreme Court, *Waite v. Macy*,<sup>267</sup> it was more successful than Butterfield in its challenge under the Tea Act. However, before recounting the firm's victory at the Supreme Court, it is worth noting its previous defeat in a separate case, *Macy v. Loeb*.<sup>268</sup> In *Macy v. Loeb*, a 1913 case, the firm sued a revenue collector for the port of New York to enjoin the destruction of its tea on the theory that the Tea Importation Act required a pre-deprivation hearing.<sup>269</sup> The Second Circuit determined that the Tea Importation Act did not grant importers the statutory right to a hearing at any state.<sup>270</sup> It held that the 1897 Act did not require that the initial examination of tea, or any appeal taken to the Board of General Appraisers for that matter, occur in the importer's presence.<sup>271</sup> The Act provided no opportunity for the importer to offer evidence or testimony at any stage.<sup>272</sup> Under *Stranahan*, the lack of hearing was perfectly constitutional,<sup>273</sup> and the Second Circuit reaffirmed that, "Congress has undoubtedly the power to exclude all teas, or to admit them under the most arbitrary regulations it may choose to prescribe."<sup>274</sup> To the importers' novel assertion that the 1897 Act did not apply to teas equal to or above the standards set by the Secretary of the Treasury, the Second Circuit colorfully responded,

This is a mistaken idea. The act provides in substance that no tea shall come here unless it meets the requirements of the statute – that is unless it can secure a finding from the examiner or from the Board of General Appraisers that it is in their opinion up to standard. Unless an importation of tea can secure such a finding it must be taken away, even though it be the highest grade of brick tea that ever left China by caravan.<sup>275</sup>

This decision was not appealed.

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<sup>267</sup> *Waite v. Macy*, 246 U.S. 606 (1918).

<sup>268</sup> *Macy v. Loeb*, 205 F. 727 (2<sup>nd</sup> Cir. 1913).

<sup>269</sup> *Id.* at 727.

<sup>270</sup> *Id.* at 729.

<sup>271</sup> *Id.* at 728.

<sup>272</sup> *Id.*

<sup>273</sup> *Stranahan*, 192 U.S. at 497.

<sup>274</sup> *Macy v. Loeb*, 205 F. at 728.

In 1918, the Supreme Court decided *Waite v. Macy*,<sup>276</sup> which upheld an importer's right under the Tea Importation Act to import colored tea. The case has an unusually well recorded history, as the opinions of both the Second Circuit<sup>277</sup> and the district court<sup>278</sup> are reported. Macy and his business associates attempted to import a shipment of green tea into the United States through the port of San Francisco.<sup>279</sup> The tea was far superior in quality to the government standard, being worth approximately four times more on the open market.<sup>280</sup> However, it contained a "microscopic" amount of Prussian blue, a non-deleterious substance commonly used to color green teas during that era.<sup>281</sup> The government standard tea contained no coloring matter whatsoever,<sup>282</sup> but the firm's tea was in all other ways superior to the standard in terms of purity.<sup>283</sup>

The examiner rejected the tea under Treasury regulations that effectively forbid the importation of artificially colored teas.<sup>284</sup> Under Treasury Regulation 22, examiners were required to utilize the relatively new 'Read method' to test for the presence of coloring matter.<sup>285</sup> Regulation 23 required that imported teas meet government standards in all requisites, including the amount of artificial coloring.<sup>286</sup> That is, if a tea contained more color than the government standard, the examiner was forced to reject it regardless of its relative purity as a whole.<sup>287</sup>

Customs and the Treasury Department had apparently waged a long campaign to exclude colored tea from entering the United States.<sup>288</sup> Why it held such a policy not entirely clear; however it is very likely that the authorities regarded the policy as the only effective method of deterring the use of color to deceive consumers

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<sup>276</sup> *Waite v. Macy*, 246 U.S. 606 (1918).

<sup>277</sup> *Macy v. Browne*, 224 F. 359 (2d Cir. 1915).

<sup>278</sup> *Macy v. Browne*, 215 F. 456 (S.D.N.Y. 1914).

<sup>279</sup> *Id.* at 457.

<sup>280</sup> *Id.* at 460.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* Though the standard contained no color, it had a greater amount of other impurities. *Id.*

<sup>284</sup> *Id.* at 459.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

as to a tea's quality.<sup>289</sup> As the Secretary of the Treasury had authority to fix government standards, it was within his discretion to choose sample teas that were absolutely free of coloring matter. Thus, assuming the regulations were within the Secretary's authority, he could prevent the entry of all colored teas.

The importers appealed the examiner's decision to the Board of General Appraisers.<sup>290</sup> However, before the Board could render its decision, they cleverly sued the Board to enjoin it from applying Treasury Regulations 22 and 23, asserting that the regulations were not authorized by the Tea Act.<sup>291</sup> The importers attacked the Treasury's policy on two fronts: First, they argued, the Act did not provide for use of the Read method. The 1897 Act provided only that tea offered for importation "shall be tested according to the usages and customs of the tea trade, including the testing of an infusion of the same in boiling water, and, if necessary, chemical analysis."<sup>292</sup> As the Read method was neither a chemical analysis, nor known to the tea trade in 1897,<sup>293</sup> any regulation requiring its use must be unauthorized. Second, they asserted that the Act made three and only three demands on tea offered for import: equivalent purity, quality, and fitness for consumption. It was outside the Secretary's authority to add a fourth requirement, unspecified by the legislation, i.e., relative absence of coloring matter.<sup>294</sup>

In *Macy v. Browne*,<sup>295</sup> the district court did not reach the merits of either argument, and for a now familiar reason: dismissal due to lack of equity jurisdiction.<sup>296</sup> However, Judge Hough provided some analysis of the situation, and came to an interesting conclusion: the Board of General Appraisers was not strictly bound by the Treasury Regulations. He reasoned:

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<sup>289</sup> See Taylor, *supra* note 59, at 195.

<sup>290</sup> *Macy v. Browne*, 215 F. at 458.

<sup>291</sup> *Id.* at 460.

<sup>292</sup> 29 Stat. 604, *supra* note 2, § 7.

<sup>293</sup> *Macy v. Browne*, 215 F. at 460.

<sup>294</sup> *Id.*

<sup>295</sup> The case was so captioned in both the district and circuit court proceedings.

<sup>296</sup> *Macy v. Browne*, 215 F. at 461.

the powers of the tea board are derived from the statute itself – it is quite independent of the Secretary.... The Secretary can no more compel the tea board to decide any question lawfully coming before it in any particular way than he can so act toward any other lawfully constituted tribunal.<sup>297</sup>

The “real question” before the Board was “whether the standard samples of tea are to be interpreted (so to speak) narrowly or broadly.”<sup>298</sup> Whether failure to meet the government standard in respect to color alone constituted inferiority in purity was “emphatically a matter of opinion, of discretion.”<sup>299</sup> Since the Board of General Appraisers was not required to follow the Treasury Regulations, “it must have a chance to do right before it is assumed to be about to go wrong.”<sup>300</sup>

The Second Circuit reversed Judge Hough’s dismissal of the case for want of equity jurisdiction.<sup>301</sup> Rather than simply remanding the case, the court ruled on the merits and found that Regulations 22 and 23 went beyond the Secretary’s statutory authority.<sup>302</sup> The court remanded the case with instructions to issue an injunction, ruling that, under the Tea Importation Act, tea could not be excluded solely on the basis that it contained coloring matter.<sup>303</sup> The circuit judges noted that if Congress had intended that teas should be rejected on this basis alone, it would have expressed the policy in the Act.<sup>304</sup> Hence, the regulatory provisions were:

inconsistent with the statute, because they undertake to direct the tea board to reject tea... although the board may be convinced... that the coloring matter is present in such harmless quantities that the tea is not inferior to the statutory standards in purity, quality, or fitness for consumption.<sup>305</sup>

On the other hand, the Board’s use of the Read method was entirely proper, regardless of whether it could

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<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Macy v. Browne*, 224 F. at 363.

<sup>302</sup> *Id.* at 362.

<sup>303</sup> *Id.* at 363.

<sup>304</sup> *Id.* at 361.

be described as a “chemical” analysis.<sup>306</sup> In fact, the Board was free to utilize “whatever means they may adopt to satisfy themselves as to the degree of purity, or quality, or of fitness [for consumption].”<sup>307</sup>

*Macy v. Browne* could be distinguished from *Stranahan*: while the Board “was the final judge in its allotted field,” as found in *Stranahan*, the Supreme Court’s earlier opinion “did not indicate that the Board had any power to extend that field.”<sup>308</sup> Nor was the district court correct in finding the Board independent of the Secretary of the Treasury: “The members of the board are appointed by the Secretary, who has the power to remove them....”<sup>309</sup>

Strangely, the Second Circuit did not specifically analyze the issue of equity jurisdiction. However, in order to find that the district court had equity jurisdiction, the judges must have believed that enforcement of the regulations would have constituted an interference with a vested right that could not be adequately repaired with monetary damages. Though the court indicated that rejection of the teas “would be an invasion of the rights of complainants,” it did not further explain its decision.<sup>310</sup>

In 1918, the Supreme Court upheld the Second Circuit’s ruling in *Waite v. Macy*, an opinion by Justice Holmes. The Court agreed with the Second Circuit’s assertion that *Stranahan* presented a different issue than did the case at hand:

No doubt it is true that this Court cannot displace the judgement of the board in any matter within its jurisdiction, but it is equally true that the board cannot enlarge the powers given to it by statute and cover a usurpation by calling it a decision on purity, quality, or fitness for consumption.<sup>311</sup>

Holmes forcefully concluded, “It cannot be made a rule of law that any tea that has an infinitesimal amount of innocuous coloring matter is inferior in those respects to a standard that has a much greater amount

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<sup>306</sup> *Id.* at 362.

<sup>307</sup> *Id.*

<sup>308</sup> *Id.* at 361.

<sup>309</sup> *Id.* at 362.

<sup>310</sup> *Id.*

of other impurities and is worth only a quarter as much.”<sup>312</sup> *Waite v. Macy*, was the final reported case challenging the enforcement or constitutionality of the Tea Importation Act.<sup>313</sup>

## A Short Summary of the Post-litigation years

In 1920, enforcement of the Tea Act was partially transferred to the Bureau of Chemistry in the Department of Agriculture.<sup>314</sup> Enforcement was now a cooperative endeavor between Chemistry and U.S. Customs.<sup>315</sup> The Board of Tea Experts was now to be appointed by the Secretary of Agriculture.<sup>316</sup> The Board of General Appraisers was substituted with a new “United States Board of Tea Appeals,” to be made up of three employees of Agriculture, to be designated by the Secretary.<sup>317</sup> Enforcement of the Act was subsequently re-transferred several times.

In 1940, FDA (formerly Chemistry) was transferred from Agriculture to the Federal Security Agency.<sup>318</sup>

Additionally, Congress failed to appropriate any funds for enforcement of the Tea Act for fiscal year 1940-

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<sup>312</sup>*Id.* at 609.

<sup>313</sup>However, another case relating to the Tea Act may be of interest to the reader, as it involves familiar a familiar party, the firm of Carter, Macy & Co.: *Carter, Macy & Co. v. Matthews*, 220 A.D. 678, 222 N.Y.S. 472 (1927). One aspect of the case was a controversy as to the interpretation of a contract that incorporated the government’s tea standards. Carter, Macy & Co., the plaintiffs, alleged they had a contract to import “government standard Congou tea” for the defendants. The teas offered to the defendant were of a lesser market value (for aesthetic reasons) than government standard Congou. However, the examiner at the port of New York had allowed the teas into the country under the Congou standard; under the Department of Agriculture’s regulations, tea examiners should not take the appearance of the tea leaves into account when determining whether quality standards were met. The plaintiffs claimed that “government standard Congou” for purposes of the contract meant Congou tea which government examiners allowed into the country. The defendants argued that “government standard Congou” meant Congou tea equal to government standards in all aspects, including appearance and market value. The court held that the contract term was ambiguous and that the question should be submitted to a jury. However, the complaint was dismissed on other grounds.

<sup>314</sup>41 Stat. 712 (May 31, 1920), repealed by 110 Stat. 1198 (April 9, 1996).

<sup>315</sup>Customs officials remained responsible for approving bonds offered by importers. *Id.*

<sup>316</sup>*Id.*

<sup>317</sup>*Id.*

<sup>318</sup>54 Stat. 1237, § 12 (1940 Reorganization Plan No. IV § 12) (effective June 30, 1940).

41.<sup>319</sup> In order to preserve the program, industry agreed to pay for enforcement through an inspection fee of 3  $\frac{1}{2}$  cents for every hundred pounds of tea imported.<sup>320</sup> In 1943, the compensation and expenses for the Board of Tea Experts, formerly paid by the Secretary of the Treasury, was transferred to the FSA's appropriation.<sup>321</sup> The 1943 amendment also provided the 1897 Act with its official statutory title, the "Tea Importation Act."<sup>322</sup>

In 1953, Congress created the Department of Health, Education and Welfare (HEW),<sup>323</sup> later to be renamed Health and Human Services (HHS).<sup>324</sup> All functions of the former Federal Security Agency (including FDA and its Tea Act enforcement authority) were transferred to the new department.<sup>325</sup>

## The 1990's push to repeal the Tea Act

Starting shortly after the Great Depression, those in favor of cutting the federal budget made occasional murmurs about repealing the Tea Importation Act. In more recent years, Presidents Nixon, Carter and Reagan were all in favor of ending the inspection program.<sup>326</sup> None of these half-hearted attempts had much

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<sup>319</sup>Killingsworth, *supra* note 65, at 502.

<sup>320</sup>*Id.*; *see also* 55 Stat. 478 (July 1, 1941), repealed by 110 Stat. 1198 (April 9, 1996).

<sup>321</sup>57 Stat. 499, 500 (July 12, 1943).

<sup>322</sup>*Id.* at 499.

<sup>323</sup>67 Stat. 631, § 1 (Reorganization Plan No. 1 of 1953).

<sup>324</sup>93 Stat. 695 (October 17, 1979).

<sup>325</sup>67 Stat. 631, *supra* note 323, § 5.

<sup>326</sup>*See* Tom Teepen, *Bag the Federal Tea Board? The Case for the Tasters*, *The News and Observer*, Raleigh, NC, Sept. 28, 1995, at A15; *see also* Carl Peel, *Tea act is still intact*, *Tea and Coffee Trade J.* 48, Dec. 1, 1995; Martin Anderson, *Teeing off board of tenacious tea tasters Cutting waste: Tactics to stay alive leave a bad taste*, *The Detroit News*, Sept. 19, 1993. Anderson, a former White House staff member, tells an interesting story about the Nixon administration: in 1970, Nixon was increasingly concerned with the rise in federal spending and wanted to "find some program, any program, that deserved to be eliminated and to do so simply to prove that it could be done." They chose the Tea Board to make an example of, and it was simply crossed off the budget. The administration was pleased with itself until informed that the Board could not be eliminated absent an act of Congress. A law to repeal the 1897 Act was drafted, sent to Congress, and was quashed by tea industry lobbyists. Congress refused to pass the bill, with the justification that the savings would be too insignificant. *Id.*

support, in large part because the savings to the budget were so small.

The 1990's saw several attacks on the tea program, most of which were unsuccessful. Politicians who wanted to end the program did not entirely understand its workings. Simply cutting the program's budget wouldn't end the program itself: As long as the Tea Importation Act was on the books, FDA had the obligation to set tea standards and enforce them, regardless of whether Congress appropriated funds for the activity.<sup>327</sup> Additionally, targeting any single part of the three-part scheme of standard setting, enforcement, and adjudication would accomplish little. In regards to this phenomenon, Senator Reid – the Tea Importation Act's most vocal and tenacious opponent - stated, "These tea-tasting people are just like lizards. You grab them and jerk something off and they are right back."<sup>328</sup>

In 1993, for example, some Congress members tried to kill the Act, but the legislature instead reached a compromise with the industry: the Act would not be repealed if the tea trade was willing to pick up the tab. First, the Board of Tea Experts would receive no federal funding for its activities, which totaled approximately \$7,000 per year.<sup>329</sup> Industry would take responsibility for this expense. Second, the inspection fee was raised from raised from 3  $\frac{1}{2}$  cents per hundredweight to 10 cents per hundredweight in order to cover all enforcement costs.<sup>330</sup> Through an oversight in the Harmonized Tariff Schedule, this higher duty was never enforced.<sup>331</sup> If it had been, the government would have easily collected the \$200,000 enforcement cost.<sup>332</sup>

It was in 1996 that the Tea Importation Act was finally repealed. Congress passed the Federal Tea Taster's

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<sup>327</sup>Cindy Skzycki, *The Cup Board isn't Bare Yet; Apparently the FDA's Teatasters Will Get Federal Funding Again*, The Washington Post, Aug. 9, 1995, at F01; see also David Brotherton, *Tea-tasters' survival angers Reid*, The Las Vegas Review-Journal, Dec. 19, 1995, at 9D (quoting FDA spokesman Don McLearn: "The law doesn't say we should not have a tea taster at the FDA. It places restrictions on how our tea tasters can interact with the tea board and raises questions about how any of these positions are supposed to be funded").

<sup>328</sup>Teepen, *supra* note 326.

<sup>329</sup>Skzycki, *supra* note 327.

<sup>330</sup>107 Stat. 378 (August 10, 1993).

<sup>331</sup>H. Rep. No. 104-467(II) (1996).

<sup>332</sup>*Id.*

Repeal Act,<sup>333</sup> finally bringing the program to a close. This move was not supported by industry, which lobbied against the repeal.<sup>334</sup> However, the tenacity of a few legislators, including Senator Reid, overcame the tea lobby. Parallel legislation was introduced in the House<sup>335</sup> and the Senate.<sup>336</sup> The House bill was passed by Congress and signed into law by President Clinton.<sup>337</sup>

The House reports cited three major reasons for the repeal. First, Congress wished to reduce the cost to taxpayers.<sup>338</sup> Second, they stated that the Tea Act was redundant; the Federal Food, Drug, and Cosmetic Act provided consumers with sufficient protection.<sup>339</sup> Finally, legislators felt that the tea trade was over-regulated.<sup>340</sup>

## Conclusion:

### All a Matter of Principle?

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<sup>333</sup>110 Stat. 1198 (April 9, 1996).

<sup>334</sup>Peel, *supra* note 326. Peel quotes Simrany, president of the Tea Association of America: "It's something the industry feels strongly about. And its worth fighting for." *Id.* Simrany also states, "Having the Tea Importation Act is a signal to all the growers of the world over that the U.S. is not the place to unload your adulterated tea. It assures quality and also provides a first line of defense for the industry." *Id.*

<sup>335</sup>H.R. 2969, 104<sup>th</sup> Cong. (1996).

<sup>336</sup>S. 1518, 104<sup>th</sup> Cong. (1996). On a side note, this Senate bill had a colorful history: Reid apparently got the bill through the Senate by holding other legislation 'hostage.' One such piece of legislation was a law to honor the Reverend Bill Graham, 77 at the time and suffering serious health problems. The Graham bill was important to Senator Paul Coverdell, R-Ga, who'd placed a hold on the Federal Tea Taster's Repeal Act. John Monk, *Tiffs over even smallest bills can turn bitter*, The Orange County Register, Feb. 3, 1996. Reid is quoted as saying, "I put a hold on everything and said nothing's going to happen until we get the tea board taken care of." *Reid wins round in battle to kill controversial Board of Tea Experts*, The Las Vegas Review-Journal, Feb. 2, 1996. Though Reid's legislation passed the Senate, it was thwarted again - this time by the House. The House deemed the bill an unconstitutional violation of Art. I § 7.2, which provides that all revenue measures shall be initiated in the House. The bill was returned to the Senate. H.R. Res. 387, 104<sup>th</sup> Cong. (1996). This last scuffle was inconsequential, as the House was concurrently considering identical legislation of its own.

<sup>337</sup>110 Stat. 1198 (April 9, 1996).

<sup>338</sup>H.R. Rep. No. 104-467(I) and (II).

<sup>339</sup>*Id.*

<sup>340</sup>*Id.*

The repeal of the Tea Importation Act has not greatly affected the quality of teas on the American market. Certainly, consumers are not subjected to the sorts of evils they faced in the late 19<sup>th</sup> century. So, to a large extent, there is some truth to the assertion that the Tea Importation Act was made redundant by FDA enforcement of the Federal Food, Drug, and Cosmetics Act.

However, the justifications for passing the Act given by the House reports are somewhat suspect. Over-regulation of the industry was cited as a central reason for ending the program, yet it is clear that industry did not, and never did, favor repeal of the Tea Importation Act. American industry viewed the Act as a first line of defense for merchants, as well as an additional layer of computer protection. Indeed, industry described the relationship between itself and the government as unusually congenial. Thus, any justification that the repeal was good for industry should not be taken at face value.

Cost to taxpayers was ultimately a red herring as well. Industry had proved it was ready and willing to pay the expenses of the program. Industry leaders already paid all expenses of the standard setting meetings of the Board of Tea Experts. As in 1940 and 1993, the trade was content to pay increased inspection fees to fully fund enforcement of the Board of Tea Expert's standards. Indeed, had the inspection fee increase of 1993 been properly enforced, the Tea Act's program would already have been self-funding, with no additional fee increase necessary.

To use Senator Reid words, the repeal must have come down to a matter of principle<sup>341</sup> - a firmly held belief as to the proper role of government in American life. In this view, the federal government should not be in the business of setting and upholding quality standards. Instead, competition could be trusted to uphold tea

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<sup>341</sup> "This is a matter of principle with me. It didn't involve a lot of money, but it was a matter of principle." *Reid wins round in battle to kill controversial Board of Tea Experts*, The Las Vegas Review-Journal, Feb. 2, 1996, at 3B.

quality. Americans were capable of choosing what they wished to drink, and if consumers wished to sacrifice quality for price, it was their right to do so.

Behind this expressed libertarian view, other members of Congress may have had another hidden worry: regulatory capture. While the Act did not directly delegate standard setting to the industry, traditionally, six of the seven members of the Board of Tea Experts had been industry members.<sup>342</sup> It may be that the government was hard pressed to find ‘experts in tea’ who were not also in the business. Nevertheless, the relationship described by industry leaders as “congenial” may have been more troubling to federal lawmakers than it was to the tea trade.

It is also possible that the repeal was passed in large part due to a misunderstanding of the industry’s position on the matter - and a miscalculation of the actual cost to taxpayers. From the justifications given in the House reports, it is fairly clear that legislators did not understand (or chose to ignore) the actual state of things. Some speculate that one factor in this was that Mr. Robert H. Dick,<sup>343</sup> the nation’s Chief Tea Examiner and president of the Board of Tea Experts, was unable to lobby for the program due to his failing health.<sup>344</sup> With no knowledgeable voice to counter Reid’s tenacious politics, Congress was left with the false impression that the Tea Importation Act was useless - an anachronism.

Tracing the Tea Importation Act’s history serves as a small lesson in the development (and subsequent

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<sup>342</sup> See Killingsworth, *supra* note 65, at 500.

<sup>343</sup> Mr. Dick was highly respected by the industry. One article described him as “a dozen-sample-a-minute connoisseur who could identify a brew right down to its exotic origin, sometimes its particular garden.” Calvin Woodward, *Tea and Milk: A Brew for Budget Cutting and Political Gain*, The Associated Press Political Service, April 10, 1996. The various articles written on Mr. Dick disagree as to his age at the time of the repeal (and his retirement from government service). However, all place him in his mid to late 70’s as of 1996, and all state that his entire 50-odd year career with the government was spent tasting tea. See *e.g.*, Skrzycki, *supra* note 327; see also Sean Holton, *Budget had tea tasters in hot water Clinton want to dump tasting panel to save money*, San Francisco Examiner, Feb. 15, 1993.

<sup>344</sup> Teepen, *supra* note 326, commenting, “taking cruel advantage of an illness that has sidelined the redoubtable chemist Dick, Congress is after the tea tasters in earnest.”

partial dismantling) of the administrative state. In the end, the story of the Act is most interesting not for itself, but for the exposition it presents on changing political attitudes toward the role of government – and its proper relationship to industry - over the last century.