

Customs & International Trade Bar Association

475 Park Avenue South, 25th Floor, New York, NY 10016 • 212 725-020 • Fax 212 889-4135 • jcannon@cassidylevy.com

March 20, 2013

The Honorable Harry Reid
Majority Leader
United States Senate
522 Hart Senate Office Building
Washington, D.C. 20510-2803

The Honorable Mitch McConnell
Minority Leader
United States Senate
317 Russell Senate Office Building
Washington, D.C. 20510-2803

Re: *Nomination of Claire Kelly to the U.S. Court of International Trade*

Dear Majority Leader Reid and Minority Leader McConnell:

The Customs and International Trade Bar Association herewith submits its views concerning the fitness of Claire Kelly to serve as a Judge on the U.S. Court of International Trade.

The Customs and International Trade Bar Association (CITBA) was founded in 1926. Its members consist of attorneys that maintain an interest in the field of customs law, international trade law, and related matters. CITBA members represent United States importers, exporters, and domestic parties concerned with matters that involve the United States Customs laws, antidumping, countervailing duties, and other international trade laws, and related laws and regulations of other U.S. federal agencies concerned with international commerce. The vast majority of our over-500 members are members of the bar of the U.S. Court of International Trade.¹

¹ CITBA's membership includes government attorneys and officials, but they have taken no position regarding this matter.

James R. Cannon, Jr. President • Joseph W. Dorn, Vice President • Lawrence M. Friedman, Secretary • William C. Sjoberg, Treasurer
• Barbara S. Williams, Chairman, Continuing Legal Education & Professional Responsibility • Beth C. Ring, Chairman, Meeting & Special Events • Brenda A. Jacobs, Alan Goggins, Co-Chairs, Customs and Tariff • Kathleen W. Cannon, Alice Kipel, Co-Chairs International Trade • Melvin S. Schwechter, Chairman, Export • Elizabeth Drake, Chairman, Judicial Selection • Frances P. Hadfield, Chairman, Trial & Appellate Practice • Claire R. Kelly, Chairman, Liaison with Other Bar Associations • Jay Eizenstat, Chairman, Membership • Mark Ludwikowski, Chairman Publications • Victor S. Mroczka, Chairman, Technology • Michael S. O'Rourke, Past President • Jeanne Davidson, At Large

Summary of CITBA Views

CITBA strongly recommends that it is appropriate and desirable to appoint judges to the United States Court of International Trade that possess a depth of experience in the relevant field of law. Ms. Kelly meets this standard. Ms. Kelly is well qualified to serve on the Court of International Trade, in terms of expertise in the relevant laws applied by the court and professional experience as a professor of international trade law and related legal topics at Brooklyn Law School.

Background on the U.S. Court of International Trade

The Court of International Trade has jurisdiction over a diverse range of matters involving import transactions. Since 1890, the Board of General Appraisers, which became the Customs Court and, later, the Court of International Trade, has been responsible for reviewing the rate and amount of duty imposed on imported merchandise, as well as the classification and value of such merchandise. In 1980, the Court of International Trade was created to clarify and expand the jurisdiction of the Customs Court. The Court of International Trade was created by Congress in the Customs Courts Act of 1980 as a nationwide forum to review and resolve disputes involving the importation of goods and the payment of customs duties.

Among other things, the 1980 Act clarified that the Court of International Trade has jurisdiction to review antidumping and countervailing duty determinations by the Department of Commerce and the International Trade Commission, in addition to its traditional jurisdiction over Customs classification and valuation matters. Importantly, Congress bestowed on the Court of International Trade residual jurisdiction to decide any civil action against the United States arising out of any law pertaining to international trade. The House Report articulated that the purpose of the 1980 Act was to create

a comprehensive system of judicial review of civil actions arising from import transactions, utilizing the specialized expertise of the United States Customs Court [now Court of International Trade] and the United States Court of Customs and Patent Appeals [now Federal Circuit].²

Congress' intent to provide for judicial review by a national court with "specialized expertise" is best served by appointing true experts to the Court of International Trade. The subject matter before the court is complex, technical, and always changing.

The court reviews agency determinations—made by Customs and Border Protection, the Department of Commerce, or the U.S. International Trade Commission—under different standards of review. The Court of International Trade, however, does not function entirely in the manner of an appellate court. Various questions of Customs classification are entitled to *de novo*

² H.R. Rep. No. 96-1235 at 20, *reprinted in* 1980 USCCAN 3729, 3731.

review by the Court of International Trade.³ In such cases, questions of fact, such as the actual use or application of an imported article, must be established on the basis of “positive testimony” before a judge of the Court of International Trade. These issues typically involve presentation of expert and other testimony and evidence.

Legal issues, where the facts are not in dispute, are typically decided upon motions for summary judgment.⁴ Questions presented by appeals from antidumping and countervailing duty cases are not covered by the Administrative Procedure Act, but are governed by a standard of review that is quite similar to the APA standard.⁵ These cases also typically involve a voluminous evidentiary record including accounting documents, statistical data, and economic analyses. When a Customs classification ruling is challenged on a point of law, the court applies the standard of review established by the Supreme Court in *United States v. Mead Corp.*⁶ Application of such a standard presumes an expert judiciary, fully capable of interpreting and applying the HTS as intended by Congress.

In order to provide relief in matters covered by its broad subject matter jurisdiction, the Court of International Trade has complete powers in law and equity. That is, the court is an Article III court of the United States. The court may grant any relief appropriate to the particular case before it, including, but not limited to, money judgments, writs of mandamus, and preliminary or permanent injunctions.

Moreover, the geographical jurisdiction of the Court of International Trade is nationwide. The court decides cases that arise anywhere in the country, and judges may sit in the courthouse in New York or in a Federal Courthouse in the locality in which the dispute arose. The court also is authorized to hold hearings in foreign countries.

In short, the Court of International Trade confronts disputes that affect industries and workers across the nation, and those disputes can be economically and politically substantial, technical, and subject to complicated and differing standards of review. For all of these reasons, CITBA believes that it is appropriate and desirable to appoint judges to the United States Court of International Trade that possess a depth of experience in the relevant field of law.

³ Customs' classification decisions are subject to *de novo* review pursuant to 28 U.S.C. § 2640 (1994).

⁴ See, e.g., *E.M. Chem. v. United States*, 920 F.2d 910, 912 (Fed. Cir. 1990).

⁵ Pursuant to 19 U.S.C. § 1516a(b)(1), the Court of International Trade reviews certain agency determinations under the “arbitrary, capricious” standard and other determinations under the “substantial evidence” standard.

⁶ 533 U.S. 218, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001).

Consideration of Fitness

In considering the fitness of Ms. Kelly to assume a position on the bench, CITBA did not conduct a detailed review of her personal background, finances, or political affiliations. Rather, in keeping with our mission as an association of customs and international trade practitioners, CITBA focused on the prior experience and public writing of Ms. Kelly. In order to assess the fitness of Ms. Kelly for a position on the court, CITBA reviewed articles on international trade matters that were authored by Ms. Kelly. In addition, CITBA interviewed Ms. Kelly to better understand her judicial philosophy.

Ms. Kelly has a high degree of expertise on the substance of international trade law, as well as a deep understanding of administrative procedure and the standards of judicial review applied by the Court of International Trade. She is a widely published academic and speaks frequently on international trade and customs issues, including current issues facing the court. She is also a well-respected professor, and she has mentored a number of students seeking to enter the practice of international trade law. Before joining academia, Ms. Kelly also practiced in the area for a number of years, primarily in the customs area. These professional experiences will serve Ms. Kelly well as a judge at the Court of International Trade should she be confirmed.

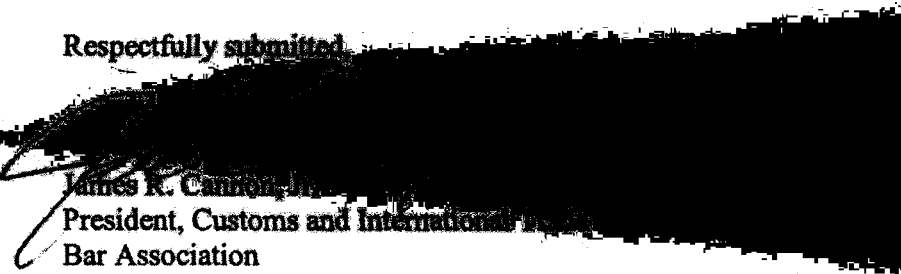
Finally, as a result of Ms. Kelly's participation in CITBA over the years, members of the bar association who have had the opportunity to work with her can attest to her professionalism, temperament, and dedication to the law. For example, at a time when the court had experienced an increase in the number of appeals involving the Trade Adjustment Assistance program, Ms. Kelly oversaw the creation of a primer on such cases that was of great value to the bar. For all of these reasons, we believe Ms. Kelly will make a fine addition to the Court of International Trade.

citba.org

Conclusion

On behalf of the Customs and International Trade Bar Association, we respectfully submit these views on the fitness of Claire Kelly for the position of Judge of the U.S. Court of International Trade. We thank you for considering our views in a matter of great interest and importance to the lawyers practicing before the Court of International Trade.

Respectfully submitted,



James R. Cannon
President, Customs and International
Bar Association

Elizabeth J. Drake
Chairman, Judicial Selection Committee, Customs
and International Trade Bar Association

cc: Senator Patrick Leahy
Chairman, Senate Judiciary Committee

Senator Chuck Grassley
Ranking Member, Senate Judiciary Committee

