1 IN THE SUPREME COURT OF THE UNITED STATES

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3 UNITED STATES, :

4 Petitioner :

5 v. : No. 99-1434

6 MEAD CORPORATION :

7 - - - - - - - - - - - - - - - - - -X

8 Washington, D.C.

9 Wednesday, November 8, 2000

10 The above-entitled matter came on for oral

11 argument before the Supreme Court of the United States at

12 10:02 a.m.

13 APPEARANCES:

14 KENT L. JONES, ESQ., Assistant to the Solicitor General,

15 Department of Justice, Washington, D.C.; on behalf of

16 the Petitioner.

17 J. PETER COLL, JR., New York, New York; on behalf of the

18 Respondent.

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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument

4 now in Number 99-1434, the United States v. Mead

5 Corporation.

6 Mr. Jones.

7 ORAL ARGUMENT OF KENT L. JONES

8 ON BEHALF OF THE PETITIONER

9 MR. JONES: Mr. Chief Justice and may it please

10 the Court:

11 The harmonized tariff schedule employs more than

12 9,000 individual categories and more than half-a-million

13 words to classify every conceivable article of commerce

14 for tariff purposes. This massive document was drafted

15 initially by an international commission, and in 1988 it

16 was enacted in its entirety as a law of the United States.

17 Two terms ago in the Haggar case this Court held

18 that courts should defer to the reasonable interpretive

19 regulations adopted by the customs service to implement

20 these complex tariff provisions. In the present case,

21 however, the Federal Circuit held that it would give no

22 weight whatever to the interpretive rulings adopted by the

23 customs service to apply the tariff provisions in specific

24 situations under the very same statutory provisions.

25 The court, having concluded it would give no

1 deference to the agency rulings, then held that the
2 particular item involved in this case, known as a date
3 planner, would not constitute a bound diary within the
4 specific meaning of the tariff provision we have here
5 before us. In our view, the court's method of analysis
6 and its ultimate classification determination are both
7 incorrect.

8 In enacting a harmonized tariff schedule,
9 Congress specified that -- its understanding and intent
10 that the customs service would be responsible for
11 interpreting and applying these provisions, and for that
12 purpose Congress gave broad and varied types of
13 interpretive authority to the agency.

14 In particular, in 19 U.S.C. 1502, Congress
15 provided that the agency could adopt rules and regulations
16 for the classifications of goods under the tariff
17 schedules, and it was under that provision that this Court
18 applied Chevron and Haggar to say that reasonable
19 interpretations of ambiguous provisions set forth in
20 regulations should be applied by the courts.

21 Now, Congress understood, however, that the
22 regulations alone would not be sufficient to address the
23 infinite myriad of small interpretive problems that arise
24 under this kind of tariff legislation, and so Congress
25 specified and gave authority to the agency to adopt

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1 binding interpretive rules for the purpose of applying the
2 statute in these discrete situations.
3 QUESTION: Mr. Jones, there is kind of a curious
4 feature. As I understand it, if a case on a tariff ruling
5 were to go to the Court of International Trade --
6 MR. JONES: Yes.
7 QUESTION: -- as I understand it, it engages in
8 de novo review of the classification rulings?
9 MR. JONES: I think the -- we have used that
10 expressing in describing it --
11 QUESTION: Yes.
12 MR. JONES: -- but as the Court pointed out in
13 Haggar, and as we have argued in these two cases, what
14 really happens is there is a de novo fact-finding on the
15 record made in the Court of International Trade.
16 QUESTION: Do you think that court affords some
17 kind of deference to the views of the customs service, and
18 would it be some kind of deference to the ruling such as
19 we have here?
20 MR. JONES: Well, Haggar also pointed out that
21 what the court does is, in determining what the law is
22 that it applies these facts to, it looks to the agency's
23 interpretations, and we think it should look to the
24 agency's rulings. That's --
25 QUESTION: And you think that's clear?

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1 MR. JONES: Yes.
2 QUESTION: And what kind of deference to do they
3 give it? Is it Chevron, or something less --
4 MR. JONES: Well, what they have --
5 QUESTION: -- such as so-called Skidmore, and
6 what are you urging us is the proper rule?
7 MR. JONES: Our -- what we are urging you is
8 that it is the deference that the Court described in
9 Chevron, that is that you -- that the Court is to defer to
10 the reasonable interpretations set forth in these binding
11 rulings, and what -- in the NationsBank v. Variable
12 Annuity case the Court described these as a deliberative
13 conclusions set forth in the agency's interpretations.
14 QUESTION: But not adopted after notice and
15 comment, and so is there some lesser kind of deference,
16 such as suggested in the Skidmore case?
17 MR. JONES: Not in this context. I mean, let me
18 point out that when we're talking about interpretive
19 rulings they are routinely initiated by the importer
20 themselves. The importer has ample opportunity to make
21 comments on how they think this procedure should be -- how
22 that statute should be interpreted, and when the agency --
23 if the agency adopts that interpretation and then some
24 other importer doesn't agree and they want to ask for a
25 different ruling, they can submit and request an

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1 interpretive ruling, and that's what's --
2 QUESTION: How does this differ from the Labor
3 Department ruling in Christiansen, which we said was not
4 entitled to Chevron deference?
5 MR. JONES: In Christiansen the Court said that
6 there was an informal opinion stated in a format that
7 Congress had not provided for official interpretations.
8 Here, we have a formal provision of Congress directing the
9 agency to make these kinds of interpretive determinations
10 and to make them in a binding way.
11 QUESTION: It was dictum in Christiansen anyway,
12 wasn't it? Didn't the Court find that it wasn't a
13 reasonable interpretation?
14 MR. JONES: I believe that's correct. The Court
15 concluded that it was not, in the words of Skidmore,
16 entitled to any consideration because it wasn't
17 persuasive, but I -- clearly the Court was of the view
18 that it was not a reasonable interpretation, and --
19 QUESTION: Mr. Jones, could we just back up a
20 bit? Your answer to Justice O'Connor about the Court of
21 International Trade owing some deference --
22 MR. JONES: Yes.
23 QUESTION: -- to the customs rulings, as far as
24 I recall, in this very case, although the Court of
25 International Trade upheld the customs classification,

1 there wasn't one word that they said, so we don't know
2 from this case what position the Court of International
3 Trade takes on this question.
4 MR. JONES: Well, historically we know the court
5 said that it would defer to reasonable interpretations of
6 the service, but in this -- you're very right about the
7 oddity of the specific issue, the way it came up, and we
8 addressed that at the petition stage.
9 What happened was that when Haggar was before
10 this Court, the United States did not press the lower
11 court to apply what is now to be called Haggar or Chevron
12 deference because the Federal Circuit had said in Haggar
13 that it would give no weight to customs service
14 interpretations, and so at the time the case was in the
15 Court of International Trade, that court was not asked to
16 give that type of deference to the agency's
17 interpretation --
18 QUESTION: But the --
19 MR. JONES: -- because that was the law of the
20 circuit.
21 Once this Court reversed the circuit ruling in
22 Haggar, this -- the Federal Circuit then addressed how the
23 principles of Haggar and Chevron applied.
24 QUESTION: But that didn't happen until the case
25 was in --

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1 MR. JONES: In the Federal Circuit, but I would
2 point out that respondent has agreed, and we think it's
3 clear that the Court of International Trade applied the
4 same definition of bound diary that the ruling sets forth.
5 QUESTION: May I ask you before we get to the
6 specific ruling, you're asserting that there should be
7 deference equivalent to Chevron deference.
8 MR. JONES: Yes.
9 QUESTION: And yet, as I understand it, there
10 are two features of this that would lead me to hesitate
11 about that. One is that the vast majority of these
12 rulings, as I understand it, are just you'll classify
13 this, you'll classify that, with no reasons elaborated,
14 and the other is that you don't have one decisionmaker, as
15 you would have, say, for the EPA. Instead, you have
16 decisions that are dispersed among 45 ports of entry.
17 MR. JONES: Well, let me address the second
18 point first. I think in Smiley v. Citibank the Court had
19 a similar situation where there was a subsidiary
20 determination that was then reviewed by the headquarters
21 office to result in a final agency determination, which is
22 the process that we've gone through with respect to these
23 rulings, and the Court said, well, that doesn't result in
24 a change of view, it results in a proper application of
25 the agency's ruling process.

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1 With respect to the first point, the respondent
2 says, well, there are 10,000 a year of these kinds of
3 rulings made in the head -- in the regional offices. In
4 fact, we do not claim that there's -- we are unaware of
5 any of those rulings in which there would be what the
6 Court, in the opinion you authored for the Court in the
7 Variable Annuity case call the deliberative conclusions.
8 It is only the deliberative conclusions that set forth the
9 actual interpretations of provisions that the Court can
10 look to to defer to. It's not simply the result.
11 And in most of the simple tariff entry at issue
12 determinations, of course it's a very simplified
13 procedure. It has to be, because of the volume of
14 transactions at issue, and those kinds of entry-level port
15 determinations are very simple, and the Trade Bar
16 Association brief acknowledges they contain almost in
17 every instance no discussion. They just contain the sort
18 of a statement that 12 apples come in as apples.
19 QUESTION: Can't you appeal that within the
20 agency?
21 MR. JONES: Yes, and the agency has --
22 QUESTION: Don't you have to appeal it within
23 the agency before you go to court?
24 MR. JONES: I don't believe you have to. I --
25 QUESTION: You don't have to?

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1 MR. JONES: The agency -- it's an election of
2 the importer whether he wants, whether he can ask -- he
3 can ask the headquarters for a ruling in the first
4 instance. He can ask the headquarters to review a field
5 determination.
6 QUESTION: And you'd say that any ruling by the
7 headquarters either on review or as an original matter is
8 entitled to Chevron deference.
9 MR. JONES: That is correct. To the extent --
10 QUESTION: But not the rulings that come out of
11 the field and are not reviewed.
12 MR. JONES: As a practical matter, that's true,
13 but I would say that either of them would be entitled to
14 deference to the extent they contain deliberative
15 conclusions, and I'm just being finicky about that because
16 as a practical matter the entry-level port determinations
17 don't contain those kinds of --
18 QUESTION: Why is that? I mean, if it comes out
19 of headquarters it's obviously been considered at a high
20 level within the agency and they say, this is the answer.
21 Why should --
22 MR. JONES: I think as a practical matter the
23 agency would have no objection to a determination of that
24 type. It's just, all I'm addressing is the logical basis
25 by which the Court would reach such a determination.

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1 QUESTION: Well, but I mean, if we're going to
2 use that criteria -- you see, I thought Chevron was just,
3 if it's an authoritative agency position we defer to it,
4 but if you're going to hang qualifications on that, that
5 is, it has to be an authoritative agency position that is
6 explicated in written opinion, you might as well add the
7 fillips that your brother suggests, which is only those
8 rulings that are the product of formal rulemaking. The
9 one is as logical to me as the other.
10 MR. JONES: Well, the -- I'm not -- I think what
11 I'm trying to describe and not doing a very good job at it
12 is simply that it's up to what -- the ultimate question is
13 what did Congress intend? How did Congress intend the
14 agency to function?
15 The best evidence of that is probably the
16 agency's regulations pursuant to the authority that
17 Congress gave the agency to provide for a binding ruling
18 program. The agency's regulations specify that the port
19 service's rulings are precedential and binding, but they
20 don't go on to say, because it's up to this Court to say,
21 the extent to which those precedential binding
22 determinations are to be given deference by the courts,
23 and all I was trying to say was that it seems to me that
24 when this Court has addressed interpretive rulings in
25 prior cases, like Variable Annuity, PBGC v. LTC, it has

1 looked to the question of whether the -- you can look to
2 the interpretation expressed by the agency --
3 QUESTION: Well --
4 MR. JONES: -- and find in it a reasoned --
5 QUESTION: Well, you say that Christiansen was
6 not an interpretive ruling?
7 MR. JONES: Not in the sense that we're using
8 that term in this case. What Christiansen was was the
9 private correspondence that was sent --
10 QUESTION: Well, private correspondence by the
11 Secretary of Labor, wasn't it?
12 MR. JONES: Well, actually it was sent by the
13 Wage & Hour Division of the Labor Department.
14 QUESTION: Okay, but you wouldn't call that --
15 those people are paid by the Government.
16 MR. JONES: Right, but what the -- but I think
17 what this -- the Court's concern in Christiansen was that
18 there was no evidence that that was an official
19 interpretation of the type that Congress had authorized
20 the agency to use to interpret the statute.
21 Here, we have a statute that expressly tells the
22 agency to make these kinds of binding determinations, and
23 the agency's done it just the way Congress said.
24 QUESTION: Well, could you go back for a second
25 on that to the first question that Justice O'Connor put to

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1 you, and she said there's a statute that says, in effect,
2 that the Court of International Trade is to review these
3 things de novo, to which you replied no, it's just
4 reviewing matters of fact.
5 MR. JONES: Yes.
6 QUESTION: But my copy of the statute says
7 nothing about matters of fact. What it says is, the Court
8 of International Trade shall make its determinations upon
9 the basis of the record before the court. The importers
10 tell us, the textile importers tell us there's hardly ever
11 a dispute of fact.
12 You know, this is what it is. Everybody knows
13 that, that almost all these things concern how you apply a
14 tariff or -- to the facts and the Customs Trade Bar tells
15 us that if we set down the distinction you want to make
16 between facts and application of the tariff, this whole
17 thing's unworkable, because people would never be able to
18 figure out, or hardly ever, what's going on, which is
19 which. So that would seem to be a pretty strong argument
20 that Justice O'Connor's initial characterization was right
21 as opposed to the application of these tariffs, and I'd
22 like you to respond to that.
23 MR. JONES: The function of the interpretive
24 binding ruling program is to make the system more workable
25 by providing effective advanced guidance.

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1 QUESTION: They didn't say that was unworkable.
2 What they said would be unworkable would be for the Court
3 of International Trade to figure out, you know, is it a
4 question of fact, is it a determination of application of
5 the tariff, et cetera.
6 MR. JONES: It's -- this -- I believe the Court
7 has already addressed this very point in the Haggar case.
8 Chevron deference is about how you decide what the law is.
9 There are other doctrines, burden of proof, presumption of
10 regularity, that go to about how you decide what facts are
11 and how the facts apply to law.
12 Chevron is simply a doctrine about how does a
13 court decide what the law is, and in this case the agency
14 made a determination about legal issues and said what it
15 believed a diary was, for example, or what it believed the
16 law, properly interpreted was, bound for this purpose is.
17 Having made that legal determination, it's then
18 up to the Court of International Trade to decide whether
19 these facts represent such an item. Of course, the
20 agency's binding rulings state its own view of what the
21 facts are and how they apply to these legal
22 interpretations, but that's what the Court of
23 International Trade has the right to do de novo, to decide
24 whether these facts fit within the legal determination,
25 the legal interpretation that the agency has expressed in

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1 the binding ruling.
2 QUESTION: Suppose we were to hold --
3 MR. JONES: It's just like tax cases.
4 QUESTION: Suppose we were to hold that Chevron
5 deference applies to regulations that are adopted under
6 the EPA with notice and comment, and that this does not
7 qualify, but that this ruling, or this determination gets
8 a Skidmore deference.
9 Do you think that the courts would find that
10 that's a meaningful difference? Oh, this is just a
11 Skidmore case and therefore I can rule as follows. If it
12 had been a Chevron case, I would have to rule --
13 MR. JONES: Well, addressing your practical
14 question before I -- I do want to respond to your question
15 about how this might be looked at. Your practical
16 question is, does it make a difference. Yes, it makes a
17 big difference.
18 QUESTION: Okay.
19 MR. JONES: Because if we -- if you had the sort
20 of sliding scale approach of the Skidmore doctrine, then
21 no one would know until the end of the day what -- you
22 know, how much -- how effective the agency's
23 interpretation is, and the advantage of the Chevron
24 approach, if you needed to look at it in a practical
25 sense, is that everyone knows at the outset what the

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1 effectiveness of the agency's interpretation is. It's to
2 be upheld if it's reasonable.
3 Now, I would like to point out that this Court
4 has never held, and would have to overrule several cases
5 if it did now, that Chevron deference requires that the
6 agency issue this regulation with notice and comment.
7 There are cases in which this Court --
8 QUESTION: I understand.
9 MR. JONES: Okay.
10 QUESTION: In one of your earlier responses,
11 your first response I think to Justice O'Connor, you said,
12 oh, no, Skidmore deference would be inappropriate. As a
13 fallback position, if we say, no Chevron deference, I
14 assume you would urge some sort of Skidmore --
15 MR. JONES: I would assume that if the Court
16 were to conclude that Chevron deference didn't apply it
17 would then conclude Skidmore was an appropriate formula to
18 look at this issue under.
19 QUESTION: But you say Skidmore is inappropriate
20 in order to urge upon us Chevron --
21 MR. JONES: I don't really remember having used
22 that phrasing. What I -- I think Chevron's analysis is
23 appropriate. This Court's applied it in other
24 interpretive ruling situations, and only in that sense is
25 Skidmore inappropriate.

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1 QUESTION: Mr. Jones, you said something very
2 quickly, but I wanted to be sure I understood your
3 position about tax rulings, revenue rulings.
4 MR. JONES: Yes.
5 QUESTION: How do they compare to customs
6 classifications, and if you could just -- probably you
7 made this clear already. You are not claiming deference
8 for just stamped, this, that.
9 MR. JONES: That's right.
10 QUESTION: It's only when we have a reasoned
11 decision as we do in this case. Okay.
12 MR. JONES: Right. With respect to revenue
13 rulings, the history on this is sort of interesting, and
14 it'll take me a minute to explain it all. In United
15 States v. Correll, this Court held that revenue rulings
16 should be upheld when they're reasonable, and the Court
17 emphasized that it was based on the expertise of the
18 agency and the fact, to quote the Court, that it doesn't
19 sit as a committee of revision to perfect the
20 administration of the tax laws. The Congress told the
21 agency to do that by authorizing it to issue all necessary
22 rules and regs.
23 Now, the tax counsel amici says no, that case
24 was really about a regulation, not about a ruling. Well,
25 that's simply and flatly, clearly wrong. The regulation

1 they cite had something to do with the procedures as used
2 to make a claim for a deduction.
3 When Justice Marshall was Solicitor General, he
4 filed the Government's brief in the Correll case. His
5 successor, Solicitor General Griswold, filed a reply
6 brief. Neither of those briefs mention any regulation.
7 They rely just on the revenue ruling of the service and
8 ask the Court to defer to it, which is what Justice
9 Stewart's opinion for the Court said was appropriate.
10 QUESTION: But that was pre-Chevron, so we don't
11 know --
12 MR. JONES: Yes.
13 QUESTION: -- exactly what they meant by
14 deference.
15 MR. JONES: Well, we know exactly what they
16 meant, if we -- I mean, reading the opinion it says that
17 the agency's reasonable interpretation should be accepted.
18 It was a pre-Chevron Chevron case.
19 QUESTION: Well, have we addressed this issue
20 post-Chevron?
21 MR. JONES: That's where it became confusing,
22 and there's a nomenclature shift that occurred that really
23 hasn't been addressed. Prior to the 1960's, there were
24 two kinds of rulings. There were Treasury decisions
25 issued by the Secretary, and there were Commissioner's

1 rulings that were published in what's called the
2 Cumulative Bulletin.
3 The Cumulative Bulletin pointed out before 1960
4 that the Commissioner's rulings were not approved by the
5 Secretary, therefore they weren't binding on the agency.
6 In 1961, the Commissioner was given interpretive
7 authority in a regulation we've cited in our brief, and
8 that interpretive authority is subject, however, to the
9 approval of the Secretary, and since that time, what are
10 now called Revenue Rules, with a capital R, are issued by
11 the Commissioner with the approval of the Secretary.
12 They are functionally the same as Treasury
13 decisions were before 1960, and in the cases before 1960
14 the Court had pointed out Treasury decisions were entitled
15 to substantial deference, and even in Skidmore the Court
16 pointed out they were often decisive.
17 After Correll -- I'm sorry. After Correll and
18 indeed, I think after Chevron, but in any event in that
19 time frame, Justice Marshall wrote an opinion for the
20 Court, bringing this full circle, in which he said that a
21 Treasury decision issued in connection with a customs
22 ruling should be given -- should be accepted if it's
23 reasonably -- if it's sufficiently reasonable. That's the
24 way -- that's why I pointed out that revenue rulings and
25 Treasury decisions and customs interpretive rulings have

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1 followed a path that should lead to the same result.
2 QUESTION: But here we're -- we get back to
3 something you've already talked about, which is a little
4 curious. As I understand it, the customs maybe issues
5 over 12,000 classification decisions annually, and only
6 some of them involve some kind of legal conclusion, or
7 explanation.
8 MR. JONES: Right.
9 QUESTION: And you would say it's only the
10 latter that deserve Chevron deference?
11 MR. JONES: I would say only to the extent that
12 they contain that kind of deliberative conclusion that the
13 Court --
14 QUESTION: But not these thousands of rulings
15 that are issued every year.
16 MR. JONES: There isn't an interpretation stated
17 in a ruling of the type they're talking about, which
18 simply says an apple's an apple.
19 QUESTION: Mr. Jones, could I ask just one
20 clarifying question? I'm having difficulty drawing the
21 line between what it is the international court has to do
22 de novo and what is entitled to deference, and I thought
23 you said that they're entitled to deference if they're
24 applying -- they're deciding whether a particular item
25 fits within the rule, whether a particular document as we

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1 have here is a diary or not. Why isn't that the very
2 thing that's supposed to be decided de novo under
3 what's --
4 MR. JONES: Because to decide that they have to
5 know what a diary is, and that's a legal conclusion. It's
6 like instructing a jury. The jury is instructed that a
7 diary means these things, and then the jury decides
8 whether this thing is a diary under that set of
9 definitions.
10 That's what Haggar said. Haggar said that
11 it's -- there's nothing inconsistent with the
12 responsibility of the Court of International Trade to make
13 this de novo --
14 QUESTION: But isn't that always what the Court
15 of International Trade does, is decide whether the item
16 that is presented -- there are no disputing the facts
17 about what the item is, whether it is the particular thing
18 described in the rule? Isn't that what they always do?
19 MR. JONES: But they -- to make that second
20 step, they have to know what the law is and all -- and
21 what Haggar said and what we think is clear in Chevron
22 cases generally, is that in deciding what the law is the
23 Court should defer to the agency's reasonable
24 interpretations.
25 It might be that I can make this clearer by

1 focusing on the facts of this case, which would probably
2 be useful in any event. In this case, the agency said
3 that --
4 QUESTION: Mr. Jones, just before you get there,
5 and in this picture of deference based on, among other
6 things, expertise, does the Federal Circuit in the
7 Government's view owe any deference to the Court of
8 International Trade?
9 MR. JONES: I believe the decisions of the Court
10 of International Trade are reviewed like the decisions --
11 QUESTION: Of a district court, and no special
12 credit is given to the specialization of the Court of
13 International Trade?
14 MR. JONES: That's correct. I mean, of course,
15 to the extent that the Court of International Trade makes
16 factual determinations, then its determinations --
17 QUESTION: But it would be just like a district
18 court?
19 MR. JONES: It would be just like a district
20 court.
21 QUESTION: Are you going to finish your answer
22 to --
23 MR. JONES: In this specific --
24 QUESTION: -- and then I have a question.
25 MR. JONES: Okay. In this specific case, the

1 agency, in our view, reasonably concluded that the
2 definition of a diary, which the agency found from a
3 dictionary to be --
4 QUESTION: Well, I understand that, but what is
5 it that the International Trade -- the Court of -- was
6 supposed to do in this case? What did they have to do de
7 novo, just decide that that document --
8 MR. JONES: They're supposed to decide whether
9 the --
10 QUESTION: -- is what that document is?
11 MR. JONES: They're supposed to decide whether
12 the item that has been brought to them --
13 QUESTION: Right.
14 MR. JONES: -- constitutes a bound diary, and in
15 deciding whether it's a bound diary, they have to know
16 what the law -- what that legal definition is of a bound
17 diary, and in deciding that, they're supposed to look to
18 the agency's interpretation, if it's a reasonable one.
19 And again, I think I can make this more concrete
20 by pointing out that the -- here's the way it worked in
21 this case. The ruling said that a diary is a book for the
22 keeping of a record of daily events, and that that
23 definition is broad enough to encompass the commercial
24 usage of that term, which is a business diary, which has
25 been commonly employed and, under cases like Stone and

1 Downer, the agency and the courts are supposed to consider
2 in deciding what the terms of the tariff provisions mean.
3 Now, what the court of appeals said was, well,
4 we think that -- we want to add two things to that. We
5 want to say it has to be room for extensive notations, and
6 it has to be retrospective, but the diary definition
7 doesn't say that in the dictionary. There -- you can find
8 alternative dictionary definitions, and the commercial
9 usage is inconsistent with that.
10 QUESTION: Mr. Jones --
11 MR. JONES: Yes.
12 QUESTION: -- why wouldn't a judgment that's
13 made in the field, that isn't appealed, but once it gets
14 into court, presumably the agency at a high level decides
15 that this ruling, made out in the field, ought to be
16 defended in court, why doesn't that represent an official
17 agency endorsement of that position made in the field?
18 MR. JONES: It is an official agency position at
19 that point.
20 The problem I've had in giving an answer that's
21 better on this for your -- from your perspective is that I
22 don't under -- I think that if you look at the way these
23 decisions are made at ports of entry, and the way they're
24 intended to be made at ports of entry, there is little in
25 the face of that document that gives a reasoned

1 explanation of the agency's interpretation.

2 By comparison, the headquarters rulings are

3 thorough, they provide a definite description of the text,

4 and internally the agency has advised its regional offices

5 to not include a full discussion of text, and I'm going

6 outside the record, but I have to answer your question,

7 and internally the understanding is that if the issue is

8 complicated enough it will get referred to the

9 headquarters.

10 Now, that doesn't mean that complicated issues

11 aren't resolved at the field office, but it does mean that

12 when the field offices ordinarily determine them it's not

13 with a deliberative explanation. That -- to get that, you

14 go to the headquarters.

15 QUESTION: Mr. Jones, I want to get clear on two

16 points about the deference that the agency itself gives to

17 these rulings. My two questions are these. First, with

18 respect to the importer for whom the ruling was given in

19 the first place, is it correct that the Government can

20 always in effect withdraw the ruling as a precedent for

21 future cases simply by telling the importer by letter or

22 otherwise, you can't rely on this prior ruling?

23 MR. JONES: No.

24 QUESTION: My second question is, would you

25 explain what reliance someone other than the original

1 importer can place on it?
2 MR. JONES: Well, the statute and regulations
3 specify that before a ruling that has been issued may be
4 modified or overruled, public notice and comment, an
5 opportunity to comment, has to be given. That's in
6 1625(c).
7 QUESTION: Okay, so they can't just withdraw it.
8 MR. JONES: They can't just withdraw it, and
9 even when they change it for a period of 60 days there's
10 an automatic protection of people who are using the old
11 ruling.
12 If I may reserve the balance of time for my --
13 QUESTION: Very well, Mr. Jones.
14 Mr. Coll. Am I pronouncing your name correctly?
15 MR. COLL: You are, sir.
16 ORAL ARGUMENT OF J. PETER COLL, JR.
17 ON BEHALF OF THE RESPONDENT
18 MR. COLL: Mr. Chief Justice, and may it please
19 the Court:
20 I'd like to start by picking up on a question
21 that Justice Souter just asked, and that is, may it be
22 revoked, may it be modified without further proceeding
23 between the customs service and the importer, and at the
24 time that these rulings issued, the answer to that is yes.
25 There was no notice required.

1 As the record reflects, in June of 1991 they
2 classified this day planner as a unbound diary, duty free.
3 In 1993, without notice, without any further proceeding, a
4 letter was received from the customs service saying that
5 that classification had been changed.
6 QUESTION: With no waiting period?
7 MR. COLL: No. We --
8 QUESTION: So that the very day of the notice,
9 it became dutiable?
10 MR. COLL: We had the opportunity, which we took
11 advantage of, which was to get a detrimental reliance
12 letter from the customs service that said to the effect
13 that those imports that were in process we were able to
14 rely on the previous ruling, on the previous
15 classification ruling, but that we could not rely in the
16 future, so that the first revocation allowed us to take
17 those orders that we had in process and bring them in duty
18 free, but thereafter we now had duty attached.
19 QUESTION: Now, is there a different regulatory
20 scheme in effect today?
21 MR. COLL: There is now a notice provision that
22 requires publication in the Customs Bulletin.
23 QUESTION: Is that the one that's set forth in
24 page 3 of the Government's brief?
25 MR. COLL: I don't have it by the page, Your

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1 Honor, but I believe it is.

2 QUESTION: 19 U.S.C. 1625?

3 MR. COLL: That's correct, and its reflected in

4 the -- in 19 C.F.R. --

5 QUESTION: But that was not in force in the case

6 before us?

7 MR. COLL: It was not. It was not in force at

8 that time. There was -- there's a second notice provision

9 that has been raised by the Government in its brief, and

10 that relates to change in practice, but this was not a

11 change in practice, either, as the courts have defined

12 that particular regulation, so that the importer here

13 received a classification ruling in 1991. It was revoked

14 in 1993 without further proceeding. Now --

15 QUESTION: Now, with respect -- with respect to

16 reliance by someone other than the original importer, as I

17 recall the briefs there was a difference of opinion

18 between you and Mr. Jones on that, and I think his

19 response to you was that the -- that someone other than

20 the original importer can rely unless notice is given by

21 the Government. Have you resolved your difference on

22 that?

23 MR. COLL: Well, I think it's probably a matter

24 of practice as much as it is a matter of the

25 interpretation of the rules, or the regulations.

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1 Under 19 C.F.R. 177.9 it sets forth very clearly
2 who may rely on a particular classification ruling. The
3 importer may rely who has sought the classification ruling
4 on that ruling for those goods in similar circumstances.
5 That is who may definitely rely.
6 Other importers may rely, may -- but they are
7 not certain that it is even in effect any longer because
8 of the way the rule -- because of the way the service runs
9 its classification rulings, and it says -- and this is
10 where the Solicitor General took me to task, I think, is
11 that there's a second sentence that says, if you want to
12 know what the current ruling is, you can contact us and by
13 the way, send us enough information so we can figure out
14 what it is that may pertain to you, so it is not --
15 QUESTION: So they -- in any case they can get a
16 prospective determination as long as they're on their
17 toes.
18 MR. COLL: I don't think it's a prospective
19 determination. What they can get is a current status of
20 how a particular good has been classified for a particular
21 importer at a given point in time.
22 QUESTION: Well, does --
23 MR. COLL: Whether --
24 QUESTION: I should have the reg in front of me
25 and I don't, but does the reg say anything about the

1 reliance that may be placed upon a ruling once the
2 Government has said yes, this ruling is still in effect?
3 MR. COLL: No, I don't believe it does. The
4 problem here, as I see it, to ask for Chevron deference,
5 which I view as mandatory, controlling weight deference,
6 rather than Skidmore deference --
7 QUESTION: Well, on that point, Mr. Coll, this
8 Court had a holding in NationsBank v. Variable Annuity
9 Life Insurance where we held that a letter ruling by the
10 Comptroller of the Currency warranted Chevron deference.
11 How is this different?
12 MR. COLL: Well, I would focus on the question
13 in that case as posed by Justice Ginsburg, which said, may
14 or can national banks in the United States sell variable
15 annuities, question mark, and that was -- as I understood
16 that question, viewed by this Court, that ruling was now
17 going to be applicable to every national bank in the
18 United States and as I've just discussed --
19 QUESTION: Well, I suppose that we can assume
20 that the customs service made clear that it thought that
21 anything like a filofax here with the little entry spaces
22 on pages in a loose-leaf binder met the definition.
23 Apparently that was their idea.
24 MR. COLL: I don't think we can assume that.
25 QUESTION: No?

1 MR. COLL: I don't think we can assume that.
2 The problem is that by definition of the regulations of
3 the service itself, these are applications of the customs
4 law to the specific facts presented by the importer,
5 and --
6 QUESTION: Well, would you concede that at least
7 the customs has taken the position that a loose-leaf ring
8 binder is bound? I mean, they at least said that,
9 apparently.
10 MR. COLL: For purposes of 4820 I think we can.
11 I don't know --
12 QUESTION: What do you mean, of 4820?
13 QUESTION: A statute?
14 MR. COLL: The statute, I'm sorry.
15 QUESTION: There's a statute --
16 MR. COLL: A statute of --
17 QUESTION: -- that refers to bound diaries,
18 right?
19 MR. COLL: -- 19 U.S.A. section 4820.
20 QUESTION: Oh, but that's all that we're talking
21 about. I mean, that's -- in applying that to any other
22 importer, surely you anticipated that the agency would
23 take the same position. The agency can't say for one
24 importer it -- you know, a ring binder is okay, for
25 another importer it isn't. I mean, once they make that

1 ruling, don't you know that the agency has taken that
2 position of law?
3 MR. COLL: Well, we don't know that under the
4 particular section of 177.9 of their regulations, because
5 they tell us similar articles, or identical articles or
6 similar circumstances, and therefore they hedge that
7 relative to every importer who comes to a dock --
8 QUESTION: Well, surely it means similar
9 relevant circumstances. You -- they can say, you know,
10 you have blonde hair and the other guy had brown hair.
11 You think that they'd say, not similar circumstances?
12 MR. COLL: I don't know. I'd suspect not, but I
13 don't know. But what we have here, just to look at the
14 record, we start out in 1991 with an identical -- the same
15 product that we had in 1993 and that we had in 1994, when
16 it made it into headquarters and their view changed.
17 QUESTION: Ah, but the exact question I think
18 is, I could imagine -- it's all hypothetical -- being a
19 Member of Congress and if I were asked, do you really want
20 the Comptroller of the Currency to have some binding
21 authority when he writes a letter answering the question
22 that was posed, yeah, that's a pretty good idea. He knows
23 quite a lot about these things.
24 Then similarly, if you were a Member of
25 Congress, you might say, would you want these several

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1 thousand customs inspectors to have the authority of
2 whether the word bound does or does not include these ring
3 binders? Well, you might say yeah, they know a lot about
4 it, similar answer. Now, there's a lot of confusion
5 getting to whether you get a firm position, but if you get
6 a firm position at the agency, yes, defer to that.
7 That's the question. That's why I thought maybe
8 your stronger point was the statute.
9 MR. COLL: Well --
10 QUESTION: And I'd like to hear both the answer
11 to that question and something about the statute.
12 MR. COLL: Well, I'd like to go to what Congress
13 may have said with regard to whether or not the customs
14 service should be binding, and we looked to the
15 legislative history in 1979 with regard to de novo review,
16 and that legislative history said, in light of the Zenith
17 Radio case it's precedents suggested that deference should
18 be given to the customs service rulings, that --
19 QUESTION: On most of these things Congress says
20 nothing. What you're trying to do is make sense of some
21 kind of statutory scheme. Looking at the scheme, would it
22 make sense to give the power to make somewhat binding
23 rulings under Chevron to this particular official in this
24 kind of instance under these circumstances.
25 MR. COLL: I --

1 QUESTION: So that's how I'd look at it.
2 MR. COLL: And responding to that question --
3 QUESTION: Yes.
4 MR. COLL: -- I believe the answer is no, that
5 Skidmore deference would be appropriate, but Chevron
6 deference would be inappropriate. To --
7 QUESTION: I don't understand. What is the
8 criterion for just saying we're going to give deference
9 to, you know, formerly adopted regulations? I can
10 understand a criterion that tries to assess whether the
11 agency's view that has been expressed is authoritative,
12 but surely the agency's view on this issue has been
13 authoritatively expressed in this case by the Solicitor
14 General.
15 I mean, we know that the agency believes that
16 this is what the law says. Now, why should we give one
17 sort of deference if the agency tell us that in a
18 regulation with notice and comment and another kind of
19 deference if it comes to us in some other fashion? So
20 long as it's the agency's authoritative view, what
21 difference should it make?
22 MR. COLL: Well, that question, as I would
23 understand it, starts from the premise that we're going to
24 somehow narrow this field of classification rulings from
25 the 10 to 15,000 that issue each year to some smaller

1 group that purportedly are qualitatively better, certainly
2 quantitatively less, and if that's the case, then I think
3 we also need to not lose sight of the fact that these are
4 mixed conclusions of fact and law, even when articulated.
5 And for example, in our particular ruling, the
6 third ruling, the one that I assume the Solicitor General
7 says that the deference to attach -- should attach to, not
8 the earlier ones, the last.
9 There, the -- Mr. Durant, who was the fellow who
10 exercised that discretion, that interpretation, and who
11 signed that letter, says that he has reached his
12 interpretation on the basis of factual analysis, ex parte
13 factual analysis, ex parte to anything that this importer
14 had an opportunity to respond to.
15 It says -- this is at 32a of -- it begins at the
16 bottom of 31a. It's 32a in the petition for the writ of
17 certiorari, and it says, the rationale for this
18 determination was based on lexicographic sources as well
19 as extrinsic evidence of how these types of articles are
20 treated in the trade and commerce of the United States.
21 Now, that record was made --
22 QUESTION: Mr. Coll, does that get a presumption
23 of deference -- of correctness? That's the other piece of
24 this statute, that this Court of International Trade is
25 supposed to accord decisions of customs a presumption of

1 correctness, is that right, and that's statutory?
2 MR. COLL: That's correct, and it's as to facts,
3 and it's part of the process. I mean, this process --
4 QUESTION: You're getting into the same problem
5 that we have in discussing this with Mr. Jones, what is
6 fact as opposed to law in these customs classifications?
7 MR. COLL: Exactly. What we have here --
8 QUESTION: Well, gee, I don't think that -- you
9 say, was based on lexicographic sources. I assume he's
10 talking about dictionaries.
11 Now, I guess you can say it is a question of
12 fact whether dictionaries say this or that. I mean,
13 everything in the world is a question of fact, but when we
14 issue a ruling on a point of law that relies in part on
15 dictionaries, I don't consider that a mixed -- a ruling on
16 a mixed question of fact and law, did the dictionary say
17 this and is it accurate that that produces this result.
18 MR. COLL: It's --
19 QUESTION: And the other one is extrinsic
20 evidence of how these types of articles are treated in the
21 trade and commerce of the United States. I mean, I
22 don't -- you know, if that is a factual question, it is a
23 factual question of the generic type that we usually
24 subsume under the term of judicial notice. I mean, what
25 do people usually think of diaries as? You can call that

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1 a question of fact, if you like, but my goodness, I think
2 that's still a legal determination.
3 MR. COLL: Well, I beg to differ. I think it is
4 a question of fact. The Government, the -- as well as the
5 importer treat it as a question of fact. On the filing of
6 the action in the Court of International Trade, both
7 parties filed -- the -- both parties filed affidavits,
8 affidavits relating to the facts, relating to commercial
9 use, relating to commercial jargon as to how these
10 products were described within the trade, and so both
11 sides here treated that portion as being an item of fact.
12 And I don't think that it makes much sense, when
13 we talk Chevron deference, we talk about the Haggar case,
14 which says that Haggar stems -- that deference stems from
15 the creation of a legal norm, to put to the Court on a
16 mandatory basis deference that has a mixed question of
17 fact, or a mixed conclusion of fact and law, and say to
18 them, now, you may apply whatever that is to what remains
19 of the facts.
20 QUESTION: Well, but that's a different point
21 that you should be arguing, then, not that all these
22 rulings are not entitled to deference, but rather that the
23 ruling in this case is not a ruling purely of law, but it
24 involves factual matters and therefore should get, indeed,
25 de novo review if it went to the Court of International

1 Trade.

2 MR. COLL: That goes to the second question that

3 was certified, which is -- and we approach it under

4 Skidmore -- does this have persuasive effect, the power to

5 persuade, and we say it has absolutely none for any number

6 of reasons.

7 QUESTION: Mr. Coll you were --

8 QUESTION: Do you accept what Justice Scalia

9 just said -- I'm quite curious about that -- that, I'd

10 thought the difference between this and Smiley is, here

11 there is a specific statute, and that statue says that the

12 Court of International Trade will make its determinations

13 de novo?

14 Now, the Government says that that word,

15 determinations, means simply matters of fact, not matters

16 of whether, given agreement about the facts, this is a

17 bound or unbound thing for purposes of the tariff. Is

18 that -- in other words, do you agree with what -- he

19 wasn't saying it particularly, but I mean, do you agree

20 with that characterization, that determinations cover only

21 matters of fact?

22 MR. COLL: No.

23 QUESTION: No. Why not?

24 MR. COLL: Because I don't think the one can

25 dissect even this, what the Solicitor General would

1 concede is as elaborate a classification ruling as one
2 normally finds that one can dissect the fact from the law.
3 QUESTION: Well then, do you disagree with
4 Haggar?
5 MR. COLL: Well, Haggar --
6 QUESTION: It sounds to me like you're
7 disagreeing with Haggar in your answer to Justice Breyer.
8 MR. COLL: Haggar is a much different situation,
9 Your Honor. Haggar arose when Congress passed a
10 particular provision of the tariff schedule that left a
11 gap to be filled, and they delegated that filling of the
12 gap, specific gap to the customs service. It was matters
13 incidental to assembly outside of the United States, and
14 it listed such as, it left obvious gaps for filling.
15 They went, and on a notice and comment basis,
16 had a regulation promulgated that furthered that
17 definition. I don't view it as interpretive. I view it
18 as legislative, and that's what the customs service did,
19 and this Court found that that created normal law similar
20 to a statute. That --
21 QUESTION: Why didn't that constrain or modify
22 or elaborate the term, de novo, in the Court of
23 International Trade's jurisdictional standards, just as
24 much as this case does?
25 MR. COLL: It impacted it in a slightly

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1 different fashion. It impacted it in that there was no
2 interpretation left of the law. the statute, or the --
3 it -- the promulgation of the regulation, notice and
4 comment regulation now told us, this is what is or isn't
5 incidental.
6 Now we had -- the question that remained was
7 what had occurred outside of the United States, and did
8 that fall within that language, so that now we were
9 focused, as I understand this Court's direction, on that
10 fact, what was happening outside the United States, and
11 does it fit into that articulated definition in the
12 regulation.
13 QUESTION: Mr. Coll, let me approach this from a
14 different vantage point. If we decide that we do owe
15 Chevron deference to the position taken by the customs
16 service in this case, do you lose? Is that the end of the
17 matter?
18 MR. COLL: No, because --
19 QUESTION: Why not?
20 MR. COLL: I would take the position that the
21 interpretation at first blush and upon further analysis is
22 unreasonable.
23 QUESTION: Do you think the word bound is open
24 to different interpretations as to what's bound?
25 MR. COLL: Yes.

1 QUESTION: And so is it open at all to the
2 agency to decide that it includes these ring binders as
3 being bound? I mean, that would be one possible
4 interpretation.
5 MR. COLL: That's one possible interpretation,
6 and the question then becomes whether or not --
7 QUESTION: So I would have thought, then, if you
8 apply Chevron deference that's the end of the case for
9 you.
10 MR. COLL: Well, their interpretation is
11 predicated upon one provision, an explanatory note that
12 isn't applicable at that level of the tariff schedule,
13 which doesn't relate to whether or not things are bound.
14 It relates to what things are made of.
15 The schedule, this particular provision, this
16 particular chapter, 4820, relates to paper, and what this
17 explanatory note says, if things come with packaging that
18 has metal, leather, et cetera, they will still be
19 classified as paper that the other substance, the other
20 material will not predominate. Everything here in 4820
21 has to be held together in some fashion, because the
22 chapter note says that these -- this provision does not
23 cover loose sheets, so everything has to be --
24 QUESTION: Mr. Coll, there's one piece of this,
25 before we get to the application of it, that I find vastly

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1 puzzling. Maybe there's an easy answer to it.

2 You talked about the provision that says, de

3 novo review, but then you quickly said, and yes, there's a

4 presumption of correctness. Those two seem to be at

5 loggerheads. Why are they not?

6 You told me that the facts found by customs get

7 a presumption of correctness. On the other hand, the

8 facts are gone over de novo.

9 MR. COLL: It's a burden-of-proof issue, Your

10 Honor. It's a matter that because there's a presumption

11 of correctness, then the burden is slightly different on

12 the plaintiff, the importer, than it might otherwise be,

13 that he has a presumption that is working against him, and

14 it's a burden of proof. It doesn't relate to deference.

15 But focusing on chapter 4820 and why this is not

16 appropriate interpretation and would be unreasonable even

17 under Chevron, though we don't believe Chevron applies,

18 the statute is fairly clear. The statute tells us that

19 there are diaries, and there are similar articles, and

20 then breaks it down further to diaries bound in all these

21 other items that would be similar articles.

22 QUESTION: Well, but I had a little difficulty

23 with your argument there. If you turn to pages 17 and 18

24 of your brief, on page 18 you make that argument. You

25 say, in effect, diaries bound is to be contrasted with

1 other, and one reason that you say that a diary does not
2 fall -- one reason that you say that this does not fall
3 within the diary category is that it's not adapted for
4 exhaustive recording of past events. It's a schedule.
5 But in the statute itself, which you quote on
6 the preceding page, on 17, there is the term in
7 4820.10.20, which you quote only with ellipsis, and that
8 term refers to diaries. It also refers to notebooks and
9 address books, bound, which does not seem to carry the
10 same connotation. The notebooks and address books don't
11 seem to carry any connotation one way or the other with
12 respect to either recording past events or noting future
13 schedules.
14 If we don't engage in the ellipsis that you did
15 and we refer to these other examples as having some
16 bearing on what a diary is, your argument is considerably
17 weaker, isn't it?
18 MR. COLL: Well, I'm going to have to defer at
19 this point in time to customs practitioners, who tell me
20 that you cannot look in a classification as to this
21 product at those other two, either by way of combination,
22 because that isn't the way the law gets interpreted in
23 combination products that exist elsewhere, so --
24 QUESTION: Well, but I assume that they're not
25 intending to -- you know, to exclude the interpretive

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1 rule, you know, noscitur a sociis. We sort of know each
2 term by those associated with it, and if that interpretive
3 canon applies, then there isn't a simple contrast between
4 diaries and others. There's a contrast between diaries,
5 notebooks, and address books and others, and notebooks and
6 address books and others do not have the kind of
7 connotation that you want us to read so clearly into
8 diary.
9 MR. COLL: Well, I think that we have to start
10 at the top, because that's what the chapter notes tell us.
11 The chapter notes tell us -- and the chapter notes are
12 statutory, and the chapter notes tell us that we have to
13 start at 4820. We can't start at 4820.10.20, or at
14 4810.40. We have to start at the top, and our argument is
15 centered on the fact that it's diaries and similar
16 articles.
17 QUESTION: I understand your point there
18 perfectly well, but by the same token we can't ignore
19 48 -- 4820.10.20, either, and it seems to me that as the
20 statute becomes progressively more detailed, it becomes
21 progressively more indicative of what it may have in mind
22 by similar articles, and it seems to me that by the
23 ellipsis as you quote 4810.20 on page 18, you are in
24 effect telling us to ignore whatever interpretive value
25 there might be to considering notebooks and address books,

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1 and that does have some interpretive value, because
2 notebooks and address books do not have a connotation of
3 time past, time future, in the sense that your argument
4 assumes.
5 MR. COLL: But we weren't classified as an
6 address book, and we weren't classified as a notebook. We
7 were classified as a bound diary, and the other two cannot
8 support this classification. This classification was very
9 simply made and very simply stated. It doesn't say --
10 QUESTION: So your point is, we ignore them.
11 MR. COLL: We -- yes.
12 If the Court has no further questions --
13 QUESTION: I -- ask you again about the statute
14 that's quoted at page 3 of the Government's brief, which,
15 as I understand it, indicates that if a proposed
16 interpretive ruling modifies an earlier ruling, there has
17 to be publication in the Customs Bulletin.
18 MR. COLL: Correct.
19 QUESTION: Now, that is inapplicable to the case
20 before us?
21 MR. COLL: Right. That was part of what they
22 refer in the Customs Bar as the Mod Act. It was not in
23 effect at the time that we were -- this ruling came down.
24 There's a second feature out there that relates
25 to --

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1 QUESTION: Do you think that this statute would
2 be very important in another case, insofar as whether or
3 not these rulings are -- should be accorded Chevron
4 deference because they're very much like a regulation, or
5 do you think both cases, a case arising under this statute
6 and your case, should be dealt with the same?
7 MR. COLL: I think it enhances part of their
8 argument. It does not enhance their whole case, because I
9 believe that it does not enhance the particular point,
10 which is that these are conclusions of fact and law as to
11 which one cannot dissect neatly those interpretive legal
12 norms that would be required for Chevron deference.
13 But in terms of process, in terms of notice, in
14 terms of procedural regularity, it certainly is better
15 than receiving a letter in the mail 2 years after you've
16 gotten a classification ruling telling you that the
17 classification ruling no longer is effective.
18 QUESTION: Thank you, Mr. Coll.
19 QUESTION: Actually, if you have an extra
20 minute, if it's all right I'd like to go back for 1 second
21 on the word determinations.
22 MR. COLL: Yes.
23 QUESTION: The Government has also argued, and I
24 wondered about this, I want to -- that really we decided
25 in Haggar that that word determinations must refer only to

1 factual and not legal determinations. I'd like to know
2 your response to that.
3 MR. COLL: As I read the Haggar decision, there
4 was an argument made at that time that Haggar, or the
5 class -- the regulation at issue in Haggar was not
6 entitled to Chevron deference. It was not entitled to any
7 deference because of de novo review.
8 We have a legislative regulation there and as I
9 understand the Court, the Court was trying to explain how
10 those two elements, a statutory regulation that creates a
11 legal norm, would -- could still be harmonized with the de
12 novo review feature, and used as an example there that
13 could still be applied to the facts.
14 We don't have that neat dissection. One can't
15 surgically pull out the interpretive law from the fact in
16 these types of classification rules.
17 QUESTION: Thank you, Mr. Coll.
18 Mr. Jones, you have 2 minutes remaining.
19 REBUTTAL ARGUMENT OF KENT L. JONES
20 ON BEHALF OF THE PETITIONER
21 MR. JONES: Thank you. I think I have two
22 points.
23 Justice Breyer, as we understand the issue that
24 you've been addressing, the Court expressly confronted and
25 resolved it in the Haggar case. The Court quoted the same

1 provision of the statute that you're quoting and said that
2 the responsibility of the Court of International Trade to
3 make its determinations on the record before it, meant
4 that it was to assemble the record and make factual
5 determinations and apply those facts to the law, but in --
6 the Court said that deference can be given to the
7 regulations without impairing the authority of the court
8 to make factual determinations and to apply those
9 determinations to the law de novo.
10 And what the Court said in Haggar was that the
11 regulations, the interpretive regulations of the agency
12 were part of the law that the Court of International Trade
13 was to apply, which is our position precisely in this
14 case.
15 I believe that -- I want to say one more thing
16 about this deliberative conclusion point. Now, the cases
17 that have described, that you look to the deliberative
18 conclusion to find -- in the interpretive ruling to decide
19 whether to give deference to the agency's reasonable
20 conclusions, involve rulings in particular.
21 In Martin v. OSHRC, Occupational Safety & Health
22 Review Commission, the Court applied the same principle of
23 Chevron deference to an agency's citation when the
24 citation had been issued in the -- precisely in the format
25 that Congress authorized for interpretive purposes, so I

1 think you may need to look to the nature of the regulatory
2 ruling -- rulemaking program to decide, you know, what
3 sort of specificity is required.
4 But in the context of the customs service
5 rulings, I think as a practical matter you're going to be
6 looking at headquarters rulings that contain the
7 deliberative analysis to find out what the agency's
8 reasonable interpretation is.
9 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Jones.
10 The case is submitted.
11 (Whereupon, at 11:00 a.m., the case in the
12 above-entitled matter was submitted.)
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