



Federal Bar Association  
OFFICE OF THE PRESIDENT

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November 28, 2007

The Honorable Max Baucus  
Chairman  
Committee on Finance  
United States Senate  
Washington, D.C. 20510-6200

The Honorable Charles Grassley  
Ranking Minority Member  
Committee on Finance  
United States Senate  
Washington, D.C. 20510-6200

**Re: Opposition to Section 601 of the Trade Enforcement Act of 2007 (S. 1919)**

Dear Chairman Baucus and Senator Grassley:

I write on behalf of the 16,000 members of the Federal Bar Association to express our concerns regarding certain provisions of the Trade Enforcement Act of 2007 (S. 1919) under consideration by the Finance Committee. As you know, the Federal Bar Association is the foremost national association of private and government lawyers engaged in the practice of law before all federal courts and federal agencies. Our interests focus upon the role and the advancement of federal jurisprudence.

Our concerns with S. 1919 are generated by Section 601 of the measure, which would authorize the International Trade Commission (ITC) to hire and appoint hearing officers to adjudicate the controversies under section 337 of the Tariff Act of 1930. In the course of its adjudication of Section 337 matters, the ITC is required to hold on-the-record hearings under the adjudicatory provisions of the Administrative Procedures Act before imposing penalties.

We believe that enactment of Section 601 would subvert the long-standing mandate and practices established under the Tariff Act of 1930 and the Administrative Procedures Act by permitting the ITC to appoint non-APA hearing officers with specialized patent and trademark experience in place of Administrative Law Judges appointed pursuant to 5 U.S.C. § 3105 of the Administrative Procedure Act of 1946 (APA), 551 U.S.C. § 551 *et seq.* (2007).

Furthermore, section 601 departs markedly from the framework of established administrative justice created by the APA. The measure would permit the ITC to appoint hearing officers in a non-competitive process, rather than defer to the appointment of ALJs through a competitive process administered by the OPM. Such officers would owe their appointment solely to the ITC and their independence would be more limited; they would be subject to agency influence as they owe their appointment solely to the ITC; they would not be prohibited from engaging in *ex parte* communications with agency officials or private parties; and they could be supervised by ITC employees who also are responsible for the investigation and prosecution of violations of its enabling statute.

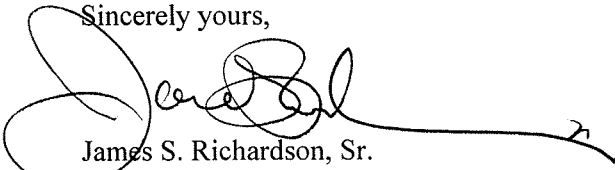
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In addition, section 601 is unnecessary because ALJs hired without selective certification could achieve the necessary technical proficiency to adjudicate section 337 cases. Even if this were not the case, ITC could hire ALJs with the necessary expertise from other agencies. Moreover, it is unclear what, if any, remaining responsibilities would remain within the four Administrative Law Judges at the International Trade Commission who currently decide these cases. The resulting situation is quite different from that which prevails at agencies which require the services of ALJs and non-APA judicial officers

In conclusion, the Federal Bar Association opposes enactment of Section 601 of S. 1919, the Trade Enforcement Act of 2007, because it would undermine the principles of independent adjudication under the Administrative Procedures Act and reduce the independence of ITC adjudicators. Congress established the APA to protect parties who appear before federal agencies for determinations of administrative claims, not for the benefit of the agencies or the agencies' ALJs. The APA protections are intended to ensure that the American people receive a full and fair due process hearing with a decision based only on the evidence in the hearing record without agency pressure. Section 601 of S. 1919 would produce a contrary and undesirable result.

Thank you for your consideration of these comments.

Sincerely yours,



James S. Richardson, Sr.  
National President