

CUSTOMS COURTS ACT OF 1980

HEARINGS
BEFORE THE
SUBCOMMITTEE ON
MONOPOLIES AND COMMERCIAL LAW
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
NINETY-SIXTH CONGRESS
SECOND SESSION
ON
H.R. 6394
CUSTOMS COURTS ACT OF 1980

FEBRUARY 15 AND 28, 1980

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CUSTOMS COURTS ACT OF 1980

WEDNESDAY, FEBRUARY 13, 1980

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 10 a.m. in room 2142, Rayburn House Office Building, Hon. John F. Seiberling presiding.

Present: Representatives Seiberling, Volkmer, Harris, McClory, and Butler.

Staff present: Joseph L. Nellis, general counsel; Leo M. Gordon, counsel; Franklin G. Polk and Charles E. Kern II, associate counsel.

Mr. SEIBERLING. The Subcommittee on Monopolies and Commercial Law will come to order.

Today the subcommittee is holding a hearing on H.R. 6394, the Customs Courts Act of 1980. Over the years many complex questions have been raised concerning the jurisdiction of the Customs Court, its scope of review and type of relief that the court may award. Periodically the Congress has addressed these issues and has altered the court's status, jurisdiction and powers in a manner intended to solve the specific problem or to meet a specified need at a particular time. This approach has resulted in making the statutes governing the court's jurisdiction and remedial powers awkward and uncoordinated.

The law governing the U.S. Customs Court simply has not kept pace with the problems posed by modern day international trade litigation. Furthermore, a serious conflict exists between the jurisdiction of the Federal district courts and the Customs Court regarding international trade cases. As such, litigants proceed with some degree of uncertainty when choosing a forum for judicial relief. If an improper forum is chosen that may well result in a holding that the plaintiff is before the wrong court. With the cost of litigation today, such a holding can effectively preclude any judicial relief for some people.

The Customs Courts Act of 1980 is designed to eliminate many of the problems faced by litigants in international trade cases before the various Federal courts. This bill expands the Customs Court's substantive jurisdiction and the type of relief it may award.

In so doing the Customs Courts Act of 1980 will create a comprehensive system of judicial review of civil actions arising from import transactions, utilizing the specialized expertise of the U.S. Customs Court and the U.S. Court of Customs and Patent Appeals to assure a national consistency in the judicial making process. H.R. 6394 will assure better access to the courts for such civil actions by more clearly defining the division of jurisdiction between the district courts and the Customs Court.

Finally, in order to reflect the expanded jurisdiction of the court, this legislation would change the name of the U.S. Customs Court to the U.S. Court of International Trade. This designation is more descriptive of the court's clarified and expanded jurisdiction and its new judicial functions and purposes relating to international trade.

This morning's first witness is Senator Dennis DeConcini, the chairman of the Senate Subcommittee on Improvements in Judicial Machinery. But before I recognize him, I would like to recognize Congressman McClory for his opening comments.

Mr. McCLORY. Thank you very much, Mr. Chairman.

I would like to welcome the witnesses here this morning and express my general support for this legislation. We have a bit of a problem regarding the number of items that we have on our subcommittee agenda, but we are hopeful that we will be able to favorably consider this legislation as well as the proposed constitutional amendment to limit Federal spending.

I had the privilege of participating with Senator DeConcini and Judge Re recently at a very exciting, interesting and illuminating conference in Williamsburg where the executive branch, the judiciary, and the legislative branch had an opportunity to discuss this matter. We learned quite a bit about it there, and I'm glad that the rest of my colleagues now will have the opportunity to begin considering customs court jurisdiction to thus advance the administration of justice in our country. I compliment the gentleman for his contribution and welcome his testimony. Thank you, Mr. Chairman.

Mr. SEIBERLING. Thank you. Are there any other opening remarks?

[No response.]

Mr. SEIBERLING. Well, Senator, we certainly do welcome you here. We are looking forward very much to having your testimony. I wish to apologize to you on behalf of Congressman Rodino who was called out for a short time on a very, very urgent and important matter.

You are a sponsor of S. 1654, the companion bill to H.R. 6394. We look forward to having your advice.

TESTIMONY OF HON. DENNIS DeCONCINI, U.S. SENATOR FROM ARIZONA

Senator DeCONCINI. Mr. Chairman, I'm very pleased to be here before your committee in order to assist in your review of the proposed Customs Courts Act of 1980. After having worked on similar legislation during this Congress and the 95th Congress, I feel that I am in an excellent position to support your efforts concerning this proposal.

The history of the U.S. Customs Court has been one of constant evolution, from an administrative unit to a court established under article III of the U.S. Constitution. In the late 1960's, it was recognized that both the procedures and jurisdiction of the Customs Court were in need of revision. Congress decided at that time to devote its efforts to the enactment of the Customs Courts Act of 1970, a reform which substantially modified procedures, leaving the clarification of jurisdictional matters for the future. To complicate matters, the types of decisions involving import transactions were expanded as the Customs Court evolved. It is with these considerations that I believe the proposed Cus-

toms Courts Act will help clarify the law through the resolution of jurisdictional and other problems regarding its status as a court established under article III.

Recently, with the completion of the Tokyo round of the Multilateral Trade Negotiations and the President's signing of the Trade Agreements Act of 1979, there has been a realization of a need for additional legislation regarding the Customs Court. The Trade Agreements Act substantially expanded the opportunity for judicial review of anti-dumping and countervailing duty determinations. The act also, for the first time, authorized the Customs Court to grant injunctive relief in limited circumstances.

As a historical consequence, the series of statutes which govern the court's jurisdiction, status and procedures are akin to a jigsaw puzzle with enough missing pieces to make it difficult for any but the closest observer to discover what the completed puzzle was intended to depict. The Trade Agreements Act recently added to the puzzle by including a number of major modifications. However, this incomplete puzzle still awaits its few remaining pieces.

The Federal district courts have become overburdened and overworked through the years leading to considerable delays in the resolution of disputes. The comparatively recent increase of litigation in the field of international trade has compounded this problem by adding to the already outstanding caseload of the district courts. Conversely, the volume of litigation instituted in the Customs Court has decreased. Under these circumstances, we believe that it makes good sense to require that some of the cases now instituted in the overcrowded district courts clearly belong in the underutilized Customs Court.

The Customs Courts Act would create a comprehensive system of judicial review of civil actions arising from import transactions. This scheme of review would be extremely effective since it would perfect the status of the Customs Court by granting it all the powers in law and equity of, or as conferred by statute upon, a district court of the United States. The U.S. Court of International Trade would continue to be equipped with the same expertise and specialized skills that the U.S. Customs Court has acquired through the years. Moreover, the court would continue to remain national in scope in order to insure uniformity of decision and policy to litigants with regard to the adjudication of disputes involving import transactions.

The clarification and expansion of the Customs Court's jurisdiction will help to assure access to judicial review of civil actions arising from import transactions. The Customs Courts are national courts and their decisions are nationwide in impact. Thus, a clarification of jurisdiction will eliminate the possibility of conflicting decisions on any one point of dispute. This, coupled with their current expertise in the area, would enable the Customs Courts to render extremely expeditious decisions in matters which are important both to our country and to our trading partners. The clarification of jurisdiction eliminates at least some of the confusion in the international arena created by our beliefs in the availability of judicial review, without compromising that belief.

The Customs Courts Act would make it clear that the U.S. Court of International Trade possesses broad jurisdiction to entertain certain civil actions arising out of import transactions. In addition, the Cus-

toms Courts Act would make it clear that, in those civil actions within its jurisdiction, the court possesses the authority to grant the appropriate relief when required to remedy an injury. These provisions, when coupled with those contained in the Trade Agreements Act of 1979, make it clear to those who suffer an alleged injury in this area, that they may seek redress in a court with confidence that their case will be heard on the merits—not decided upon jurisdictional grounds and that, if they are successful, the Court of International Trade will be able to afford them the relief which is appropriate and necessary to make them whole. This legislation will offer the international trade community, as well as domestic interests, consumer groups, labor unions and other concerned citizens, a vastly improved forum for judicial review of administrative actions of the U.S. Customs Service and other Government agencies dealing with imported merchandise.

Concluding, I am optimistic that your committee will complete a prompt, yet comprehensive analysis of H.R. 6394 and its Senate-approved companion, S. 1654, so that the needed benefits will come to fruition.

And I thank you, Mr. Chairman, for indulging my feelings toward this legislation. I have worked on it for 3 years now and feel very strongly that it is necessary and that the bill before you is worthy of your prompt action.

Mr. SEIBERLING. Thank you, Senator. I think that your testimony is very helpful and certainly the very fine work you have done on this bill will help us on this bill in moving it through this committee.

I have personally experienced the complaints of American industry that the present procedures are entirely too complex and while some of those are probably due to the substantive law, unquestionably the problems also are procedural ones involving the Customs Court and its very peculiar, illogical structure and jurisdiction, and I certainly commend you for taking the initiative in getting this matter before the Congress.

I'd like to ask a couple of specific questions, but before I do, let me say that those two bells deal with final passage of H.R. 469 to declare February 19 as Iwo Jima Day. I do not propose to go over and interrupt this proceeding to vote, but those wishing to do so should feel free.

Senator DeCONCINI. Mr. Chairman, please don't stay away from Iwo Jima Day on my behalf.

Mr. SEIBERLING. I suspect that Iwo Jima Day will get through without my help.

Mr. VOLKMER. Mr. Chairman, we may not have a quorum.

Mr. SEIBERLING. That would be tragic indeed.

Mr. McCLORY. You probably won't be invited to any more veterans' events.

Mr. SEIBERLING. I was in the Army, not the Marines.

Senator, later this morning the subcommittee will hear from witnesses who will request that a small claims procedure be added to this legislation. Could you comment on the desirability of that?

Senator DeCONCINI. Mr. Chairman, we had testimony along that line and we gave it a great deal of consideration. It was our best judgment to ask the Federal Judicial Center of the Judicial Conference to complete a study on it. The court itself I think will testify today that

they have the inherent authority now to institute such a procedure if indeed it was necessary, and it was our best judgment that it was not appropriate to put it in the legislation.

You may come to a different conclusion. We did study it very carefully and decided that it just wasn't proper to mandate it here when there are procedures that can be implemented by the court itself.

Mr. SEIBERLING. I see. Is that because this court really should be devoted to major international trade questions?

Senator DECONCINI. Indeed it should, but there may be instances where other small claims might come up. We received testimony, and the evidence was clear to us, that the court has the capacity to handle those in their present form and if they needed to make some alteration they can do so being an article III court.

Mr. SEIBERLING. Fine. I wonder if you could comment on the proposed section 702(f) which contains the effective date provision which would coincide with the effective date of the Trade Agreements Act of 1979, thereby making it retroactive. Do you think this is essential?

Senator DECONCINI. Well, it was our best judgment that it ought to coincide with the Trade Agreements Act. When you say, is it essential—I think really the essential part of this legislation is that it pass and that it be implemented and the court be upgraded to have equity powers and that the jurisdiction of the court be clarified.

Mr. SEIBERLING. Would this prejudice any litigants who instituted a suit based on the amendments made by the Trade Agreements Act?

Senator DECONCINI. Mr. Chairman, I don't know the answer to that question. I'd have to defer to someone from the Treasury or Justice regarding that point.

Mr. SEIBERLING. All right. Thank you. I have no further questions. Mr. McClory.

Mr. McCLORY. Thank you, Mr. Chairman. Under existing law, the Customs Court is composed of, I believe, five Democrats and four Republicans. At least there's a balance there due to the requirement that there be no more than five members from one party. That requirement is omitted from the present bill. Is it your position that the existing law is unconstitutional, or is there any—

Senator DECONCINI. No, Mr. McClory. We felt that an article III court ought not to be tied to the political numbers game. Other article III courts are not. People ought to be selected for the court based on their merit and this was really an upgrading of that procedure.

Mr. McCLORY. One of the concerns of those who complain about being overwhelmed by foreign imports is that the antidumping laws take too long to enforce and are too cumbersome. Now, do you think the establishment of this court will accelerate and expedite the disposition of complaints based on the antidumping law?

Senator DECONCINI. Mr. McClory, you will have the chief judge of that court before you later today for whom I would not want to speak; however, it's my belief that it would expedite the handling of those cases and other cases. Judge Re is indeed the expert in this area and can explain exactly how that will happen. He did with us before at our hearings, and I would defer to his judgment.

Mr. McCLORY. Thank you very much.

Mr. SEIBERLING. I have a few more questions and it's possible some

of our colleagues who stepped out for a vote will have some too. I understand you have a hearing at 10:30.

Senator DECONCINI. Yes, I do, before Congressman Pepper's Select Committee on Aging.

Mr. SEIBERLING. Let me just ask one or two questions. The bill as drafted would permit a transfer to district courts of any civil action commenced by the United States in this Customs Court. Could you tell me what the rationale behind that is?

Senator DECONCINI. Well, Mr. Chairman, it was our belief that the transfer was a necessary procedure since we felt additional controversy would be added to the bill should the Customs Court begin holding jury trials. Currently, several of the matters found in proposed section 1582 are international trade-related issues that are now in the district courts. As a first step, we decided that these cases should initially be within the jurisdiction of the Customs Court. If a party felt it was entitled to a jury trial, a motion could be made and, if granted, the case would be transferred to the appropriate district court. I think your witnesses from the court, and the Justice Department and Treasury will substantiate that.

Mr. SEIBERLING. Well, it is my feeling because a case involving the United States might involve broader questions and policies, that it ought to be decided in the district court.

Senator DECONCINI. That's correct, Mr. Chairman.

Mr. SEIBERLING. Well, I think that makes sense. I just want to make sure.

Senator DECONCINI. I felt it made sense too. I can't give you an example right now of an incident, but we had several in our record and it seemed to make good sense.

Mr. SEIBERLING. Let me try one more and if our colleagues don't arrive I guess we'd better let you go to your next meeting.

The bill also contains a limited exception which would allow a party to gain direct access to the court for review of a ruling issued by the Secretary of Treasury. I wonder if you could explain the thought behind that and also tell me why you think the language as drafted is sufficient for all purposes.

Senator DECONCINI. Mr. Chairman, I'm sorry, I can't speak to that question. I quite frankly don't remember.

Mr. SEIBERLING. All right. Well, I'm just educating myself.

Senator DECONCINI. I understand.

Mr. SEIBERLING. So I thought I'd take advantage of it.

Senator DECONCINI. Sorry, I can't answer that.

Mr. SEIBERLING. I thought you might have the answer to that. All right. Well, I think we'd better let you go on to your next meeting.

Senator DECONCINI. Thank you very much, Mr. Chairman, for your consideration and indulgence and I certainly applaud you for your hearings today in moving this bill along.

Mr. SEIBERLING. Thank you. We'll see if we can't handle it. By the way, what is its status in the Senate?

Senator DECONCINI. The bill passed the Senate on December 18, 1979.

Mr. SEIBERLING. It's already passed the Senate! All right. Well, I'm learning, as you see.

Senator DECONCINI. Thank you, Mr. Chairman.

[Complete statement of Senator DeConcini follows.]

STATEMENT OF SENATOR DENNIS DECONCINI ON H.R. 6394, THE CUSTOMS COURT ACT OF 1980, FEBRUARY 13, 1980

Mr. Chairman, I am pleased to be here before your Committee in order to assist in your review of the proposed Customs Courts Act of 1980. After having worked on similar legislation during this Congress and the 95th Congress, I feel that I am in an excellent position to support your efforts concerning this proposal.

The history of the U.S. Customs Court has been one of constant evolution, from an administrative unit to a court established under article III of the U.S. Constitution. In the late 1960's, it was recognized that both the procedures and jurisdiction of the Customs Court were in need of revision. Congress decided at that time to devote its efforts to the enactment of the Customs Courts Act of 1970, a reform which substantially modified procedures, leaving the clarification of jurisdictional matters for the future. To complicate matters, the types of decisions involving import transactions were expanded as the Customs Court evolved. It is with these considerations that I believe the proposed Customs Courts Act will help clarify the law through the resolution of jurisdictional and other problems regarding its status as a court established under article III.

Recently, with the completion of the Tokyo Round of the Multilateral Trade Negotiations and the President's signing of the Trade Agreements Act of 1979, there has been a realization of a need for additional legislation regarding the Customs Court. The Trade Agreements Act substantially expanded the opportunity for judicial review of antidumping and countervailing duty determinations. The Act also, for the first time, authorized the Customs Court to grant injunctive relief in limited circumstances.

As an historical consequence, the series of statutes which govern the Court's jurisdiction, status and procedures are akin to a jigsaw puzzle with enough missing pieces to make it difficult for any but the closest observer to discover what the completed puzzle was intended to depict. The Trade Agreements Act recently added to the puzzle by including a number of major modifications. However, this incomplete puzzle still awaits its few remaining pieces.

The federal district courts have become overburdened and overworked through the years leading to considerable delays in the resolution of disputes. The comparatively recent increase of litigation in the field of international trade has compounded this problem by adding to the already outstanding caseload of the district courts. Conversely, the volume of litigation instituted in the Customs Court has decreased. Under these circumstances, we believe that it makes good sense to require that some of the cases now instituted in the overcrowded district courts clearly belong in the under-utilized Customs Court.

The Customs Courts Act would create a comprehensive system of judicial review of civil actions arising from import transactions. This scheme of review would be extremely effective since it would perfect the status of the Customs Court by granting it all the powers in law and equity of, or as conferred by statute upon, a district court of the United States. The United States Court of International Trade would continue to be equipped with the same expertise and specialized skills that the United States Customs Court has acquired through the years. Moreover, the Court would continue to remain national in scope in order to insure uniformity of decision and policy to litigants with regard to the adjudication of disputes involving import transactions.

The clarification and expansion of the customs courts' jurisdiction will help to assure access to judicial review of civil actions arising from import transactions. The customs courts are national courts and their decisions are nationwide in impact. Thus, a clarification of jurisdiction will eliminate the possibility of conflicting decision on any one point of dispute. This, coupled with their current expertise in the area, would enable the customs courts to render extremely expeditious decisions in matters which are important both to our country and to our trading partners. The clarification of jurisdiction eliminates at least some of the confusion in the international arena created by our beliefs in the availability of judicial review, without compromising that belief.

The Customs Courts Act would make it clear that the United States Court of International Trade possesses broad jurisdiction to entertain certain civil actions arising out of import transactions. In addition, the Customs Courts Act would make it clear that, in those civil actions within its jurisdiction, the Court

possesses the authority to grant the appropriate relief when required to remedy an injury. These provisions, when coupled with those contained in the Trade Agreements Act of 1979, make it clear to those who suffer an alleged injury in this area, that they may seek redress in a court with confidence that their case will be heard on the merits—not decided upon jurisdictional grounds and that, if they are successful, the Court of International Trade will be able to afford them the relief which is appropriate and necessary to make them whole. This legislation will offer the international trade community, as well as domestic interests, consumer groups, labor unions and other concerned citizens, a vastly improved forum for judicial review of administrative actions of the United States Customs Service and other government agencies dealing with imported merchandise.

Concluding, I am optimistic that your Committee will complete a prompt, yet comprehensive analysis of H.R. 6394 and its Senate-approved companion, S. 1654, so that the needed benefits will come to fruition.

Thank you.

Mr. SEIBERLING. Our next witness is Judge Edward D. Re, chief judge of the U.S. Customs Court. Judge Re, we certainly appreciate your coming here and we look forward to your enlightening us on this legislation.

TESTIMONY OF HON. EDWARD D. RE, CHIEF JUDGE, U.S. CUSTOMS COURT

Judge RE. Thank you very much, sir.

I appreciate your cordial invitation to appear before this subcommittee in connection with the proposed Customs Courts Act of 1980, H.R. 6394, to discuss the need for reform of the laws governing litigation before the U.S. Customs Court.

I believe I can best contribute to achieving the purpose of this hearing by highlighting what I perceive to be the three major achievements of the bill, and then answering any questions you may have.

The bill will implement the constitutional mandate, which provides that "all Duties, Imports and Excises shall be uniform throughout the United States," by utilizing the national jurisdiction of the Customs Court to provide uniform and consistent interpretation and application of the laws involved in disputes arising out of import transactions.

Existing laws pertaining to the jurisdiction of the Customs Court, specifically limit the subject matter jurisdiction of the Customs Court, the class of persons with standing to institute actions, and the forms of remedies available before the court. As a consequence of these limitations, aggrieved persons have tried—frequently without success—to challenge administrative actions involving importations in the district courts: when the subject matter is not clearly assigned by law to the Customs Court; or, when the aggrieved person has no standing in the Customs Court; or, when the remedy sought is not available in the Customs Court.

When a plaintiff alleges that he has no effective access to, or cannot obtain an adequate remedy from the Customs Court, the district courts are asked, usually unsuccessfully, to take jurisdiction over the dispute under one of their general or specific jurisdictional statutes.

Therefore, the uniformity required by the Constitution is provided for under existing law only in those relatively few administrative actions which are within the Customs Court's presently limited jurisdiction.

The Customs Courts Act of 1980 will resolve the problem by correcting the present ill-defined jurisdiction between the district courts and the Customs Court and by providing, in essence, that all law suits arising out of import transactions and brought against the United States are within the exclusive subject matter jurisdiction of the proposed U.S. Court of International Trade.

A second and equally important achievement of the bill is that it will establish as matters of legislative policy two significant jurisprudential concepts pertaining to disputes arising out of agency actions affecting importations:

One, those agencies which deal with importations are made subject to the same policy of judicial review as Congress has provided for other administrative agencies; and

Two, persons adversely affected or aggrieved by agency actions arising out of import transactions are entitled to the same access to judicial review and judicial remedies as Congress has made available for persons aggrieved by actions of other agencies.

These concepts are not now reflected in existing law, and the existing statutory procedures have not been satisfactory. The law—both statutory and decisional—pertaining to judicial review is unpredictable, inconsistent, and, in some situations, unjust. The congressional attention to these problems, as reflected in the bill, will extend to persons engaged in or affected by importations, the protection afforded by our traditional standards of due process and equal protection of the law. For these reasons alone, the Customs Courts Act of 1980 will contribute immeasurably to the public interest.

A third major achievement of the bill—one which complements the other two—has to do with the institution of the Customs Court itself. In addition to changing the name of the court to reflect its expanded jurisdiction and judicial functions, the bill will clarify and confirm the article III status of the court, and provide it with the same plenary powers in law and equity as those possessed by the district courts of the United States.

As for the title of the new court, the U.S. Court of International Trade, to quote the fine statement of Chairman Rodino in his remarks introducing the bill, the title is more descriptive of the court's clarified and expanded jurisdiction and its new judicial functions and purposes relating to international trade.

In conclusion, personally, and on behalf of the U.S. Customs Court, I commend to your favorable consideration the provisions of this most significant legislation. I am confident that the Customs Courts Act of 1980 will be seen as an historic event in the evolution and development of the judicial machinery established by Congress for resolving disputes arising from international trade matters.

I wish to close my remarks by commending Chairman Rodino for introducing this epoch-making legislation, the members of this committee for their prompt consideration, and the committee's staff for the excellent legislative draftsmanship reflected in the bill. With these words of appreciation, I thank you for the opportunity to appear before you.

Mr. SEIBERLING. Thank you, Judge Re.

The bill contains a limited exception which would allow a party to gain direct access to the court for the review of a ruling issued by the

Secretary of the Treasury. I wonder if you have any comment on that as to its desirability and also whether you think it's drafted properly, assuming the aim is desirable. If you want to look at the precise language, it's section 1581 (j) (2). The section is found on page 7 of the bill.

Judge RE. Yes, there is an exception in that section which specifies that this exclusion of jurisdiction shall not apply if a person demonstrates that he would be irreparably harmed without an opportunity to obtain judicial review.

That concept is obviously good, and it is an additional provision that complements the equity powers conferred upon the court by section 1585. It would be fair to say that, in legal writing and also in legislative drafting, there is no good legal writing; there is only good legal rewriting. Surely, any provision could be improved, but the concept is desirable. It is in keeping with granting the court equity jurisdiction. How that equity power is exercised, of course, will be consistent with all the equity cases that have balanced and weighed the conflicting factors that require the granting of an injunction in one case but not in another. So the concept is a good one.

Mr. SEIBERLING. What do you think about the idea of adding a specific small claims procedure to this bill?

Judge RE. The court had a committee of the court look into that question and we have a quantity of letters that we will be happy to make available to the subcommittee.

The Federal Judicial Center at the request of the Senate subcommittee has commissioned two law professors to look into the matter. I hesitate to make any specific proposal until I see what they say.

I think it should be borne in mind that we usually are dealing with commercial litigation, and that any particular case may have far-reaching importance on the meaning of the tariff provision that is interpreted and applied. So there is rarely such a thing as a small claims case before the U.S. Customs Court, because almost all of our cases are like class actions.

We have a suspension procedure where similar cases are suspended until the so-called test case is decided. Then, the suspended cases can be disposed of based upon the decision in the test case. The principle of uniformity and consistency, for which this court exists, depends upon its interpretation and application of the tariff laws.

If an individual says, "I can't afford a lawyer," it is within the power of the court to appoint an attorney, and I have designated distinguished counsel to represent an individual who stated he was indigent. Also, we can and have waived the filing fee. We can and have heard cases in chambers. So we already have the powers to provide for the plaintiff who says, "I can't afford to prosecute the action but I believe an injustice has been done."

One caveat I would offer is that I would not want a double track type of justice with some cases having full consideration, while in others we just become a super administrative agency to take care of a particular small claims dispute. I don't believe in a two-track justice.

We have no strong feeling in these matters. These are matters of legislative policy, Mr. Chairman. I hope that it is borne in mind that if any individual believes that he cannot afford to be heard, we can

hear him pro se, but our cases are brought by commercial litigants. Obviously, we will abide by whatever the Congress wishes to do in this respect.

If legislation pertaining to small claims is to be passed, we hope it will merely authorize, rather than direct, a procedure.

There is one additional caveat that comes to my mind. The law now requires—and I think it is good—that every decision be accompanied by findings of fact and conclusions of law, or an opinion setting forth the reasons for the decision and stating the facts found. That will have to be changed in a small claims procedure, and I am not so sure that that is a good idea because, as I have indicated, these are all important cases.

I recall deciding a case in which the amount involved was small, but the case was of great importance in the construction of the tariff laws. That was a case dealing with the proper marking of the country of origin. Was this product properly marked so that the American purchaser will know that it was not made in the United States, but overseas. Furthermore, he is supposed to know in what country it was made. Well, the amount involved was small, but that was a very important case because it dealt with how the country of origin should be marked on imported products.

Forgive me if my answer was long.

Mr. SEIBERLING. That's all right. It was quite illuminating. I assume, then, the court at the present time decides whether to handle a case for the abbreviated procedure on a case-by-case basis, and I just wonder how you make these decisions. Obviously, if there's no set procedure, then some cases you probably decide to handle that way and some not. Is there any rule of thumb or any binding principle that you have evolved?

Judge RE. The plaintiff asserts, "I can't afford a lawyer." Well, we can assign a lawyer to him. He says, "I can't afford a lawyer, but I want to represent myself." Fine. The present procedure permits an individual to represent himself.

Mr. SEIBERLING. Well, very often what happens is he will go to his Congressman and the Congressman is not going to contact the Court because it's a judicial body, but he will put the heat on the Customs Service to give this individual another look and maybe that's not a double track system of justice, but maybe sometimes he'll get better results from his Congressman than he will from the Court or sometimes not. But this is a problem and we are going to see if we can't make sure that we handle it right. We certainly appreciate your testimony because we're feeling our way here.

Our chief counsel has a question.

Mr. NELLIS. I appreciate the chairman yielding. We have had some representations to the effect that many summons are issued in the Customs Court but not followed up by complaints because the amounts involved are too small in consideration of the legal costs involved.

Now have you any statistics as to the number of summons that are pending in the court at the present time where no complaints have been filed?

Judge RE. We can supply that for the record. I do not recall the precise statistics.

Mr. NELLIS. Do you think it's a large number?

Judge RE. I am not certain.

Mr. NELLIS. Well, the posture of the complaint has been this: That because there is no small claims procedure, many claims are not followed to fruition because of the costs involved as compared to the possible recovery. Now if that is a correct statement—and it was made by members of your bar—it would seem to me that you would want the Congress to draft permissive language that would enable you to have a small claims procedure for these people.

Judge RE. I have been a judge on this court for about 11 years and its chief judge for over 2 years, and I have not encountered that problem. An individual who cannot afford a lawyer can represent himself or herself.

Mr. NELLIS. It's not that they couldn't afford a lawyer. What they're saying is that the pursuit of their claim is not worth the candle. The amount of money involved in pursuing the claim, although it might be a very important claim, is not worth the amount of money that it costs to get it resolved.

Judge RE. I have read certain letters and resolutions of bar associations that refute the information you received. Specifically, I recall the letter of the Los Angeles Bar Association opposing a small claims procedure as unnecessary because of the availability of the suspension procedure in our court. We have a decided test case that has involved several thousand suspended cases that, as it were, piggybacked on somebody else's litigation.

As of now I do not know if there is a problem that really needs resolution. That would be the first question. Is there a problem? I am not aware of the problem. If there is a problem, I think it ought to be resolved without upsetting either the quality of justice, or the article III status of the court.

Mr. NELLIS. Mr. Chief Judge, will you look into it because we have had such representations and if there are people—these are people not necessarily without the means to pursue their claim. What they're saying, I repeat, is that the amount of recovery possible will not be sufficient to make up the cost of pursuing the claim and, as a result, they say they leave the summons in your clerk's office hoping that some other case will decide the issue, and if you look into that I think we would like to know whether that is a legitimate proposition for establishment of the small claims procedures.

Judge RE. By all means.

Mr. SEIBERLING. Thank you, Mr. McClory.

Mr. McCLORY. Thank you, Mr. Chairman. I want to reiterate my welcome to you, Judge Re, and to express my appreciation for your contribution here as well as your contribution at the recent conference in Williamsburg.

In considering the transition which will occur if this legislation is enacted, I'd like to be sure that you will be able to continue with all your expertise and your leadership as a judge on the new court. Will the legislation allow you to remain as judge of the Court of International Trade?

Judge RE. The bill provides for continuity in office, not only for me, but also for all my colleagues. Otherwise, there would be a very serious problem with the article III status of the judges if it did not.

Mr. McCLORY. You're the chief judge now. How do we get you back as chief judge in the new court?

Judge RE. The bill specifies that I remain as chief judge until 70.

Mr. McCLORY. I mentioned to Senator DeConcini my interest in the requirement under the existing law that we have balance of party membership on the court. Personally, I think it's something good to retain. Having been active in the legislation which created 152 new Federal judgeships in the last Congress, my attention is called to the fact that over 90 percent of the judges that President Carter has named are Democrats, whereas President Ford, in naming Federal judges, had a balance of 60/40 or so. I have been in strong support of merit selection of judges, but I don't know how we're going to get any political party balance unless we retain this provision in the law, since in the application of the existing law to district court and court of appeals judgeships it seems to be purely partisan political motivation that results in the naming of a judge.

Do you have any objection to the retention of the existing balance if we decided to write that into the law?

Judge RE. Well, with your kind permission, I'd like to answer your question by explaining that the present provision, Mr. McClory, is anachronistic. It is anachronistic to have a political party membership provision in the law for an article III judge. There is no provision of law for Federal judges of other article III courts to be appointed according to party affiliation. The appointment process is not what is before us.

What we are doing today, Mr. McClory, is perfecting the article III status of the court and in this respect this court should not be different from any other article III court.

Mr. McCLORY. I wish I knew how to get away from the partisanship which is practiced so egregiously by this administration. It is contrary to the President's own campaign promises to this country and to what I felt we were working on in the conference committee.

Mr. SEIBERLING. Would the gentleman yield?

Mr. McCLORY. If you'll give me another half a minute.

Mr. SEIBERLING. You can have all the time you want. I just want to say—are you sure the President isn't merely trying to correct the previously existing imbalance?

Mr. McCLORY. I pointed out that President Ford had a pretty good balance in the appointments he made.

Mr. SEIBERLING. What about President Nixon?

Mr. McCLORY. I'll do some research on that, but I don't think it was quite as partisan as this administration.

I'd like to get on to another point. In the Internal Revenue Service, if a taxpayer is sued, he can make a deposit of the additional tax that's claimed and if it's decided that the taxpayer is entitled to a refund or decided in his favor, he gets interest on the money that he has deposited.

Is there any reason why we shouldn't write a similar provision into this bill? When an importer deposits his duties and then waits years for a refund, should he not be entitled to recover interest?

Judge RE. The law makes no provision for interest and clearly, Congressman McClory, that question is strictly a policy determination for the Congress.

Mr. McCLORY. But with such higher interest rate these days and the terrible burden which is imposed on a person if he is denied the use of his money, do you see any reason why the Government should not pay interest if a deposit of moneys is made?

Judge RE. That would be strictly a policy question.

Mr. McCLORY. You would have no objection?

Judge RE. I have no position on that.

Mr. McCLORY. Thank you very much, Mr. Chairman. Thank you for your testimony.

Mr. SEIBERLING. Thank you. The Chair recognizes the gentleman from Missouri, Mr. Volkmer.

Mr. VOLKMER. Thank you.

Judge RE. I quite agree with you as far as the method of appointment of the judges is concerned and I do not believe we should include the language of providing for Republicans and Democrats, and my only comment to the gentleman from Illinois is it's because of the involvement with the past President, not with the present President, if he's not enjoying enough Republicans being appointed. I think he should talk to President Ford about that.

I would like to ask one little matter with regard to, again, methodology. We have a Senate bill in which the chief judge presides by virtue of one's seniority, as is the case with the district court judges, and then we have a House bill which provides for the designation of the chief judge by the President.

Do you have any comment as to which version is preferable?

Judge RE. Well, that is the one provision that I did not discuss at all. This is a policy determination to be made. Do you want to have the chief judge selected as is done with other national courts, or as is done for district courts and courts of appeals? The Senate has done it one way; the House bill speaks of designation. The manner provided in the bill before us is by designation with service up to the age of 70, which is surely an improvement over the existing law. The Senate bill, uses seniority according to the formula set forth in that bill.

It is a policy determination. There is no doubt that the manner provided by the bill before us today is an improvement over existing law.

Mr. VOLKMER. But either way, it shouldn't cause any great difficulties in the operation of the court?

Judge RE. No.

Mr. VOLKMER. You see no difficulty with either way?

Judge RE. I do not, sir.

Mr. VOLKMER. Also, as I understand in my brief reading of the bill, there's a provision in the bill providing for a counterclaim by the Federal Government. Now as I understand it, the provision presently in the bill is broadly drafted. The scope of this provision is basically a policy decision, but in reality this subcommittee must also look at the effect of this provision on the operation of the court. The subcommittee must determine whether any pending claim by the Federal Government could be asserted as a counterclaim—that's what seems to be in the bill—or whether that provision should be narrowed to only those claims related to "the" import transaction pending before the court.

Judge RE. I think 1583 reads :

Any counterclaim asserted by the United States which arises out of an import transaction that is the subject matter of a civil action pending before the court.

I think that is the way it currently reads.

Mr. VOLKMER. So you think that would be satisfactory. Therefore, it would be very narrow.

Judge RE. Yes. It is not a broad counterclaim provision. It is limited to the same subject matter of the civil action pending.

Mr. VOLKMER. My concern is, then you could have more than one action actually pending in the same court and have separate determinations rather than have one determination on one product.

Judge RE. I am not so sure that I am prepared to state how this would be interpreted in actual application, but from the standpoint of legislative drafting it seems to be a way of limiting counterclaims.

Mr. VOLKMER. Assume the U.S. Government has a claim based on the violation of some section of a Trade Act against XYZ corporation and at the same time XYZ files a separate action against the U.S. Government based on a subsequent importation. As I understand it, in the narrow view, they would both have to be tried separately because they are "not arising out of the same transaction."

Judge RE. It would have to arise out of the subject matter of the civil action pending before the court.

Mr. VOLKMER. And you don't think all cases between the same parties should be basically consolidated then, even though they may not be the same subject matter but still pertain to trade policy?

Judge RE. I really do not know what more I can say, sir. I think that the intent, as I read this—

Mr. VOLKMER. I'm not asking you about that. I'm asking about a general application by the court.

Judge RE. Well, the court is faced with interpreting this particular section.

Mr. VOLKMER. Yes, but this can be changed.

Judge RE. Oh, I see.

Mr. VOLKMER. That's what I'm asking you. Let's say we wrote other language, language that would permit all cases basically to be consolidated. What effect would that have?

Judge RE. Your point would be to raise counterclaims not related to the particular subject matter of the suit?

Mr. VOLKMER. Sure.

Judge RE. At some point there could be a chilling effect on bringing of the suit; and, I can see why plaintiffs would not like that. I would not want to chill the right of the plaintiff to sue in the court. If you limit a counterclaim to the cause of action upon which the plaintiff sues, I do not see how there could be much reasonable complaint, but if you can raise something unrelated thereto—

Mr. VOLKMER. But it would have to be in the trade law, not outside the trade law.

Judge RE. Well, the trade law is rather broad. It should be, I think, related to the subject matter of the plaintiff's claim.

Mr. VOLKMER. That's basically not the same as what we have in the present law with regard to civil action in our district courts.

Judge RE. No, it is not.

Mr. VOLKMER. That's my point. Thank you.

Judge RE. I have a thought that might be worth stating. It is in the public interest to have a plaintiff sue in the court because it permits an interpretation of the law. It is in the public interest for Congress and others to know how that law was construed. It may very well be that Congress would not agree, in which case it would have the opportunity to amend it. So I think that a plaintiff suing in our court is, to an extent, performing a public service by giving the court an opportunity to interpret the law. I would not wish to have that opportunity stifled unduly.

Mr. VOLKMER. Thank you.

Mr. SEIBERLING. Thank you. The gentleman from Virginia, Mr. Butler.

Mr. BUTLER. Thank you, Mr. Chairman.

Judge RE, I have several questions based on your experience which I think would be very helpful to us. Let me ask you to turn to subsection (b) (2) of section 1582. If the Court of International Trade has the special expertise necessary to adjudicate international trade problems, why is provision made in this subsection for the transfer of actions to a district court if it is determined that the moving party is entitled to a trial by a jury? What is the justification for moving jury trials from the Court of International Trade? Isn't or shouldn't the court be competent to conduct jury trials in civil actions commenced by the United States?

Judge RE. There is no doubt that the court is competent to conduct jury trials. As an article III court, it has the power, the expertise, and the skills. There is no question that it can.

The answer is that traditionally it has not. If you want the expertise of the court you go to the court. If the defendant says, "Well, I don't want to be deprived of my right to trial by jury," then the court will transfer the case to the district court. In effect, it is the way whereby we tamper least with the existing procedures of the court. It has no budgetary impact. But there is no doubt that if the Congress wanted the court to conduct a jury trial, we could. This was the easiest way of doing it, because the factual issue is not a question of what does the law mean. The interpretation and the application of the law would not be involved. It would be, for example, a question of motive, a question of fact, that would be passed upon by a jury. They are really two different kinds of questions.

Mr. BUTLER. Don't you make factual determinations in this court or wouldn't you—

Judge RE. My answer is simply that it is a matter of tradition and history of the procedures. Traditionally, the court has functioned without a jury.

Mr. SEIBERLING. Would the gentleman yield?

Mr. BUTLER. I'd be happy to yield, but do you realize we have already had one rejection of tradition this morning. I wonder if this might be another.

Mr. SEIBERLING. Is there any problem in having a panel from which you can draw jurors for this Court? Couldn't you use the same panel the district courts use?

Judge RE. It could be worked out. There is no doubt it could be accomplished. The only question is what is the easiest way of taking care of the matter.

Mr. BUTLER. Excuse me. I don't understand the difficulty of why this is easier. What is the problem with jury trials?

Judge RE. There is no problem. If the person wants a jury trial he may have it, and the only question is is he to have it here or in the district court. This is based upon the assumption that if he wishes to waive a jury trial and have the case remain in the U.S. Court of International Trade, there would be no jury trial. If he wishes a jury trial, the matter would be removed to the district court for the appropriate district.

Mr. BUTLER. You restate what this proposal says. Now what I'm trying to figure out in my mind is, is there a better reason than habit for not requiring the customs court to conduct jury trials, and I judge from what you say that there is not.

Judge RE. The reason would be habit, to use your word, which summarizes tradition and current practice plus the possibility of avoiding a complexity of procedure that would involve a budgetary impact. This way there would be no budgetary impact, but we would have no objection to it, Congressman Butler. Our interest is to perfect the status of the court and to get equity powers to permit us to do the major decisional work of the court, which is the interpretation and application of the tariff laws of the United States.

Mr. BUTLER. Yes, sir. Thank you. I think that's a policy decision for the Congress.

Judge RE. Yes, sir; no question about it.

Mr. BUTLER. May I turn to another problem, where I am at a loss and I have to rely somewhat on your background. Subsection (d) (1) of section 1581, which appears on page 5, provides for Court of International Trade review of the procedures followed by the International Trade Commission in advising the President regarding certain actions to protect domestic industries against injury from imports, but such review is possible only if the International Trade Commission has provided affirmative advice and only after the decision of the President has become final and has been published in the Federal Register.

This sounds like a situation of closing the barn door after the horse has already escaped. Why should we not authorize procedural review by the Court of International Trade on an accelerated basis, if necessary, before the President acts?

Judge RE. Well, first of all, there must be a case or controversy. Assuming there is a case or controversy, the scope of review and standard of review is strictly a matter of legislative policy. A problem that I see here is, what is the scope and standard of review where you review solely for the purpose of determining the procedural regularity of such actions? Professor Kenneth Culp Davis, an authority on administrative law, tells us that judicial review may be from zero percent to 100 percent. There may be express preclusion of any review, or total review, or trial de novo.

Well, procedural regularity would seem to mean something less than the arbitrary and capricious standard. Precisely what it would mean would depend upon a matter of judicial interpretation. I have one caveat about this standard. I hope it is not construed to be so narrow a review that a litigant may say, "I am not really getting meaningful review, in which case maybe I will go to the district court where they

do not have such a limitation upon the standard and scope of review." If that were to be the meaning, then we would be destroying the uniformity and consistency that is the very purpose for the existence of the court in fulfillment of article I, section 8 of the Constitution that requires that duties be imposed uniformly throughout the land.

Mr. BUTLER. My problem with what you just said is what happens if the court actually determines that there has been a procedural irregularity? What does the court do then?

Judge RE. Well, it is so hard to talk about how you would decide a case, I presume that the issue is the harm involved—

Mr. BUTLER. No, no. My question is, what would be the power of the Court of International Trade in the event it finds a procedural irregularity.

Judge RE. One thing that immediately comes to my mind is that you are empowered under the law to remand and have it done right; but, I was speaking of substantive review in addition to the procedural aspect. Suppose, in addition, you comply with the law meticulously, comply with the procedure meticulously, is the court permitted to go into the substance? That is the problem I find which would be even more significant.

Mr. BUTLER. Basically, what do you think happens to the President's order if it becomes final and is published in the Federal Register and is then subject to this provision for review? What can you do about it? Do you finalize it? What do you think your power would be under this legislation?

Judge RE. Well, I presume that the court can say, comply with your procedures; but the substantive question would be, is that a meaningful review? Judicial review must be meaningful. Even under the arbitrary and capricious standard, the court could look into the reasonableness of the decision—is it a reasonable decision? Is there principled decisionmaking on the part of the agency? So judicial review should be meaningful. It cannot be a sham. If it were to be a sham, it would be better to say that judicial review is precluded, because then we have the advantage of candor. Since procedural regularity is lower on the scale, from zero to 100, than the arbitrary and capricious standard, the question is, is it a meaningful review just to comply with the procedures? But that is what the bill provides and I can only conclude by saying that scope and standard of judicial review are matters of legislative policy.

Mr. BUTLER. I thank the gentleman. It seems to me, Mr. Chairman, that we have a responsibility to be fairly clear in legislation, at least when we create courts, and I would suggest, with all due respect, that we are not altogether clear both as to the reason for this provision and whether it does what the draftsmen intended. So I would hope that during the course of our inquiry we will come up with perhaps a better approach and one that is more defensible. I certainly appreciate your comments, Judge Re.

Judge RE. I do not know what more I could have added other than to explain that the provision will merely insure that the ITC or the special trade representative comply with the relevant statutory notice and procedural requirements.

Mr. BUTLER. Thank you. I yield back to the chairman.

Mr. SEIBERLING. Mr. Butler is one of our more meticulous and expert draftsmen here and there's no one who matches him for giving careful scrutiny to the language of the bills, and I think we benefit from that and I think it's well that we do get into these questions.

The other gentleman from Virginia, Mr. Harris.

Mr. HARRIS. Thank you, Mr. Chairman.

I handle the policy matters. My colleague does the drafting, which I think is a good division of labor.

I have seen testimony that the amount of cases, the amount of your docket is going down. Is that correct?

Judge RE. Yes; that is correct, sir.

Mr. HARRIS. Do you have those figures for us, what it is now?

Judge RE. We could submit that.

Mr. HARRIS. I would appreciate it, Mr. Chairman, and ask unanimous consent that that be made part of the record.

Mr. SEIBERLING. Without objection, that will be included in the record.

Judge RE. Yes, sir.

[See Judge Re's statement on p. 22.]

Mr. HARRIS. Do you feel that the amount of litigation would be increased by this bill?

Judge RE. Yes. Both this bill and the Trade Agreements Act of 1979 facilitate judicial review and make available for judicial review many more cases. There is no doubt about that.

Mr. HARRIS. And you feel that the court as currently established, as far as its personnel is concerned, could handle that increase?

Judge RE. No question about that. Absolutely.

Mr. HARRIS. Things are that slow over there that you could increase it substantially and not put on any additional personnel?

Judge RE. Well, it is not that things are that slow. It is that we are able to do more.

Mr. HARRIS. I see. Thank you, Mr. Chairman. I appreciate the testimony.

Mr. SEIBERLING. Judge Re, I just have one other general question. When we were dealing with the bill which created the bankruptcy courts as article III courts in the last Congress, we found that we were facing the opposition of the U.S. Judicial Conference. Nevertheless, we went ahead and did it. We also found when we were adding some district judgeships in certain districts beyond what the Judicial Conference recommended that they opposed that. We nevertheless did it.

Does the Judicial Conference have any position on this bill in terms of giving you the full powers, not just the status, but the full powers of an article III court which you don't have at the present time?

Judge RE. Mr. Chairman, the Judicial Conference supported that provision in an earlier bill. There is no question but that we are already an article III court.

Mr. SEIBERLING. I understand that.

Judge RE. What this bill does is give us additional powers and perfects that article III status in a variety of ways. There should be no objection from the Judicial Conference because, if anything, this bill will lessen the caseload of the district courts and, to that extent, should be welcomed by every district court judge in the United States.

Mr. SEIBERLING. Well, I'm glad to hear that. We don't like to seem to be in opposition to the Judicial Conference and it's nice to find them agreeing in this particular matter.

Are there any further questions? Our staff has a couple of questions.

Mr. GORDON. Judge Re, I'd like to bring your attention to proposed section 1582. As currently drafted, subsection (b) of that section would allow the transfer provision to apply to a civil action described in subsection (a). Do you believe that the transfer provision for a trial by jury should be limited only to civil penalty actions? As drafted in the legislation, 1582(a) has three subsections. It says civil actions may be commenced to recover a civil penalty, to recover upon a bond relating to the importation of merchandise and to recover customs duties; and subsection (b)(1) says any party to a civil action described in subsection (a) of this section who desires to have such action tried before a jury may, within 30 days after the date such action is commenced, file a motion with the Court of International Trade requesting a transfer of such action to the district court of the United States for the district in which such action arose. Should that provision be limited only to civil penalty actions?

Judge RE. No. I believe that if a person has a right to trial by jury and wishes to have it, he should have it.

Mr. GORDON. The second question I have for you pertains to proposed section 2639(a) which is on page 24, which provides for a presumption of correctness regarding the decision of the Secretary of the Treasury or his delegate. Should this presumption be extended to include the International Trade Commission and the administering authority?

Judge RE. Clearly, there is a presumption of regularity that applies to all administrative action. When a public official acts, there is a presumption that the public official has acted correctly and, as a matter of consistency in the draftsmanship, there is no reason why that same presumption of correctness should not be enjoyed by the other agencies involved in import transactions. The section merely codifies what in all likelihood would be the presumption of law that would prevail in the absence of a statute, and if you do it for one, you should do it for all.

Mr. GORDON. As the bill is currently drafted, the remand power of the Court of International Trade would be limited to civil actions commenced pursuant to section 515 or 516 of the Tariff Act of 1930. Is this limitation sufficient under the circumstances, or should the power be broadened to be coextensive with that of the Federal district courts?

Judge RE. It should not be so limited. Clearly, it should be coextensive with that of the district courts. In section 2643, pertaining to the relief the court may grant, the bill specifically authorizes the power of remand. It should not be limited.

Mr. GORDON. My final question is, subsection 701(a) which would coincide the effective date of H.R. 6394 with that of the Trade Agreements Act of 1979, the result being a retroactive effective date. Do you believe this is an essential ingredient of H.R. 6394 and, second, would making the bill prospective have a deleterious impact on any litigant who has instituted suit in the Customs Court based on the amendments made by the Trade Agreements Act of 1979?

Judge RE. To a certain extent, this present bill complements the Trade Agreements Act of 1979. For example, to the extent it gives us plenary power and law in equity, it facilitates doing the kind of judicial work that we have to do under that very important legislation. To make it effective as of the same date would be desirable. If it were to be prospective, you might have a hiatus. I presume it might be possible to have certain provisions effective as of January 1, 1980 and others not, but to give a general answer, I think that it would be preferable if it could be effective as of January 1, 1980.

From the standpoint of giving the court plenary powers, those provisions that do that are long overdue and clearly as to them, the sooner the better. The court has been greatly hampered in the past in not having those remedial powers.

Mr. GORDON. Thank you.

Mr. SEIBERLING. Well, thank you, Judge Re. I presume that if we pass this bill the existing court would continue. This is merely a revision of its statute which means the existing judges would also continue in office.

Judge RE. None of us would be out of a job, sir.

Mr. SEIBERLING. Well, I'm glad to hear that. I have been most impressed by your testimony.

Judge RE. That is very gracious of you, sir. Thank you very much.

[Complete statement of Judge Re follows:]

STATEMENT OF
HONORABLE EDWARD D. RE
CHIEF JUDGE, UNITED STATES CUSTOMS COURT
ON
THE CUSTOMS COURTS ACT OF 1980 (H.R. 6394)
BEFORE THE
SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
FEBRUARY 13, 1980

I appreciate your cordial invitation to appear before this Subcommittee, in connection with the proposed Customs Courts Act of 1980, H.R. 6394, to discuss the need for reform of the laws governing litigation before the United States Customs Court.

I believe I can best contribute to achieving the purpose of this hearing by highlighting what I perceive to be the three major achievements of the bill, and then answering any questions you may have.

The bill will implement the Constitutional mandate, which provides that "all Duties, Imports and Excises shall be uniform throughout the United States", by utilizing the national jurisdiction of the Customs Court to provide uniform and consistent interpretation and application of the laws involved in disputes arising out of import transactions.

Existing laws pertaining to the jurisdiction of the Customs Court, specifically limit the subject matter jurisdiction of the Customs Court, the class of persons with standing to institute actions, and the forms of remedies available before

the Court. As a consequence of these limitations, aggrieved persons have tried--frequently without success--to challenge administrative actions involving importations in the district courts: when the subject matter is not clearly assigned by law to the Customs Court; or, when the aggrieved person has no standing in the Customs Court; or, when the remedy sought is not available in the Customs Court.

When a plaintiff alleges that he has no effective access to, or cannot obtain an adequate remedy from, the Customs Court, the district courts are asked, usually unsuccessfully, to take jurisdiction over the dispute under one of their general or specific jurisdictional statutes.

Therefore, the uniformity required by the Constitution is provided for under existing law only in those relatively few administrative actions which are within the Customs Court's presently limited jurisdiction.

The Customs Courts Act of 1980 will resolve the problem by correcting the present ill-defined jurisdiction between the district courts and the Customs Court and by providing, in essence, that all law suits arising out of import transactions and brought against the United States, are within the exclusive subject matter jurisdiction of the proposed United States Court of International Trade.

A second and equally important achievement of the bill is that it will establish as matters of legislative policy two significant jurisprudential concepts pertaining to disputes arising out of agency actions affecting importations:

1. Those agencies which deal with importations are made subject to the same policy of judicial review as Congress has provided for other administrative agencies;
2. Persons adversely affected or aggrieved by agency actions arising out of import transactions are entitled to the same access to judicial review and judicial remedies as Congress has made available for persons aggrieved by actions of other agencies.

These concepts are not now reflected in existing law and, the existing statutory procedures have not been satisfactory. The law--both statutory and decisional--pertaining to judicial review is unpredictable, inconsistent, and, in some situations, unjust. The Congressional attention to these problems, as reflected in the bill, will extend to persons engaged in or affected by importations, the protection afforded by our traditional standards of due process and equal protection of the law. For these reasons alone, the Customs Courts Act of 1980 will contribute immeasurably to the public interest.

A third major achievement of the bill--one which complements the other two--has to do with the institution of the Customs Court itself. In addition to changing the name of the Court to reflect its expanded jurisdiction and judicial functions, the bill will clarify and confirm the Article III status of the Court, and provide it with the same plenary powers in law and equity as those possessed by the district courts of the United States.

In conclusion, personally, and on behalf of the United States Customs Court, I commend to your favorable consideration the provisions of this most significant legislation. I am confident that the Customs Courts Act of 1980 will be seen as an historical event in the evolution and development of the judicial machinery established by Congress for resolving disputes arising from international trade matters.

I wish to close my remarks, Mr. Chairman, by commending you for introducing this epoch-making legislation, the members of your Committee for their prompt consideration, and the Committee's staff for the excellent legislative draftsmanship reflected in the bill. Thank you for the opportunity of appearing before you.

UNITED STATES CUSTOMS COURT
ONE FEDERAL PLAZA
NEW YORK, N. Y. 10007

JOSEPH E. LOMBARDI
CLERK
212-264-2919-11

RICHARD J. DE MARCO
CHIEF DEPUTY CLERK

February 14, 1980

Mr. Leo M. Gordon
2137 Rayburn House Office Building
Washington, D. C. 20515

Dear Leo:

At yesterday's hearing we were asked to supply the Subcommittee with information pertaining to the current workload of the Court.

I am enclosing a copy of our Annual Report for the last fiscal year. If you require more information, please let me know.

Sincerely yours,


Joseph E. Lombardi
Clerk

Enclosure

*
*
* THE UNITED STATES CUSTOMS COURT *
*
* REPORT *
*
* For The Fiscal Year Ending *
*
* September 30, 1979 *
*

SUMMARY OF ALL CASES FILED AND TERMINATED
DURING FISCAL YEARS 1978-1979

	FY 1978	FY 1979	Increase + Decrease -
Cases Pending at Beginning of Year	96,821	79,628	- 17,193
Cases Filed During Year	2,946	2,247	- 699
Cases Terminated During Year	19,588	7,658	- 11,930
Cases Pending at End of Year	79,628*	74,217	- 5,411

*Revised

**SUMMARY OF CASES FILED AND TERMINATED BY TYPE OF CASE
DURING FISCAL YEARS 1978-1979**

	FY 1978	FY 1979	Increase + Decrease -
<u>PROTESTS</u>			
Pending at Beginning of Year	7,129	3,106	- 4,023
Filed During Year	97	1	- 96
Terminated During Year	3,569	1,178	- 2,391
Pending at End of Year	3,106*	1,929	- 1,177
<u>REAPPRAISEMENTS</u>			
Pending at Beginning of Year	75,845	62,034	-13,811
Filed During Year	11	68	+ 57
Terminated During Year	13,822	4,317	- 9,505
Pending at End of Year	62,034	57,785	- 4,249
<u>APPLICATIONS FOR REVIEW</u>			
Pending at Beginning of Year	2	0	- 2
Filed During Year	0	0	0
Terminated During Year	2	0	- 2
Pending at End of Year	0	0	0
<u>REMANDS OF PROTESTS</u>			
Pending at Beginning of Year	13	6	- 7
Filed During Year	0	0	0
Terminated During Year	7	1	- 6
Pending at End of Year	6	5	- 1
<u>CIVIL ACTIONS</u>			
Pending at Beginning of Year	13,832	14,482	+ 650
Filed During Year	2,838	2,178	- 660
Terminated During Year	2,188	2,162	- 26
Pending at End of Year	14,482	14,498	+ 16

*See first page.

The Customs Courts Act of 1970, as implemented by the Rules of the United States Customs Court, permits an importer to consolidate into a single civil action any number of denied protests and entries of merchandise involving the same category of merchandise and presenting a common issue.

The 2,717 new civil actions filed in the 1978 fiscal year included approximately 9,665 denied protests covering 26,809 entries of merchandise.

The 2,094 new civil actions filed in the 1979 fiscal year included approximately 8,200 denied protests covering 22,444 entries of merchandise.

SUMMARY OF ALL CASES TERMINATED
BY METHOD OF DISPOSITION
DURING FISCAL YEARS 1978-1979

Method	FY 1978		FY 1979	
	Decisions	Cases	Decisions	Cases
Tried/Heard Submitted	58	320	54	77
Submitted on Agreed Statement of Facts	418	3,763	466	4,163
Dispositive Orders	<u>99</u>	<u>253</u>	<u>70</u>	<u>681</u>
Subtotal	575	4,336	590	4,921
Reserve File Dismissals	n/a	399	n/a	289
8.3 Dismissals	n/a	68	n/a	131
Suspension Disposition File Dismissals	n/a	2,565	n/a	729
Abandonments	<u>n/a</u>	<u>12,220</u>	<u>n/a</u>	<u>1,588</u>
Subtotal	<u>n/a</u>	<u>15,252</u>	<u>n/a</u>	<u>2,737</u>
TOTAL	<u>575</u>	<u>19,588</u>	<u>590</u>	<u>7,658</u>

SUMMARY OF PROTESTS TERMINATED
BY METHOD OF DISPOSITION
DURING FISCAL YEARS 1978-1979

Method	FY 1978		FY 1979	
	Decisions	Cases	Decisions	Cases
Tried/Heard Submitted	6	125	2	3
Submitted on Agreed Statement of Facts	53	395	24	192
Dispositive Orders	<u>24</u>	<u>140</u>	<u>16</u>	<u>461</u>
Subtotal	83	660	42	656
Reserve File Dismissals	n/a	0	n/a	0
8.3 Dismissals	n/a	12	n/a	29
Suspension Disposition File Dismissals	n/a	2,207	n/a	244
Abandonments	<u>n/a</u>	<u>690</u>	<u>n/a</u>	<u>249</u>
Subtotal	<u>n/a</u>	<u>2,909</u>	<u>n/a</u>	<u>522</u>
TOTAL	<u>83</u>	<u>3,569</u>	<u>42</u>	<u>1,178</u>

SUMMARY OF REAPPRAISEMENTS TERMINATED
BY METHOD OF DISPOSITION
DURING FISCAL YEARS 1978-1979

Method	FY 1978		FY 1979	
	Decisions	Cases	Decisions	Cases
Tried/Heard Submitted	5	131	4	22
Submitted on Agreed Statement of Facts	216	3,127	201	3,444
Dispositive Orders	<u>6</u>	<u>9</u>	<u>4</u>	<u>169</u>
Subtotal	227	3,267	209	3,635
Reserve File Dismissals	n/a	0	n/a	0
8.3 Dismissals	n/a	7	n/a	1
Suspension Disposition File Dismissals	n/a	28	n/a	334
Abandonments	<u>n/a</u>	<u>10,520</u>	<u>n/a</u>	<u>347</u>
Subtotal	<u>n/a</u>	<u>10,555</u>	<u>n/a</u>	<u>682</u>
TOTAL	<u>227</u>	<u>13,822</u>	<u>209</u>	<u>4,317</u>

SUMMARY OF CIVIL ACTIONS TERMINATED
BY METHOD OF DISPOSITION
DURING FISCAL YEARS 1978-1979

Method	FY 1978		FY 1979	
	Decisions	Cases	Decisions	Cases
Tried/Heard Submitted	44	56	48	52
Submitted on Agreed Statement of Facts	149	241	240	526
Dispositive Orders	<u>69</u>	<u>104</u>	<u>50</u>	<u>51</u>
Subtotal	262	401	338	629
Reserve File Dismissals	n/a	399	n/a	289
8.3 Dismissals	n/a	49	n/a	101
Suspension Disposition File Dismissals	n/a	330	n/a	151
Abandonments	<u>n/a</u>	<u>1,009</u>	<u>n/a</u>	<u>992</u>
Subtotal	<u>n/a</u>	<u>1,787</u>	<u>n/a</u>	<u>1,533</u>
TOTAL	<u>262</u>	<u>2,188</u>	<u>338</u>	<u>2,162</u>

SUMMARY OF APPLICATIONS FOR REVIEW TERMINATED
BY METHOD OF DISPOSITION
DURING FISCAL YEARS 1978-1979

Method	FY 1978		FY 1979	
	Decisions	Cases	Decisions	Cases
Tried/Heard Submitted	2	2	0	0
Submitted on Agreed Statement of Facts	0	0	0	0
Dispositive Orders	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>
Subtotal	2	2	0	0
Reserve File Dismissals	n/a	n/a	n/a	n/a
8.3 Dismissals	n/a	n/a	n/a	n/a
Suspension Disposition File Dismissals	n/a	n/a	n/a	n/a
Abandonments	<u>n/a</u>	<u>n/a</u>	<u>n/a</u>	<u>n/a</u>
Subtotal	<u>n/a</u>	<u>n/a</u>	<u>n/a</u>	<u>n/a</u>
TOTAL	<u>2</u>	<u>2</u>	<u>0</u>	<u>0</u>

SUMMARY OF REMANDS OF PROTESTS
BY METHOD OF DISPOSITION
DURING FISCAL YEARS 1978-1979

Method	FY 1978		FY 1979	
	Decisions	Cases	Decisions	Cases
Tried/Heard Submitted	1	6	0	0
Submitted on Agreed Statement of Facts	0	0	1	1
Dispositive Orders	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>
Subtotal	1	6	1	1
Reserve File Dismissals	0	0	n/a	n/a
8.3 Dismissals	0	0	n/a	n/a
Suspension Disposition File Dismissals	0	0	n/a	n/a
Abandonments	<u>1</u>	<u>1</u>	<u>n/a</u>	<u>n/a</u>
Subtotal	<u>1</u>	<u>1</u>	<u>n/a</u>	<u>n/a</u>
TOTAL	<u>2</u>	<u>7</u>	<u>1</u>	<u>1</u>

SUMMARY OF DECISIONS PUBLISHED
DURING FISCAL YEARS 1978 - 1979

	<u>FY 1978</u>	<u>FY 1979</u>
C.D.s	55	54
A.R.D.s	2	0
V.D.s	1	0
C.R.D.s	<u>16</u>	<u>16</u>
TOTAL	74	70

SUMMARY OF DECISIONS PUBLISHED IN ABSTRACT FORM
DURING FISCAL YEARS 1978-1979

	<u>FY 1978</u>	<u>FY 1979</u>
Classification	199	212
Reappraisalment	237	263
Valuation	<u>0</u>	<u>1</u>
TOTAL	436	476

SUMMARY OF APPEALS TO THE UNITED STATES COURT OF CUSTOMS AND
PATENT APPEALS FOR FISCAL YEARS 1978 - 1979

The following table shows the number of appeals taken to the United States Court of Customs and Patent Appeals and the results of the appeals disposed of:

	<u>FY 1978</u>	<u>FY 1979</u>																					
Appeals pending at beginning of year	16	16																					
Appeals filed during year	18	32																					
Appeals decided during year	18	26																					
<table style="width: 100%; border-collapse: collapse; margin-left: 40px;"> <thead> <tr> <th style="width: 60%;"></th> <th style="text-align: center; width: 20%;"><u>FY 1978</u></th> <th style="text-align: center; width: 20%;"><u>FY 1979</u></th> </tr> </thead> <tbody> <tr> <td>Affirmed</td> <td style="text-align: right;">7</td> <td style="text-align: right;">17</td> </tr> <tr> <td>Reversed</td> <td style="text-align: right;">7</td> <td style="text-align: right;">3</td> </tr> <tr> <td>Reversed and remanded ..</td> <td style="text-align: right;">2</td> <td style="text-align: right;">1</td> </tr> <tr> <td>Modified</td> <td style="text-align: right;">0</td> <td style="text-align: right;">1</td> </tr> <tr> <td>Dismissed</td> <td style="text-align: right;">2</td> <td style="text-align: right;">3</td> </tr> <tr> <td>Vacated and remanded ...</td> <td style="text-align: right;">0</td> <td style="text-align: right;">1</td> </tr> </tbody> </table>				<u>FY 1978</u>	<u>FY 1979</u>	Affirmed	7	17	Reversed	7	3	Reversed and remanded ..	2	1	Modified	0	1	Dismissed	2	3	Vacated and remanded ...	0	1
	<u>FY 1978</u>	<u>FY 1979</u>																					
Affirmed	7	17																					
Reversed	7	3																					
Reversed and remanded ..	2	1																					
Modified	0	1																					
Dismissed	2	3																					
Vacated and remanded ...	0	1																					
Appeals pending at close of year	16	22																					

SUMMARY OF COMMISSIONS AND LETTERS ROGATORY
ISSUED DURING FISCAL YEARS 1978 - 1979

The following table shows the number of commissions and letters rogatory issued to examine witnesses residing in foreign countries or in a distant part of the United States:

	<u>FY 1978</u>	<u>FY 1979</u>
Commissions issued during the year	2	0
Letters rogatory issued during year	<u>0</u>	<u>0</u>
TOTAL	2	0

Mr. SEIBERLING. All right. Our next witnesses will be Richard J. Davis on behalf of the Department of Treasury and David Cohen representing the Department of Justice. Mr. Davis is Assistant Secretary of Treasury for Enforcement and Operations, and Mr. Cohen is Branch Director of the Commercial Litigation Branch, Civil Division, Department of Justice. Welcome, gentlemen. Have you any agreement as to who is to proceed first?

Mr. DAVIS. I think I would proceed first and, with the committee's permission, I will just summarize my statement.

Mr. SEIBERLING. Fine. Without objection, we will include your entire statement in the record. Proceed.

Mr. DAVIS. Thank you very much.
[Complete statement follows:]

For Release on Delivery

STATEMENT OF
THE HONORABLE RICHARD J. DAVIS
ASSISTANT SECRETARY (ENFORCEMENT AND OPERATIONS)
DEPARTMENT OF THE TREASURY
BEFORE THE COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW
OF THE HOUSE OF REPRESENTATIVES

Mr. Chairman, Members of the Committee:

I am pleased to have the opportunity to testify today in support of H.R. 6394, the Customs Courts Act of 1980. This Department supported S. 1654, a similar bill sponsored by Senator DeConcini, which was passed late last year by the Senate. We commend you and your staff, Mr. Chairman, for the efforts that have been devoted to this bill and fully support its enactment.

This bill would create a comprehensive system of judicial review of civil actions arising from import transactions and other statutes affecting international trade. It would clarify and expand the jurisdiction of the Customs Court and insure that the court has the remedial powers to redress injuries suffered by persons engaged in international trade.

We in the Treasury Department have long recognized that the United States Customs Court was being underutilized while increased litigation having a significant impact on international trade was being instituted in the district courts. Moreover, in the last two years, there have been significant legislative initiatives in the area of international trade. Both the Trade Agreements Act of 1979 and the Customs Procedural Reform and Simplification Act of 1978 have expanded the rights of adversely affected parties to judicial review. Consequently, we anticipate that unless this bill is enacted, a significant increase in trade litigation will add to the enormous workload of already overburdened district courts.

To illustrate this point, a recent amendment to section 592 of the Tariff Act of 1930, the so-called fraud provision, authorizes a trial de novo in an action to collect a penalty assessed under that section with the burden placed on the Government to establish the degree of culpability of the violator. Prior to passage of this amendment, the structure of the law all but eliminated judicial review of these penalties. Now, we anticipate judicial review will be sought more frequently. Under existing law, the Government is required to institute such collection actions in the district courts. The bill under consideration today would require such actions to be commenced in the Court of International Trade. While it is difficult

to estimate the number of court actions per year which will be filed as a result of new section 592, we believe the number will far exceed the approximately 200 cases filed in the district courts in FY 1979. In our view, judicial efficiency and economy require that the many technical issues which surround penalties arising out of false and fraudulent Customs transactions be considered by a court versed in this somewhat esoteric area of the law.

We are concerned with one provision in H.R. 6394 which relates to the review of rulings or the refusal to issue or change a ruling regarding technical Customs matters such as classification, valuation, entry requirements, and vessel repairs. New section 1581(j)(2) would give the Court of International Trade jurisdiction to review such rulings or the refusal to issue or change such rulings if a person demonstrates that he would be irreparably harmed by having to wait and file a protest against later Customs action based on the ruling.

The Customs Service issued over 13,800 rulings to members of the public in 1979. Under current law, judicial review of these rulings can be obtained by an importer only after an importation has occurred and pursuant to an administrative protest which is denied. Similarly, an American manufacturer, producer, or wholesaler of merchandise similar to the imported merchandise may only obtain review of rulings affecting his products pursuant to section 516 of the Tariff Act by filing a petition with the Customs Court challenging the ruling of the Customs Service when it is applied to an actual importation. In each instance, the Customs Service decision is reviewed by the Customs Court in a trial de novo.

We strongly believe that this current method of obtaining review ought to be maintained. The keystone under existing law is the existence of an actual importation. It is essential for the stability of the ruling process that the treatment of an actual importation be at issue, otherwise the court will be overburdened with hypothetical cases. Judicialization of the Customs informal ruling process will discourage it from providing useful guidance to the public. We also do not believe the Congress would want the new Court of International Trade to replace the administrative agency now assigned the ruling responsibility. In addition, very few importers would import merchandise, protest and pay the duties in order to challenge Customs Service treatment of certain merchandise if they could obtain judicial review without an actual importation and without the payment of duties.

However, if the Committee finds that there are circumstances in which the traditional method of obtaining judicial review of Customs Service rulings is too restrictive and that some modification is necessary, we strongly believe that any modification should be extremely limited and applicable only to those instances in which a modification is truly necessary.

In any event, there is no justification for extending this remedy to American manufacturers, producers, and wholesalers, as this bill would do. Absent an importation which is adequately covered by section 516, any harm to an American manufacturer is speculative at best. In the Senate bill the opportunity to obtain judicial review prior to exhaustion of administrative remedies applied only to importers. As we have stated, we do not believe any changes are necessary. However, if the Committee believes otherwise, we recommend that the Senate provisions, with the modifications indicated below, be adopted. Section 516 has long provided an adequate remedy to American manufacturers, producers, and wholesalers. During the past several years both the House Ways and Means Committee, and the Senate Finance Committee considered amendments to section 516. Although 516 was expanded to include parties such as American labor unions which, traditionally, had been excluded from its coverage, we find it significant that these committees did not alter the basic statute or provide an opportunity to challenge a ruling or the refusal to issue or change a ruling before the importer actually brought the competitive product into the country.

Furthermore, it is likely that an opportunity to challenge rulings or the failure to issue or change rulings would become an unintended tactical weapon of American manufacturers and producers in their constant battle with importers for markets, risking the creation of undesirable trade barriers.

Finally, if there is to be a provision for declaratory review of occasional rulings, it should be narrowly confined to those persons who demonstrate actual need. As now drafted, the bill appears to allow much broader use because of the general language of section 2631(f) on standing, section 2636(g) on time limits for suits, and the absence of any requirement that the Customs Service be given adequate time to respond to a request for a ruling.

I have attached as part of my statement technical comments and suggestions which I hope this Committee will consider.

I will be pleased to answer any questions the Committee may have.

TECHNICAL COMMENTSTitle IISection 1581(a)(4)

The Court of International Trade would be granted exclusive jurisdiction over a civil action where the administrative decision involves the exclusion of merchandise from entry or delivery or a demand for redelivery to Customs custody (including a notice of constructive seizure) under any provision of the customs laws.

The parenthetical phrase "including a notice of constructive seizure" is not appropriate. Seizure, whether actual or constructive, does not occur when merchandise is excluded or there has been a demand for redelivery. Seizure occurs where the law provides for seizure subject to forfeiture, and where a statute authorizes seizure to secure payment of a penalty.

The Court of International Trade has not, other than in this section, been given jurisdiction over actions involving seizures and forfeitures. The parenthetical phrase should be deleted.

Section 1581(j)(2)

As noted, we prefer no provision granting an exception to the traditional method of obtaining judicial review, but if an exception is included we prefer a provision similar to that contained in S. 1654. The paragraph should be amended to read:

The Court of International Trade shall not have jurisdiction -- . . .

(2) to review any ruling or refusal to issue or change a ruling relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, and similar matters issued by the Secretary of the Treasury other than in connection with a civil action commenced under subsection (a) of this section, except that this exclusion shall not apply if a person, after exhausting such procedures as the Secretary of the Treasury may by rule provide, demonstrates that, without a substantial doubt, it would be commercially impractical to obtain judicial review under subsection (a), and the person would otherwise suffer substantial irreparable injury. If the person fulfills the conditions set forth in the preceding sentence and demonstrates that the Secretary's ruling or refusal to change a ruling is arbitrary or capricious or otherwise contrary to law, the Court shall award appropriate relief.

Section 1582(b)

In paragraph (1), subsection (a) should be corrected to read subsection (a)(1).

Since a section 592 case may involve entries in several districts, subsections 1582(b)(1) and (b)(2) should be changed to indicate "an appropriate district court". Subsection 1582(b)(2) currently contains no provision to prevent forum shopping by requesting a jury trial, obtaining a transfer of the case to a District Court, and then withdrawing the request. A new sentence should be added at the end of the subsection as follows: "If the jury trial motion is later withdrawn or denied, the case shall be remanded to the Court of International Trade for further proceedings."

Section 1583

This provision grants the Court of International Trade exclusive jurisdiction to render judgment upon any counterclaim of the United States to recover Customs duties relating to such transaction. Inasmuch as most actions against the United States to recover Customs duties arise under section 514 and payment of "customs duties relating to such transactions" are a jurisdictional prerequisite, that phrase would have little, if any, effect. In our opinion, the Court should be given exclusive jurisdiction over any counterclaim of the United States to recover any duties or penalties arising out of an import transaction which are owed by the importer to the Government. This would avoid numerous actions by the Government against the same importer in the Court of International Trade to recover unpaid Customs duties pursuant to section 1583(a)(1) and (3).

Section 1584

In both subsection (a) and subsection (b) the word "shall", the first time it is used in each subsection, should be changed to "may" in order to give the District Courts discretion to dismiss a case where institution of the action in that Court was for purposes of evading the rules of the Court of International Trade or for any other improper reason.

Title IIISection 2637(a)

The provision relating to exhaustion of administrative remedies should include a cross-reference to section 1581(j)(2) which, in effect, permits Court review prior to exhaustion of the administrative remedies provided in the Tariff Act. The provision should also address the disposition of monies found by the Court of International Trade to have been unjustly collected by the Government where the action resulting in the finding was not brought by the importer. This could occur where the importer's surety commenced the civil action. Under the law the surety may recover only the amount of the liquidated duties, charges or other exactions that he paid on the entries. The balance of the monies should remain in the Treasury of the United States.

Section 2643(c)(1)

This provision would permit the Court of International Trade to issue a preliminary or permanent injunction upon the motion of a person who would have the right to commence a civil action after exhausting all appropriate administrative remedies. The Court is directed to consider whether the person making the request will be irreparably harmed if such injunction is not granted and the effect of granting such injunction on the public interest. The relationship between this provision, section 2637 and section 1581(j)(2) is not clear. We prefer the similar provision, section 2643(a), contained in S. 1654, which permits the Court to order an appropriate form of relief, including injunctive, but apparently within the confines of the jurisdictional sections and the provision relating to exhaustion of administrative remedies.

Section 2646(1) and (3)

In establishing the precedence to be given cases in the Court of International Trade, the exclusion of perishable merchandise contained in (1) should be expanded to include the redelivery of such merchandise. With regard to (3), the words "commenced under section 515 of the Tariff Act of 1930" are unnecessary and should be deleted.

Title IVSection 2602

The comments relating to section 2646 are applicable to this section.

Section 1546(1)

2 It is inappropriate to place review of the denial of a Customs broker's license under section 641(a) of the Tariff Act of 1930 in the Court of Appeals for International Trade, Patents, and Trademarks, because there is no statutory requirement that the Secretary construct a formal record to support such actions. Review of such denials should be left to a trial court where such a record may be constructed. It would be a substantial and unwarranted burden to require the Secretary to construct such a record in view of the small number of cases in which a denial is actually contested.

TESTIMONY OF RICHARD DAVIS, ASSISTANT SECRETARY OF THE TREASURY FOR ENFORCEMENT OPERATIONS

Mr. DAVIS. Mr. Chairman, members of the subcommittee: The Treasury Department strongly supports this legislation. It is important legislation for a variety of reasons. First, as Chief Judge Re noted, it provides in one place a comprehensive statement of the jurisdiction of the Customs Court and would remove confusion as to whether the appropriate place to bring an action is the Customs Court or the district courts.

Second, it will add to the possibility for use of the Customs Court at a time when our district courts are increasingly overworked, both in terms of the amount of litigation and the variety of problems that they have to deal with.

Third, and very importantly, it provides the Court of International Trade with the opportunity to deal with a wide range of customs issues to better assure that the customs laws are being interpreted in a uniform fashion. We in the Treasury Department spend a lot of time trying to improve our abilities to have uniform rulings throughout the customs service. This provides for better assurances of uniformity in judicial interpretations of the customs laws. We should not be in a position in which the classification and valuation of a particular product varies depending on the port through which it enters.

We have a few concerns, however, with the bill, and some suggested modifications. The principal one, and the one I will discuss now, relates to judicial review of customs' rulings. There are approximately 13,800 such rulings issued every year. We believe that it would be appropriate to continue the current practice under which these rulings are not reviewable judicially until the point of importation, that is, until there's actually an importation which has gone through the administrative process and until there is an actual case or controversy. We think there's risk even in the version the committee has before it which attempts to limit judicial review to situations of irreparable harms. We believe that once that kind of window is opened, we will have a tendency to judicialize the administration of the customs service and there will be the greater risk of the courts having to deal with hypothetical cases as opposed to real controversies. We think the current system provides adequately for full judicial review by all interested parties. The importer who actually brings in merchandise has an opportunity to go through the protest process and ultimately to seek judicial review as a remedy. The competitors of the importer, the American manufacturers and others, have the opportunity, through the so-called section 516 procedure, to challenge the actions of the customs service.

We believe that system would be better left in place than to go to a system which opens the door to judicial review of Custom's rulings, where there is no actual importation.

There are some other technical points which are covered in the testimony, but I think I will rest on the statement. Thank you.

Mr. SEIBERLING. Thank you. Mr. Cohen.

TESTIMONY OF DAVID M. COHEN, BRANCH DIRECTOR, COMMERCIAL LITIGATION BRANCH, CIVIL DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. COHEN. Mr. Chairman, members of the subcommittee, I am pleased to appear here today on behalf of the Department of Justice in support of H.R. 6394. As noted in our prepared statement, which I would like to submit for the record, the Department of Justice supports the bill because it will accomplish a number of goals which the Department has supported for some years and continues to support. These goals include a clarification of the very great jurisdictional confusion which exists in this area, better utilization of the Customs Court's resources, clarification of the Customs Court's remedial powers, and most importantly, enhancement of the ability of persons who believe they have been aggrieved by Government decisions in this area to gain access to the courts.

Mr. Chairman, I only wish to mention two brief points which we believe should be clarified in the bill.

First, I would support Mr. Davis' testimony with respect to proposed section 1581(j)(2). This provision, although phrased in negative terms, in fact contains a new grant of jurisdiction to the court to review rulings issued by the Customs Service. For the reasons contained in our prepared statement, we believe this jurisdictional grant should be a narrow one. If the provision is not narrowly drawn, the provision possesses the potential of destroying the manner in which review of these actions has been obtained in the past. In our view, there is no compelling reason to completely alter this past method which has worked well.

Finally, Mr. Chairman, we believe that the provision of the bill which is concerned with the issuance of injunctive relief requires some slight clarification. We believe this provision should make it clear that injunctive relief should be granted only in exceptional circumstances and only after a balancing test which takes into account the effect that the denial of the injunction would have upon the plaintiff and the effect the granting of the injunction would have upon the public interest. Thank you, Mr. Chairman.

[Complete statement follows:]



U.S. Department of Justice

Washington, D. C. 20530

STATEMENT

OF

DAVID M. COHEN
BRANCH DIRECTOR
COMMERCIAL LITIGATION BRANCH
CIVIL DIVISION

BEFORE

THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

H.R. 6394

ON

FEBRUARY 13, 1980

STATEMENT OF DAVID M. COHEN
BRANCH DIRECTOR, COMMERCIAL LITIGATION BRANCH
CIVIL DIVISION, DEPARTMENT OF JUSTICE
ON H.R. 6394

Mr. Chairman, members of the committee, I am pleased to appear before you today to express the support of the Department of Justice for H.R. 6394.

This bill finally completes a task which was begun over 10 years ago when Congress modernized the procedure of the United States Customs Court by means of the Customs Courts Act of 1970.

At the time that procedural reform in the Customs Court, was considered by Congress, the Assistant Attorney General in charge of the Civil Division promised the then Chief Judge of that Court that the Department would support a project to clarify and expand the jurisdiction of the Court after the Congress had enacted the very urgently required procedural reforms it then had before it.

Several years later, the Department determined that the time had arrived to fulfill the promise made in 1970.

We believed that the time was appropriate because of several factors.

The jurisdictional statutes of the Customs Court had been drafted at a time when tariff rates were an extremely important factor in international trade. The drafters of the statutes were aware of this fact and they were principally concerned with the need to establish methods for

obtaining judicial review of decisions relating to the classification and valuation of imported merchandise - decisions which have decisive impact upon the rate of duty ultimately assessed. While the statutes did not always explicitly recognize this principal concern, the fact is that the entire jurisdictional scheme was and is best suited to facilitate challenges to classification and valuation decisions.

As tariff rates decreased as a result of multilateral negotiations, so called "non-tariff measures", such as anti-dumping and countervailing duties, assumed greater importance. As might be expected, the number of suits instituted by individuals who alleged that they had been aggrieved by governmental decisions relating to non-tariff measures also increased.

Many of these suits were instituted in the district courts. While there were a number of reasons which no doubt supported a decision to institute these suits in the district courts rather than in the Customs Court, it is certain that the reason included the fact that it was often extremely difficult to determine in advance whether a suit relating to non-tariff measures could be made to fit into the jurisdictional scheme relating to the Customs Court - a scheme which was principally designed to enable individuals to challenge classification and valuation decisions. Another reason for the institution of these suits in the district courts can be found in the

fact that the remedial powers of the Customs Court are limited, principally in relation to award of injunctive relief.

Whatever the reasons, in large measure, the district courts were properly reluctant to endanger the uniformity of decisions which Congress obviously desired in this area when it vested exclusive jurisdiction in a court, the Customs Court, which possesses nationwide jurisdiction. Accordingly, most of these suits were dismissed on the grounds that the Customs Court possessed exclusive jurisdiction to entertain them once it was demonstrated that there was a means - no matter how convoluted - by which the Customs Court could obtain jurisdiction over the suits.

As the number of these suits and dismissals for lack of jurisdiction increased, we became increasingly concerned by the fact that large numbers of individuals, who believed they possessed real grievances in this area, were expending time and resources in a futile attempt to obtain judicial review on the merits of their causes.

At the same time, as a result of the procedural reforms enacted in 1970 and the decline in importance of tariff rates, the caseload of the Customs Court began to decline. Significantly, this decline began at approximately the same time as the tremendous increase in the calendars of the district courts.

As a result of these factors, we became convinced that a real need and a real opportunity existed with respect to

the Customs Court. We believed that the numerous suits dismissed by the district courts demonstrated a real need to clarify the scope of the jurisdiction and the powers of the Customs Court. At the same time, we believed that the underutilization of the resources of the Customs Court presented us with an opportunity to relieve the overburdened district courts of some of their caseload while, at the same time, taking advantage of both of the Customs Court's expertise and the ability to achieve uniformity of decisions through the Court's nationwide jurisdiction.

Of course, others recognized the same need and opportunity at approximately the same time. These individuals and organizations included the Court itself, the organized bar, and the Administrative Conference of the United States.

In view of this combination of factors, the Department in 1977 brought together a number of concepts which had been expressed by others as well as a number of ideas of its own, and included them in a proposed bill which was introduced as S.2857 during the last Congress by Senator DeConcini.

Subsequently, a large number of the concepts contained in S.2857 were enacted into law as Title X of the Trade Agreements Act of 1979, P.L. 96-39. The remaining portions of the bill were refined, as a result of very numerous discussions with interested groups, and incorporated into S.1654, again introduced by Senator DeConcini, which passed the Senate last year.

The bill before us today, H.R. 6394, further improves upon and refines the concepts contained in S.1654. Indeed, you and your staff are to be congratulated, Mr. Chairman, on the excellent work in this complex area which H.R. 6394 so clearly reflects.

In our view, H.R. 6394 greatly improves upon the concepts which were contained in S.2857 and would clearly accomplish all of the goals which the Department desired to achieve when it first proposed what became S.2857. Without denigrating the continuing importance of cases involving the classification and valuation of merchandise, the bill clarifies the demarcation between the jurisdiction of the Customs Court and the district courts and completes the effort in this regard which was begun in the Trade Agreements Act of 1979. The bill expands the remedies available in the Customs Court and, if enacted, the bill should relieve the district courts of some of their caseload, and thus make more efficient utilization of the resources of the Customs Court. Finally, the bill will take advantage of the expertise of the Customs Court and will ensure uniformity in the important area of international trade through the nationwide jurisdiction of the Customs Court.

In sum, Mr. Chairman, the Department of Justice supports H.R. 6394 because it will clearly achieve a number of goals which are supported by the Department.

Indeed, aside from some relatively minor points contained in an appendix to our prepared statement, which I would like to submit for the record, there are only two improvements which I should like to mention for the subcommittee's consideration.

The first point concerns the availability of judicial review of rulings issued by the Customs Service. We recognize the need, in exceptional circumstances, for an importer to obtain review, in advance of a transaction, of the manner in which the Customs Service proposes to treat particular merchandise. However, the availability of review prior to an actual transaction must remain a limited exception to the general rule that judicial review is to be available only after merchandise is imported, a protest is filed and denied, and the duties assessed are paid. If availability of review by some other means is not limited to truly exceptional circumstances, the exception will surely swallow the rule. Faced with a choice, no importer would choose to pay the duties assessed and sue for a refund when judicial review is available pursuant to a means which requires no investment of funds. Mr. Chairman, for these reasons as well as the reasons set forth in the appendix to our prepared statement, we strongly prefer the language of the provision contained in proposed section 1581(i)(2) of S.1654, over the language of section 1581(j)(2) of H.R. 6394.

In addition, Mr. Chairman, we believe, at a minimum, proposed section 1581(j)(2) must make clear the question of standing, the definition of a "refusal to rule", the application of a statute of limitations, and the appropriate relief to be awarded.

Finally, Mr. Chairman, I would like to mention proposed section 2643 of H.R. 6394 which would empower the Customs Court, for the first time, to grant injunctive relief in all types of cases. Because this provision would grant the Customs Court a relatively new power, and because the bill would repeal the restrictions on the exercise of the power to issue injunctions contained in the Trade Agreements Act of 1979, we wish to see the statute make it clear that injunctive relief should be issued only in truly extraordinary circumstances and only as the result of a balancing test which includes a consideration of the effect, if any, that the issuance of an injunction would have upon the public interest. We have suggested some language to accomplish this purpose in the appendix to our prepared statement.

Mr. Chairman, as I have noted, the two suggested modifications I have mentioned are relatively minor. However, we would hope that the committee will give them serious consideration.

APPENDIX

Proposed section 1581(i) contains a major expansion of the jurisdiction now possessed by the Customs Court. This provision slightly rewords proposed section 1581(h)(i) of S.1654 and we have no particular preference as to which wording is adopted. We might note, however, that it might be preferable to use the term "arises under" when referring to one of the specified trade acts or to a Constitutional provision, treaty, Executive agreement or Executive order since the courts are familiar with that term due to its use in 28 U.S.C. 1331.

We also wish to make it clear that, in our view, both versions of this provision contain two requirements which must be fulfilled before the court's jurisdiction will attach: the civil action must arise directly from an import transaction and involve one of the specified trade statutes or the civil action must arise directly from an import transaction and involve a provision of the Constitution, a treaty, an Executive agreement or an Executive order which directly and substantially involves international trade. Thus, whether the civil action involves one of the statutes specified or a treaty, constitutional provision, Executive agreement or Executive order, the civil action must arise directly from an import transaction.

We would also note that proposed section 1581 of this bill, unlike proposed section 1581 of S.1654, does not contain provisions which make it clear that section 1581 cannot be utilized to circumvent the exclusive nature of the remedy contained in section 516A of the Tariff Act of 1930. We would agree that a legislative provision to this effect, such as proposed sections 1581(a)(2) and 1581(h)(2) of S.1654, is unnecessary so long as the legislative history of the bill makes it clear that there is no intent upon the part of the Congress to permit circumvention of section 516A of the Tariff Act of 1930 by means of proposed sections 1581(a) and 1581(j).

Proposed section 1581(j)(2) first restates existing law by providing that the Court of International Trade shall not possess jurisdiction to review a ruling of the Customs Service or a refusal to issue or change a ruling other than in connection with the type of civil action now within the jurisdiction of the Customs Court.

The subsection then proceeds to provide for an exception from this prohibition in those cases where a plaintiff demonstrates that he would be irreparably harmed if required to obtain judicial review in this traditional manner.

Of course, we have no objection to the restatement of the current state of the law as stated in the first portion of this proposed subsection.

We are concerned about the exception, however.

The term "ruling" in its technical sense -- and, we assume the proposed subsection utilizes the term in this sense -- applies to a determination by the Customs Service as to the manner in which it would treat a proposed transaction. A "ruling", therefore, can be distinguished from "internal advice" or a request for "further review", both of which relate to completed transactions.

At present, judicial review of a ruling may now be obtained only by completing the transaction, forcing the Service to treat the transaction as stated in the ruling, and proceeding to obtain judicial review of the action of the Service in the usual manner, i.e., filing a protest, paying the duties assessed, and contesting the denial of the protest in the Customs Court.

We recognize the fact that a person can be injured if he cannot obtain judicial review of a ruling unless and until the contemplated transaction is completed, the duties are paid, and a suit is filed in the Customs Court. Therefore, it may be appropriate in some circumstances to permit judicial review prior to the completion of the transaction or the payment of duties.

However, if the circumstances under which judicial review may be obtained prior to the completion of the transaction or the payment of duties are defined too broadly, the

chances are that the exception will ultimately swallow the rule. Obviously, individuals would prefer to obtain judicial review without the payment of duties if they could do so rather than be required to obtain judicial review only after the transaction has been completed and the duties paid.

We believe that the standard of "irreparable injury" contained in proposed subsection 1582(i)(2) is too broad and that the exception created could possibly destroy the other, traditional methods of obtaining review. We much prefer the provision contained in subsection 1581(i)(2) of S.1654 and would urge the subcommittee to substitute that provision for the one contained in this bill.

We also prefer the standard of review contained in subsection 1581(i)(2) of S.1654. Since the evidence considered by the Customs Service in connection with a request for a ruling is almost totally in the control of the party requesting the ruling, it is appropriate to apply an arbitrary or capricious standard. The application of any other standard, would permit the party requesting a ruling to withhold "evidence" from the Service in connection with the request only to produce entirely new material in the Customs Court in opposition to the ruling ultimately issued. This result would be contrary to principles of administrative law which afford the administrative agency an opportunity to act upon the basis of all evidence and contentions prior to a requirement that it defend its action before a court.

We also believe that the arbitrary or capricious standard is a fair exchange for the opportunity to obtain judicial review prior to the payment of duties. If an importer desires de novo review, it should complete the transaction, pay the duties, and institute suit in the Customs Court. If it desires judicial review in advance of completion of the transaction and payment of the duties, it should be entitled only to review on the record under the arbitrary or capricious standard.

Proposed section 1582 would grant jurisdiction to the Court of International Trade to entertain certain civil actions, such as those to recover civil penalties under section 592 of the Tariff Act of 1930, which are now instituted in the district courts.

In principle, we are not in favor of granting original jurisdiction to the Customs Court to entertain suits instituted under section 592. In addition, we believe that the system which the bill would establish for the trial of some cases in the district courts and some in the Customs Court, depending upon whether a demand is made for a jury trial, is cumbersome and will not provide for the most efficient use of resources.

More importantly, if the Customs Court is to be granted jurisdiction to entertain suits under section 592, we are concerned with the fact that proposed section 2640 would permit the court to provide by rule for exceptions to the

Federal Rules of Evidence in these types of cases. A major purpose of this bill is to remove all remaining distinctions between the district courts and what is now the Customs Court. Since the Federal Rules of Evidence apply to all other Federal courts, the Court of International Trade should not be the only court permitted to exempt itself from the application of these rules. This is particularly true with respect to the cases provided for in proposed section 1582. By the very terms of the proposed section, some of these cases (those in which a jury is requested and is found to be appropriate) will be heard in the district courts. These latter courts are, of course, subject to the Federal Rules of Evidence. Those rules should be applicable regardless of whether the case is heard in district court or the Court of International Trade. Accordingly, if the court is to be granted jurisdiction to entertain suits instituted pursuant to section 592, we recommend the deletion of the phrase "or the rules of the court" contained in proposed section 2640.

Proposed section 2643 is concerned with the relief which may be awarded by the Court of International Trade. We have two comments with respect to this section.

With respect to injunctive relief, we prefer some rephrasing of proposed section 2643(c)(1) of this bill. The Customs Court has never possessed the power to grant injunctive

relief in all cases and this bill, if enacted, would thus grant the court new authority. We believe that the legislation granting this authority should make it clear that injunctive relief should be awarded only in exceptional circumstances and that the decision to grant injunctive relief should be the result of a balancing test which takes into account the effect that the issuance of the proposed injunction would have upon the public interest.

Accordingly, we recommend adoption of the following language:

A preliminary or permanent injunction may be granted in extraordinary circumstances by the court upon the motion of a person who would have the right to commence a civil action after exhausting all appropriate administrative remedies. In ruling upon such a request, the court shall consider, among other matters, whether the person making the request will be irreparably injured if the relief is not granted, and, if so, whether the issuance of the requested injunction would be consistent with the public interest.

Our final comment with respect to proposed section 2643 is concerned with the relief which may be granted in a civil action arising under section 777(c)(2) of the Tariff Act of 1930. The Trade Agreements Act of 1979 which added

section 777(c)(2) to the Tariff Act of 1930 made it clear that the International Trade Commission could release only certain types of information under the protective order. Proposed section 2643(c) of S.1654 recognized the fact that the Customs Court was to be subject to the same restriction as to the type of information, possessed by the International Trade Commission, which it could order disclosed. The bill before the committee does not contain a provision similar to proposed section 2643(c) of S.1654 and we would urge the inclusion of such a provision in order to effectuate the intent of the drafters of section 777(c)(2). Alternatively, we would urge the inclusion in the legislative history of a statement to the effect that proposed section 2643 was not intended to eliminate the restriction contained in section 777(c)(2) of the Tariff Act of 1930.

We would also suggest that the Committee consider a provision similar to the one contained in section 708 of S.1654. We believe that at least for the foreseeable future, it is essential that the Government's litigation position be coordinated in one central authority.

Finally, we suggest that the subcommittee consider an alteration in the effective date provisions contained in subsections (a) and (c) of proposed section 701 of the bill.

With respect to proposed section 701(a), that section provides that, in general, the Customs Courts Act shall take effect on the date upon which Title VII of the Trade Agreements Act of 1979 took effect. Since Title VII of the Trade Agreements Act of 1979 took effect on January 1, 1980, proposed subsection 701(a) of the bill would mean that H.R. 6394 would be given retroactive effect. We believe that it will cause unnecessary confusion if H.R. 6394 were to be given retroactive

effect. In addition, we believe that the Court and various agencies should be given time to prepare for the implementation of the Act. We, therefore, suggest that the subcommittee consider changing the proposed section to provide that, in general, the Act will take effect six months after the date of enactment.

Proposed subsection 701(c) provides that subsections (c), (d), (e), and (f) of section 2631 of title 28 as added by section 301 of the bill, will apply to entries liquidated on or after the date of enactment.

Proposed subsections (c), (d), and (e), of section 2631 define the rules as to standing to institute certain specified actions in the Court of International Trade. Most of these actions do not involve the liquidation of entries. In addition, all of the specified subsections relate to causes of action created by the Trade Agreements Act of 1979. Therefore, in contrast to proposed section 701(a), section 701(c) should provide that subsections (c), (d), and (e) of section 2631 should take effect immediately upon the date of enactment.

Subsection (f) of proposed section 2631 relates to the institution of civil actions other than those specified in subsections (a) through (e) of proposed section 2631. Subsection (f) of proposed section 2631 is principally designed to apply to the new general jurisdictional provision contained in proposed section 1581(i). Therefore, proposed section 2631(f) should take effect six months after the date of enactment.

Mr. SEIBERLING. Thank you, Mr. Cohen.

Mr. Davis, your point about not having review of matters before an actual importation certainly is a very important issue and raises a very important issue. It seems to me that where the importer is the one who wants to raise the issue he has a very simple way of getting around this; that is to import maybe one article and then he's got the importation. But what about the person who is affected by the import, the competitor who wants a ruling? How does he handle that situation?

Mr. DAVIS. That person under current law, section 516 of the Tariff Act, does have the capability in the context of specific importations to seek review of the classification or valuation decisions of the Customs Service. So there is currently in law an opportunity and ability for American manufacturers, and this opportunity was recently extended to labor unions, to seek redress which includes judicial review. There is protection in the context of specific importations for all parties who might have an interest in the nature of the imports.

Mr. SEIBERLING. Well, until an actual importation occurs, though, as I understand your point, you feel American manufacturers, for example, should not be able to test a ruling under the provisions of this bill.

Mr. DAVIS. We believe it would be preferable that until an importation takes place that neither the importer nor the American manufacturer should be in a position to seek judicial review of a Customs' ruling, and that both should have the opportunity in connection with rulings on actual importations. The Senate bill—well, starting with this bill, the House bill, the bill we are considering today would authorize judicial review of rulings in the case of irreparable harm without, as I understand it, really restricting who would be able to pursue that. The Senate bill has a narrower exception as to whether it allows judicial review of rulings, and restricts that only to the importer.

Our position is that it would be preferable if both bills allowed for judicial review at the instigation of either an importer, a domestic manufacturer, or a labor union, but only where the ruling applies to an actual importation.

Mr. SEIBERLING. Well, I can see why it might open doors to a lot more litigation, but that's what the courts are for. This, in effect, would be a declaratory judgment action which we deal with constantly in the Federal district courts. We have statutes authorizing them and I don't know why there shouldn't be similar remedy where it involves a customs matter.

Mr. DAVIS. Well, I think among the reasons is the one you referred to. It's not a situation where people are without remedy in the situation where there is an actual importation.

Mr. SEIBERLING. Well, one would be remediless if he imports a large number of goods and he goes out of business before you can act to correct an erroneous ruling, imposing a high tariff on those goods. The fact that maybe after you correct the ruling he might be entitled to some judicial relief doesn't really help him.

Mr. DAVIS. As I said, there is the procedure which now exists. I think that one has several considerations to balance when talking about

the degree of judicial review and when to allow it. One consideration is, to what extent is it appropriate to let courts get heavily involved in the day-to-day operations of the administrative agencies, so that that administrative agency really cannot effectively exercise its responsibilities.

Mr. SEIBERLING. Are you saying this in effect would turn administrative ruling into a judicial case?

Mr. DAVIS. I don't know that I would say every ruling, but I think you would see a substantial number being appealed to the courts. Our view is that there is an opportunity to litigate these issues in the context of specific importations. We could end up having extensive litigation, which can turn into an undesirable trade barrier if allowed to go to extremes. I recognize that our administrative agencies don't always dispose of cases as quickly as we like, but adding the additional layer of judicial review doesn't always speed up the process.

Mr. SEIBERLING. Would you impose temporary restraining orders in cases where you do review a ruling if you feel there's a chance that the ruling is erroneous?

Mr. DAVIS. There are situations in which one would suspend the liquidation of entries. In other words, suspend disposing of entries, if there was a particular legal dispute that would have a material impact on what the proper classification and value could be. Sometimes that creates problems in and of itself, but that is a remedy.

Mr. SEIBERLING. I can see we're dealing with two sets of interests here. If you affect one adversely, if you give a favorable ruling to the manufacturers, you may adversely affect an importer or foreign manufacturer; and so it's a nice question as to where we draw the line, although my sympathies are going to be with the domestic manufacturer, as a politician. I think you have to be objective and apply the law, but I can see why there's a problem here, the problem you raised, but at the same time, I think your experience would probably indicate that the administrative rulings are not infallible either.

Mr. DAVIS. I always hate to admit that, but I think I must. We have learned two things: (1) we are not infallible, and (2) you're absolutely right, we never can please everybody.

Mr. SEIBERLING. Well, thank you. My time has expired. **Mr. McClory.**

Mr. McClory. Thank you very much, **Mr. Chairman.**

I have several questions about this legislation on which I'd like your views. For one thing, the bill provides that in the event a jury is requested and it's determined that the moving party is entitled to a trial by jury—a constitutional right the party may have—that then the case must be transferred to the district court and not tried by this new Court of International Trade.

Now here we are setting up an article III court with presumably broad, general jurisdiction but not competent to try a case. I could see that if the Court were confined to one community, such as New York or Washington, and only sat in that one place, then there might be some justification, but I suppose it does not sit in only one place—it can move around and you can have juries from around the country. Why is the Court not competent to or why should it not be required to handle jury trials as well?

Mr. DAVIS. I think my colleague from the Justice Department will want to answer that question. I would just say that I think principally

what you're talking about, in terms of the jury trial, relates to fraud cases where many of the fact issues might not be customs laws issues but the degree of fraud that had been committed, and I think that is probably why the distinction is made.

Mr. McCLORY. The objection made to this Court and all the specialized courts is that issues are not specialized issues; they are general issues. They are issues involving contract law, for instance, or principles of general law. So I don't think that argument holds up very well. The matters involved for which a person wants a jury trial could be matters that only peripherally relate to the subject of customs duties, tariffs, and so on, but I would be happy to have other comments.

Mr. COHEN. Congressman, I think the short answer to your question is that there is no reason in principle why the Customs Court could not conduct a jury trial. The difficulty is a logistical one. Some of the problems involved would be as follows: The Customs Court as you have noted now sits throughout the country. If a 592 action were to be instituted in the Court and the defendant were to request a jury trial for a trial let us say in Atlanta, the question would be what jury roll would be used: who would conduct the mechanical aspects of selecting the jury. In addition, there would be a problem of finding a courtroom in these days when the district courts are so overburdened and their facilities are such that it's very difficult for them to spare a courtroom for the length of time a jury trial would take.

But assuming these problems could be solved—namely, a determination as to which jury roll would be used, who would perform the functions of helping to select names for the jury panel, and the courtroom availability problem—there is no reason in principle why the Court could not be given the authority to conduct jury trials.

Mr. McCLORY. It will be hard for us to convince our colleagues when the issue is raised that, well, the reason we don't permit the Court of International Trade to conduct jury trials is because it is too difficult, it is too inconvenient. The Justice Department feels that it's going to present other problems for them: we can't render justice; we can't provide equity as we do in other kinds of cases in other courts because it's too tough.

Mr. COHEN. I understand that, Congressman. We wouldn't oppose such a provision, assuming that the Court is going to be given jurisdiction over 592 cases.

Mr. McCLORY. OK.

Mr. BUTLER. Does this legislation give the court jurisdiction over section 592 cases?

Mr. COHEN. Yes, Congressman, it does.

Mr. BUTLER. I understand your answer is that you don't believe the customs court could handle the jury trials in this case, that the overburdened district courts could do it better. Is that your response?

Mr. COHEN. No, Mr. Congressman. First, the Department of Justice does not favor giving the court jurisdiction over 592 cases to begin with. Assuming that the Court were to be given 592 jurisdiction, we would have no objection to giving it jurisdiction to conduct jury trials. In fact, in the technical appendix attached to my prepared statement, we mention the fact that under the bill as it now exists there might be a problem of having 592 cases split between the Court of In-

ternational Trade and the district courts. So I think we would favor a provision which would put all of these actions into one court, although we would not necessarily prefer it to be the Court of International Trade.

Mr. McCLORY. It's my understanding that many of these cases, the tariff cases, continue for as long as 6 or 7 years, and I'm wondering if we should not include in this legislation the right of the importer to deposit duties and then permit the importer to collect interest on his money if the Court decides in his favor. It's my understanding that under the Internal Revenue Code, the Internal Revenue Service does accord that sort of a right to the taxpayer.

Would you have any objection to our including in here the right of the importer to make a deposit and collect interest on his money?

Mr. COHEN. Well, Congressman, the Treasury Department no doubt will have a comment on this. From our point of view, I think the bill as it now stands, in our judgment, does not have any budgetary impact. All that is involved in this bill is the transfer of functions which are now being performed from one court to another court. If you were to add a provision that would provide for interest on the recovery of customs duties, you would create a budgetary impact to the bill of unknown dimensions.

I would also point out that in the Court of Claims, there is no similar provision, for the payment of interest. So to maintain the present law with respect to the Customs Court—with no payment of interest—would not be unusual. The same situation exists with other cases in other courts in which a citizen is suing for a refund of money.

Mr. McCLORY. I am concerned about the economic impact on the importer, on the person who gets soaked with the additional duty, and the person who ties up his own money pending the outcome of the case. I wonder if you could supply us with information as to the economic impact on the Government in that kind of case. I think the American Importers Association, for one, would like to have such a provision in the law.

Mr. DAVIS. Mr. McClory, sometimes the interest works both ways. At least under current practice, we do not charge interest. For example, on penalties, we have not charged interest even though it may take some period of time through litigation to collect them. There may be a period before the amounts are deposited when technically the Customs Service could charge interest. For the period that cases are in the administrative process there has been no interest charged by the Government. So while I don't think we have a firm position, we would be happy to explore the facts on that. But I just wanted to point out that it works both ways sometimes.

Mr. McCLORY. Well, the court can require the payment of interest on penalties, can it not?

Mr. DAVIS. Customs has not been charging interest in penalty cases.

Mr. SEIBERLING. The time of the gentleman has expired. The gentleman from Virginia, Mr. Harris, is recognized.

Mr. HARRIS. I want to be familiar with Treasury's and Justice's positions with regard to injunctive relief. I think I'm clear on your position that you're not for issuing a declaratory judgment relief in this particular court; is that correct?

Mr. DAVIS. Where there has been no actual importations, that's correct.

Mr. HARRIS. What about injunctive relief? Do you feel this court should have power to exercise injunctive relief in case there's a possibility of irreparable harm?

Mr. DAVIS. I think that with respect to rulings before there's an importation we would take the same position. With respect to the other functions of the court where it is given jurisdiction, speaking for Treasury, I don't see how we would have any problem with injunctive powers.

Mr. HARRIS. How about Justice?

Mr. COHEN. We would agree with that, with the caveat that I mentioned in my testimony that to grant the court the power to issue injunctions would be to grant the court a new power which it does not currently have in all cases. We would want to make it clear that injunctive relief is extraordinary relief.

Mr. HARRIS. Well, it is.

Mr. COHEN. We would want to make that clear.

Mr. HARRIS. I'm thinking, of course, in trying to review in my mind, considering all the changes in the law as far as dumping cases are concerned and what you have said, it would obviously be necessary for the court at times to utilize injunctive relief in order to be effective in dumping cases, wouldn't it?

Mr. COHEN. Yes. Of course, the Trade Agreements Act of 1979 did grant the court the power to grant injunctions in certain very, very limited circumstances. So it does currently have the power in a limited number of cases under very limited circumstances. The effect of this bill would be to increase the circumstances under which the power could be exercised.

Mr. HARRIS. And I understand that although it should be limited, Justice recognizes the need for the court to have such extraordinary remedial powers. Is that right?

Mr. COHEN. That's correct.

Mr. HARRIS. May I just ask, in an antidumping case, who has jurisdiction?

Mr. DAVIS. Since Treasury is not supposed to have jurisdiction in antidumping I'd like Mr. Abbey with the Customs Service to answer that.

Mr. HARRIS. I just remember the good old days when we didn't enforce the statutes.

Mr. ABBEY. After the dumping investigation has been initiated, the administering agency, which is now the Department of Commerce, makes a determination of whether there has been a likelihood of sales of less than their value and at that point they publish a notice of withholding of appraisement.

Mr. HARRIS. And that withholding of appraisement, then, considering if in fact determinations are made that dumping has occurred, Treasury still determines what the dumping duty is going to be, don't they?

Mr. DAVIS. No.

Mr. ABBEY. The Customs Service computes the duties based upon advice from the Commerce Department.

Mr. DAVIS. We are mathematicians, but in terms of the formulas and the principles, we take those from the Commerce Department.

Mr. HARRIS. Now the Treasury is a little bit on the defensive. The Treasury Department actually controls the dumping duties, does it not?

Mr. DAVIS. Our responsibilities are merely ministerial, is the point I was trying to make. We have no involvement in the policy judgments over what should go into that duty.

Mr. HARRIS. I'm just thinking of the importer. He has had his appraisal withheld and he doesn't know how much it's really going to cost. It's not until that point that he gets into court, even so he's probably been severely damaged, even if the court holds that the duty was inappropriately applied. Isn't that correct?

Mr. ABBEY. Mr. Harris, while I must confess that since the dumping function has been transferred to the Commerce Department I have not studied closely the new procedures under the antidumping law, I believe that judicial review is available after every major determination. So in all probability, at the time there's a determination of sales at less than fair value, the importer could obtain judicial review of that determination in the Customs Court.

Mr. HARRIS. Thank you.

Mr. SEIBERLING. One of the constant complaints of American industry is that the antidumping laws and the way they are administered are so cumbersome as to provide very little relief. I wonder if this bill will, as far as it deals with the Customs Court's role in antidumping matters, improve that situation any in terms of getting expedited decisions.

Mr. DAVIS. I think that the Trade Agreements Act of 1979, which attempted to set up a new approach to dumping and countervailing duty cases, and which does install opportunities for judicial review along the way, will do that. We shall have to see how it works in terms of speeding up the process providing more effective relief. I don't know whether anything in the bill we are discussing is really going to affect that as much as the implementation of the principles that were included in the 1979 act. One of the big issues will be whether, in trying to get perhaps a better quality judgment and judicial review, we find that in terms of the overall length of a case, we have slowed the process down. I think that we are going to have to have some experience under that statute which may be relevant to the issue I have raised today.

Mr. SEIBERLING. Well, is your statement based on that belief or simply that the role of the court is so limited in antidumping matters?

Mr. DAVIS. It's been greatly expanded in the 1979 Trade Agreements Act, in terms of the opportunities for judicial review of many, many of the steps which previously would not have been subject to judicial review.

Mr. SEIBERLING. Do you think that is going to slow up the process?

Mr. DAVIS. I think that is one of the risks. There was a lot of discussion about this balance at the time that act was before the Ways and Means Committee. Their concern was not only about the speed—they were worried about putting time limits on administrative action to speed it along—they were also concerned with having the law im-

plemented more effectively. I think we have to wait a little while to see how that works when new judicial review procedures are combined with measures intended to improve the speed and effectiveness of the antidumping program.

Mr. SEIBERLING. How about countervailing duties? Does the court get into that issue and, if so, will this bill affect its ability to expedite decisions on that subject?

Mr. DAVIS. I think basically the situation is very similar. There were changes in the 1979 act which were intended to improve the performance and the administration of that statute which involved, on the one hand, more judicial review and, on the other hand, time limits and some changes in principles.

Mr. SEIBERLING. The American Importers Association is going to testify that the authority for the court to render a judgment as a result of a counterclaim asserted on behalf of the United States will have a chilling effect on international trade litigation. Can you give us your ideas on that?

Mr. DAVIS. I think we have something in our technical comments on it and Justice may want to amplify. I think, again, you're engaged in a balance. On the one hand, by allowing some counterclaims involving the same importer which we do propose be done, you're in the position of consolidating litigation, getting disputes between the same parties resolved more quickly. The fact that somebody has to consider whether they are subject to claims when they bring suit is the kind of judgment lawyers are called upon to make in a whole host of occasions when they have to advise clients whether it's prudent or not prudent to come forward and bring litigation.

Mr. SEIBERLING. They have also recommended that the proposed section 2643(a) be amended to not allow the Government to recover additional duties unless it made a claim for them within the time limits set by section 501 of the Tariff Act of 1930. Would you comment on that proposal?

Mr. DAVIS. Again, you're talking about lawyers having to make litigation judgments. You may be faced with a situation where the Customs Service is taking one particular action and the importer or the domestic manufacturer, take the importer for example, believes it should be something else. The court may say the correct rule is the third, which would involve increased duties. I think that's the kind of judgment that lawyers are paid to make and that's a risk of litigation.

So while one could say the Customs Service ought to be bound, I'm not so sure we should bind the court not to come to the appropriate ruling.

Mr. COHEN. If I may comment on that, Congressman, as Professor Gehart in his study of the Customs Court for the Administrative Conference pointed out, when customs makes a decision to classify or value merchandise at the border, it must act very quickly. If it did not act quickly, the goods would begin to pile up at the border. So customs acts very quickly on the basis of whatever information it has available at the time. The fact that it has to act quickly was, in Professor Gehart's view, persuasive reason for allowing a trial de novo of the classification and valuation decisions in the Customs Court where new evidence could be introduced.

Now under current law, what happens is as follows: The importer brings an action claiming that the classification or the valuation of merchandise was incorrect. Since there is a trial de novo in the Customs Court, the importer introduces new evidence that was not before the Customs Service at the time it made a decision. Similarly, the Customs Service may gather new information and introduce it into evidence. Under current law in a classification case the court may decide that the plaintiff has not proved what the classification of the merchandise should have been, but has proved that customs' original classification was incorrect. At the same time, the Government may have proved that, yes, it is in fact true that the Customs Service's original classification of merchandise was incorrect, but here is what the correct classification should be.

Under current law, if the Government does prove a new classification, even though that new valuation is what the court has found should have been found, and that the duties assessed should have been higher than they actually were, the court does not assess the importer with the additional amount. All the court does is dismiss the action without affirming the classification, which means that in effect everyone has now agreed that the original classification was incorrect, that the new classification should be one that would have resulted in higher duties. Yet those higher duties are not paid by the importer.

What the provision would do here would be to allow the Government to recover the additional duties which the court has now found is in fact due as a result of what the true classification should be.

Mr. SEIBERLING. Well, that certainly would tend to have a chilling effect it seems to me.

Mr. COHEN. Well, the question is, if the importer is going to proceed to recover duties, why should it be a one-way street? If the amount due to the Government is truly more than actually assessed, then that is the amount that should be paid. I might point out with respect to the chilling effect that it is a balancing question, as Mr. Davis pointed out, between judicial economy and having all claims decided at one time.

I would point out with respect to the Court of Claims, for example, there is a provision that permits the United States to assert a counterclaim not limited to the same transaction. In fact, that provision goes as far as to say that the United States may assert a counterclaim even though the statute of limitations has expired on the counterclaim. In other words, once the plaintiff institutes an action in the Court of Claims, it revives the claim which the Government had lost through the expiration of the statute of limitations. Yet, there are thousands of actions brought every year in the Court of Claims and I have not detected any great movement to repeal that counterclaim provision on the grounds it possesses a chilling effect.

Mr. SEIBERLING. Mr. Butler, did you want to be recognized?

Mr. BUTLER. It is never clear to me how the Department of Justice develops an official line. For example, 2 years ago we had the Attorney General here when we had the Bankruptcy Court legislation, and we were told how awful it was to go to specialized courts. Now, of course, we are moving in the direction of more specialization here, and yet it seems to me that the one aspect of it that we can despecialize is with

reference to the jury trial. And so I really want to know how seriously did you consider this problem or were you just winging it at this point trying to bring up excuses?

Mr. COHEN. No, Mr. Congressman, I wasn't winging it. I'm sometimes mystified myself as to how we arrive at a position, but this was a conscious decision. With respect to your first comment, we feel that this bill is in accord with the Attorney General's prior statement because we think that this bill would broaden the jurisdiction of the Customs Court and make it less of a specialized court than it now is and in that sense moves toward the goal of not having courts that are too specialized.

With respect to the jury trial issue, we would agree that if you're going to give the Court of International Trade jurisdiction over 592 actions that it should and could be granted the authority to conduct jury trials if a jury trial was demanded.

There are logistical problems, as I pointed out, but they are not insolvable.

Mr. BUTLER. Yes, because at your request we created 117 new district court judgeships and I don't remember a single time you brought up the logistical problems of one court.

Mr. COHEN. Only because this is a court with national jurisdiction and which does not have a situs such as the district courts have where all of the statutes are tied to a particular district. This court doesn't have a particular district.

Mr. BUTLER. Do you have a recommendation as to how we ought to proceed with this legislation—if we are determined to have jury trials—and what we ought to put in the legislation to deal with that? I mean, if you are not prepared to answer that today, well, I will certainly understand it, but I would like to know how the Justice Department thinks we ought to deal with it.

Mr. COHEN. We can certainly provide the committee with our suggestions as to how these logistical problems can be solved.

Mr. BUTLER. Thank you. I won't beat that to death, but if I had to give you a reading of what the sentiment on this committee is, I would say that it is for jury trials. So I would appreciate it very much if you would really give serious thought to that. You know, article III judges have a way of falling in love with themselves and we could have a problem. We could have two judges of different courts demanding the same courtroom. Now what machinery would you suggest? Who should be resolving that problem?

Mr. COHEN. Well, at one time the Customs Court maintained a number of courtrooms throughout the country to be available should the court sit in a location outside of New York. The court recently agreed to give up those courtrooms on the understanding, by I believe the judicial conference, that should the court require a courtroom in any particular city, arrangements would be made through negotiation for the court to have a courtroom. I'm sure under that arrangement—

Mr. BUTLER. You haven't got any assessment of how that's working out?

Mr. COHEN. No. It's a recent arrangement which just began this year, but I don't believe there's been any difficulty under it. The basic problem here is that most of our trials, which are not jury trials, now

consume 2 or 3 days at most and therefore we're going to tie up a courtroom for 2 or 3 days. However, if we begin to talk about jury trials which might extend a week or more, that increases the logistical problem of finding an available courtroom.

Mr. BUTLER. Would the Court of International Trade sit en banc or could they sit as individual judges?

Mr. COHEN. Under current law, the members of the court sit as individual judges. At one time there was a provision for a panel of three judges to sit, but that was eliminated in 1970. So each judge sits individually.

Mr. BUTLER. So we don't have any problems with that?

Mr. COHEN. No.

Mr. BUTLER. Let's turn to another question. I touched on this collaterally when I talked to Judge Re. I'd ask you to direct yourself to page 6 of the bill, subsection (e) of section 1581. This says:

After the decision of the President has become final and has been published in the Federal Register, the Court of International Trade shall have exclusive jurisdiction to review any action of the Office of the United States Trade Representative under section 302(b) (1) or 304 of the Trade Act of 1974, solely for the purposes of determining the procedural regularity of such action.

My question is, What is the purpose of a procedural review at such a late date? Why not authorize it before the Presidential order becomes final so it may prevent an erroneous determination before it is made final by the President? I would ask for both of your comments.

Mr. DAVIS. Well, I think the first question is, if you don't wait until the decision has been made by the President, who's going to go to court to challenge it, because you don't know who is the winner and who the loser. Second, there would be the authority to set aside the judgment on procedural grounds and require the process be redone. The difficulty is—and I'm not an expert in all these sections—but generally, these are the international trade powers of the President which are heavily policy oriented, which is why I think the bill restricts review to the procedural grounds. I think those are some of the reasons why the section is as it is.

Mr. COHEN. These provisions are both an enlargement of the ability to obtain judicial review but also a restriction. Under current law, it does not appear that judicial review of the actions specified in sections (d) and (e) is available. What the bill would do then is expand the right to judicial review by granting some form of review. However, the substantive laws specified in those sections involve questions of policy. They generally involve the International Trade Commission or the U.S. Trade Representative investigating a matter and making a recommendation to the President. The President then has the option of rejecting the advice entirely or selecting a form of import relief which is entirely different from that recommended by the Trade Representative or by the International Trade Commission. Because these actions are very heavily policy oriented, this bill restricts review of procedural irregularity. Despite this restriction, I would point out again that the provision also contains an expansion of the availability of judicial review since under current law, no judicial review at all is available.

As to why judicial review is made available after the President's decision becoming final, I think as Mr. Davis has pointed out, the rea-

son for this is the President may reject the advice entirely and not do anything at all. It's not known until the President takes his action whether or not we have an aggrieved party.

Mr. BUTLER. But in that area the President, from what you're saying, is free to be arbitrary and capricious; is he not?

Mr. COHEN. But that was a substantive judgment made by the Senate Finance Committee and the House Ways and Means Committee with respect to this.

Mr. BUTLER. I'm not critical of it.

Mr. COHEN. Yes; you're correct, but we, of course, presume the President would not be arbitrary and capricious. He can take into account in making his decisions factors other than those taken into account by the agency charged with giving him advice. He could take into account international affairs and so forth.

Mr. BUTLER. What procedural defects would there be when the President can do what he pleases?

Mr. COHEN. Well, there's considerable variance, but some of the provisions have some very specific procedural provisions. There has to be a hearing. It specifies what kind of hearing has to be held. There may have to be a published statement of the advice. Therefore, the failure to hold a hearing, for example, would be a procedural defect.

Mr. BUTLER. What is the effect of the determination that the procedure was not adhered to?

Mr. COHEN. The kind of relief that would be granted would be, a question for the Court to determine. It could conceivably involve an invalidation of the President's decision with a remand to the agency to do it again, or the Court could hold that it is not in the public interest to hold that the President's decision shall have no effect pending a remand. The Court could then allow the denial to remand in effect, but still remand it to the agency to allow for correction of the procedural defect, with the understanding that the President's action would change after the remand if the result was different than it was originally.

Mr. BUTLER. Basically my question is, Is this trip really necessary? Does the legislation put us in the position where we have got to provide for this procedural review? I'm concerned about finding ourselves in a never-never land of procedural defect and yet a Presidential policy that needs to be implemented.

Mr. COHEN. I think it would be possible to eliminate these provisions entirely. The only question that would arise would be whether or not the Court would have jurisdiction to review these kinds of actions under the general jurisdictional provision contained in subsection 1581 and, if it did assume jurisdiction, what the scope and standard of review would be. Now there's nothing wrong with doing that because all you would be doing is leaving the situation as it now is; that is, it is conceivable that somebody could try to challenge one of these decisions in a district court and, under the general jurisdiction of the district court, the district court would have to decide whether it had jurisdiction and, if so, what the scope and standard of review is.

Mr. BUTLER. By putting this jurisdiction in this court, we are effectively saying that the district courts cannot review the procedure. Is that correct?

Mr. COHEN. That's correct. It would be exclusive jurisdiction. I think it should be because the court would have expertise in these international trade matters, but it would not be essential for the committee to specify the scope and standard of the review. It could leave that to general interpretation just as it would now be left to interpretation if such an action were to be brought in a district court or attempted to be brought in a district court.

Mr. BUTLER. All right. But why is specialization in international trade matters necessary to review a procedural matter?

Mr. COHEN. Well, because I think it's a question of economy. Congressman, I have handled a number of cases in the district courts involving the countervailing and antidumping duty acts, for example, and it's a question of beginning anew each time one of these actions is instituted.

Mr. BUTLER. You've got to educate the judges?

Mr. COHEN. Right, whereas this court is already familiar with those acts and we can start at a higher level sooner.

Mr. BUTLER. All right. I thank the gentleman. I yield back, Mr. Chairman.

Mr. SEIBERLING. Does the gentleman from New Jersey wish to question the witnesses?

Mr. HUGHES. Thank you, Mr. Chairman. I have no questions at this time.

Mr. SEIBERLING. All right. Staff has a couple short ones. I hope he means they will be short.

Mr. GORDON. To either of you gentlemen, proposed section 1582 (b) (1) would permit a transfer to the district courts of any civil action commenced by the United States. Should the transfer provision for a trial by jury be limited only to civil penalty actions pursuant to 592?

Mr. COHEN. I think you have to make a judgment first as to whether or not this court is going to be empowered to hold jury trials. If it is not, then I think all jury trial cases should be transferred to the district court. If it is to be empowered to conduct jury trials, it should conduct jury trials on all types of cases.

Mr. GORDON. Proposed section 2636(d) provides for expedited treatment of civil actions commenced pursuant to section 516(A) of the Tariff Act of 1930 to review determinations. Should these civil actions be given similar expedited treatment under other provisions of this bill, such as the section which covers the filing of official documents?

Mr. COHEN. The purpose for expedition of these types of actions are that the decisions that can be made under those sections of the Tariff Act are decisions which merely extend the time for the agency to act and, therefore, the whole case can become moot if it's not decided before the extension of time expires. In that light I would think that it would be appropriate not only to expedite the determination but to expedite the transmittal of the record and so forth.

Mr. GORDON. So the short answer is, yes, you should make a similar provision?

Mr. COHEN. Yes.

Mr. GORDON. Proposed section 2636(a) (2) would allow an importer to commence an action within 180 days after the expiration of the

2-year period within which the notice of denial protest was to be mailed by the Customs Service. Some witnesses will comment that this places an undue burden on the importer to keep alive protests filed with the Customs Service. Do you believe this is an unnecessarily heavy burden for an importer to bear? Second, have there been numerous instances where the Customs Service has neglected to mail a notice of denial and, third, would enactment of this provision provide the Customs Service with an opportunity to effectively shift the burden to the importer?

Mr. COHEN. I think this provision has been misunderstood since it was first contained in the Senate bill. The purpose of the provision was to aid importers and not to harm them. Under the current statute, a notice of denial of protest must be mailed and both the Customs Service and a court decision have held that this is absolutely essential before the Court's jurisdiction will attach. As a consequence, if the Customs Service neglects to mail the denial of the protest, the importer is precluded from seeking judicial review until the Customs Service finally decides to mail a notice of the denial of the protest.

The purpose of this provision was to give the importer the option to say, well, I can begin my action within 180 days after the notice of denial has been mailed or if for some reason the Customs Service fails to mail the notice I can go into court anyway even though the Customs Service made an error by failing to mail the notice. I don't think there's any intent on the part of the Customs Service to stop mailing denial of protests. The only intent was to allow the importer to seek judicial review earlier than he now can if the Customs Service makes a mistake and fails to mail the notice.

Mr. GORDON. Mr. Abbey, do you have any comment on that?

Mr. ABBEY. We fully agree with Mr. Cohen. While we make every effort to send a notice of denial within the 2-year period that we have to review protests, there are occasions where we do not, and I think this provision would be a benefit to importers. They could file a summons with the court either 180 days after the 2-year period has expired or within 180 days after we do in fact mail a notice. So it's only a benefit to the importer.

Mr. GORDON. Should proposed section 2637 governing the exhaustion of administrative remedies be amended to provide exclusions for cases which would fit within the parameters of the irreparable harm provision of section 1581?

Mr. COHEN. As I understand your question, it is whether or not an importer should not be required to exhaust administrative remedies in those cases where he can seek review of a ruling.

Mr. GORDON. Under section 1581(j)(2).

Mr. COHEN. It depends upon what the standard of review is going to be. If the standard of review is to be based upon the administrative record, then I think the importer should be required to exhaust the administrative remedies so an administrative record can be made. If, on the other hand, the trial is going to be de novo and there truly are exceptional circumstances, then I would not say that it would be absolutely necessary to exhaust the administrative remedies.

Mr. DAVIS. I would share those general sentiments, but I would point out that in any circumstances in which you don't require exhaus-

tion of administrative remedies you begin to open the door to simply bypassing the administrative agencies. I think that's a very important principle, no matter how the committee decides on the question of review of rulings.

Mr. GORDON. Thank you, Mr. Chairman.

Mr. SEIBERLING. The gentleman from New Jersey has a question.

Mr. HUGHES. Just briefly, I'm somewhat troubled by the provisions of section 702(a) which provide for some retroactivity. I understand that Judge Re had somewhat addressed himself to that issue and I wonder if you, Mr. Cohen or Mr. Davis, would want to comment also.

Mr. COHEN. Yes. In our prepared statement, Mr. Congressman, we did suggest some alteration in the effective date provisions. If the Congress decides to give the Court jurisdiction over 592 actions we do not believe that that provision should be made retroactive to January 1980.

Mr. HUGHES. That's to conform with the Trade Agreements Act provisions?

Mr. COHEN. Yes; however, there are some provisions in this bill which are necessary in order to fill gaps left by the Trade Agreements Act of 1979 and in addition there are provisions of this bill which merely reiterate but in a better form the provisions of the Trade Agreements Act of 1979. Those provisions could take effect immediately or even retroactively.

What I'm saying is it's a mixed bag. There are some provisions which could be made effective immediately or even retroactively, but there are others which we strongly believe should be more effective only prospectively.

Mr. HUGHES. Are you going to be submitting to this Committee your specific recommendations with regard to retroactivity?

Mr. COHEN. Yes; that is contained in our prepared statement but we would be glad to amplify upon that.

Mr. HUGHES. Thank you, Mr. Chairman.

Mr. SEIBERLING. Thank you, gentlemen. It was very helpful.

[The information referred to follows:]



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27 FEB 1980

The Honorable Peter W. Rodino, Jr.
Chairman, Committee on the Judiciary
Subcommittee on Monopolies and Commercial Law
Suite 2137
Rayburn House Office Building
Washington, D. C. 20515

Dear Mr. Chairman:

In the course of the hearing on February 13, 1980, relating to H.R. 6394, Chairman Seiberling requested us to provide the subcommittee with certain information. This letter is intended to respond to this request and to expand upon the responses to some of the questions raised in the course of the hearing.

1. We were requested to provide the subcommittee with our suggestions as to the amendments which would be required if the Congress were to decide to authorize the Court of International Trade to conduct trials by jury. Attachment A to this letter contains our suggestions on this subject.

As noted in the course of the hearing, the Department does not favor a grant of jurisdiction to the Court of International Trade to entertain suits instituted pursuant to 19 U.S.C. 1592. However, we agree that if the court is granted this authority, the court should retain those cases which involve a jury trial.

2. A witness at the hearing was asked whether the authority to remand contained in proposed section 2643(b) should be broadened to include situations other than those mentioned in that section. We believe that the answer to this question should be in the affirmative.

In view of the fact that proposed section 2643(c)(1) mentions "orders of remand", we believe that the bill as drafted already provides for broader remand powers than those contained in proposed section 2643(b). However, we agree that the bill may require some clarification on this point.

3. A question has been raised as to whether it should be permissible for the court to order third parties to appear in pending civil actions. We have no objection to such a suggestion and would recommend consideration of provisions similar to those involving actions in the Court of Claims. See 41 U.S.C. 114(b).

4. With respect to the effective date provisions, we adhere to our view, expressed at the hearing, that the bill should not be given retroactive effect. We do believe, however, that the vast majority of the bill's provisions could be made effective immediately upon enactment.

The one exception to this principle, in our view, could be sections 1582 and 1581(j)(2). These latter provisions would require some administrative actions which would require some time to implement. We would suggest that these two provisions be made effective six months after the date of enactment.

We would note that if most of the bill is to become effective immediately upon enactment, some provision will be required to cover cases pending in other courts on the effective date.

We would be pleased to respond to further questions possessed by the subcommittee or to render assistance if the subcommittee so desires.

Sincerely,



DAVID M. COHEN
Director
Commercial Litigation Branch
Civil Division

Enclosure

AMENDMENTS TO H.R. 6394 - REQUIRED
IN ORDER TO PROVIDE FOR JURY TRIALS

1. Delete subparagraphs (b) and (c) of section 1582.
2. Delete reference to section 1582 in the amendment to section 592(e) of the Tariff Act of 1930 contained in section 606 of the bill.
3. Insert the following new sections after section 514 and renumber present section 514 et seq. accordingly.

Section 514. (a) Section 1862 of title 28 is amended so as to delete the word "district".

(b) Chapter 121 of title 28, United States Code, is amended by adding the following new section --

"§1876. (a) When a jury is required in any case instituted in the Court of International Trade, the jury shall be summoned, selected, qualified, challenged, and compensated in accordance with the provisions of sections 1861-1871 of this title.

"(b) When the Court of International Trade is to conduct a jury trial in a judicial district:

"(1) Jury panels shall be selected in accordance with the plan for random selection of jurors in effect in the district in which the trial is to be conducted.

"(2) Names of prospective jurors shall be selected from the master jury wheel in the manner in which names are selected by the district court in that district. The person who selects names of prospective jurors for the district court of that district shall select the names for the Court of International Trade.

"(3) The qualifications for jurors in the Court of International Trade shall be the same as those established pursuant to section 1865 of this title by the district court of the district in which the trial is to be conducted.

"(4) Jurors shall be selected and summoned in the manner established pursuant to section 1866 of this title by the district court of the district in which the trial is to be conducted.

"(5) The provisions of subsections (c), (d), (e) and (f) of section 1867 of this title shall be applicable to the Court of International Trade.

"(6) Section 1868 of this title shall be applicable to the records and papers compiled and maintained for purposes of selecting a jury for cases in the Court of International Trade.

"(7) Jurors who served in the Court of International Trade shall be compensated according to section 1871 of this title.

"(8) The definitions contained in section 1869 of this title shall be applicable to this section.

"(9) Section 1870 shall be applicable to challenges in the Court of International Trade.

"(10) The provisions of section 1875 of this title shall apply with respect to service as a juror in the Court of International Trade."



U.S. Department of Justice

DMCohen:mef
(202) 724-7154

Washington, D.C. 20530

April 18, 1980

Leo Gordon, Esq.
Committee on the Judiciary
Room 2137
Rayburn House Office Building
Washington, D. C. 20515

Dear Mr. Gordon:

This letter is intended to reply to certain questions which you raised at our meeting on April 17, 1980.

You first requested our views concerning the effect of proposed sections 1581(d) and (e) of H.R. 6394.

In our view, those sections are both a grant of jurisdiction and a restriction on the exercise of jurisdiction.

The sections represent a grant of jurisdiction in that it is not clear under current law whether the types of administrative actions specified in the sections are currently subject to judicial review. The sections involved would make it clear that judicial review is available.

The sections also represent a restriction on judicial review since they provide that review would be available only for purposes of determining procedural regularity. We believe that this restriction is appropriate because the substance of the administrative decisions involved are of a policy nature which are not appropriately the subject of review in a judicial context.

With respect to the restriction, we believe that it is intended that the court review the decision in order to determine whether the agency has complied with the procedures specified in the relevant substantive statute. If no procedure is established in the substantive statute, it would appear that the court could not establish its own procedural requirements.

This latter principle could be established by striking the phrase "the procedural regularity of such actions" from lines 23 and 24 on page 5 and lines 6 and 7 on page 6 and substituting the following phrase "whether the agency has complied with the procedures set forth in the relevant statute".

We also believe that judicial review must be postponed until after the decision of the President has become final so as to preclude any question concerning the article III status of the court. See Glidden Co. v. Zdanok, 370 U.S. 580 (1962).

You also requested our view as to the rate of interest which should be established should the Congress decide to permit the payment of interest when, as the result of a successful suit, an importer receives a refund of customs duties.

We would note that pursuant to section 778(b) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, P.L. 96-39, 93 Stat. 189, the Government is to pay interest on refunded deposits of estimated dumping duties at the rate established under section 6621 of the Internal Revenue Code of 1954. We believe that this provision should also be used for purposes of determining the rate of interest to be paid on duties received in a suit by an importer.

With respect to the suggestions made by Mr. Jarvis, we can see the logic in the principle that when a surety is sued by the United States, the surety should be entitled to bring its principal into the suit.

However, we are unable to determine the reason for the suggestion that the surety should be entitled to counterclaim against the United States. There is no need to authorize a surety to counterclaim against the United States on any matter which could come within proposed section 1581(a), since a surety is now authorized to institute this type of suit. Indeed, we believe that a surety should be confined to the procedures established for that type of suit in the same manner that an importer is so confined. We are unable to determine what type of counterclaim other than a suit within proposed section 1581(a) would be authorized by the suggestion advanced by Mr. Jarvis. If in fact there is no such other type of suit, we would not support the suggestion of Mr. Jarvis that counterclaims against the United States be authorized.

We would be pleased to provide any further assistance you desire.

Sincerely,



DAVID M. COHEN
Director

Commercial Litigation Branch
Civil Division

U.S. Department of Justice



DMCohen:mef
(202) 724-7154

Washington, D.C. 20530

Leo Gordon, Esq.
Committee on the Judiciary
Room 2137
Rayburn House Office Building
Washington, D. C. 20515

Dear Mr. Gordon:

We have reviewed section 701 of H.R. 6394.

In our view, the effective date provision could be simplified if the entire bill were to become effective six months after enactment.

If the Congress does not agree, the effective date provision should be revised as indicated below.

1. The following sections could become effective immediately upon enactment:

a. All of Title I.

b. The following amendments to title 28, United States Code, contained in section 201(a) of the bill: 1581(a), (b), (c), (d), (e), (g), (h); 1584, 1585.

c. Section 201(b) of the bill.

d. The following amendments to title 28, United States Code, contained in section 301(a) of the bill: 2631(a), (b), (c), (d), (e), (i); 2632(b), (c), (d); 2633; 2634, 2635(a); 2636(b), (c); 2637(a), (b), (c); 2638; 2639(a), (b); 2640(a)(1), (2), (3), (b), (c); 2641; 2642; 2644; 2645; 2646.

e. The following amendments to title 28, United States Code, contained in Title IV of the bill: 401(a), (b); 402; 404.

f. The following amendments contained in Title V of the bill: 501, 502, 503, 504, 505, 506, 507, 508, 512, 513, 516, 517.

g. The following amendments contained in Title VI of the bill: 601, 603, 604, 605, 609.

h. The following amendments contained in Title VII of the bill: 702, 703, 704.

i. The amendment contained in section 301(b) of the bill. I believe the reference in this section should be to part VI of title 28 since Chapter 169 is located in part VI and not part V.

2. The following sections should be made effective in cases instituted on or after the date of enactment of the bill:

a. The following amendments to title 28, United States Code, contained in section 201(a) of the bill: 1581(f), (i), (j); 1583.

b. The following amendments to title 28, United States Code, contained in section 301(b) of the bill: 2631(f), (g), (h); 2632(a); 2635; 2636(a), (d), (e), (f), (g); 2640(a)(4), (d), (e); 2643.

c. The following amendments to title 28, United States Code, contained in Title IV of the bill: 401(c); 403.

d. The following amendments contained in Title V of the bill: 509, 510, 514, 515, 516.

e. The following amendments contained in Title VI of the bill: 602, 607, 608.

3. The following sections should become effective with respect to cases instituted six months after the date of enactment:

a. The amendments to title 28, United States Code, contained in the following sections: 1582; 2639(c); 2640(a)(5).

b. The following amendments contained in Title V of the bill: 509, 510, 511.

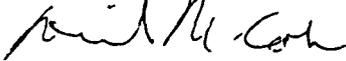
c. The following amendments contained in Title VI of the bill: 606.

4. The following amendment contained in Title IV of the bill should take effect on the first day of the first fiscal year which begins after the date of enactment: 405.

Finally, we have reexamined section 2636(a). In our view, the one hundred eighty day period for the institution of a civil action should not be altered. Six months is more than enough time for a potential plaintiff to determine whether or not to institute suit. Extension of the time period to one year would result in too many stale cases. Accordingly, we would prefer a deletion of proposed section 2636(a)(2) if the only alternative is an extension of the one hundred eighty day period.

We would be pleased to provide any additional assistance you may desire.

Sincerely,



DAVID M. COHEN
Director
Commercial Litigation Branch
Civil Division



DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE
WASHINGTON



17 MAR 1980

REFER TO

MAN-6-01 CC RHA

The Honorable
Peter W. Rodino, Jr., Chairman
House Subcommittee on Monopolies
and Commercial Law
Washington, D.C. 20515

Dear Mr. Chairman:

At the hearings on H.R. 6394, the Customs Courts Act of 1980, a question was raised regarding the annual interest cost to the United States if the law was amended to require that interest be paid on duties which the Customs Court orders to be refunded as the result of a decision adverse to the Government.

In preparing our estimate, we have assumed an interest rate of 10% per year not compounded. We have also assumed that interest accrues from the date a civil action is commenced by the filing of a summons in the Customs Court to the date the court renders its decision in the case and that the principal and interest are paid on this later date. On this basis, we estimate that if a requirement to pay interest had been in effect during the 1979 calendar year, the United States would have paid \$1.6 million in interest while refunding approximately \$6.2 million in principal. Although we believe that 1979 was a typical year, we caution that the figures for the amounts of refunded duties upon which our calculations are based are merely rough estimates.

Of course, other events could be utilized to start or end the period during which interest accrues. For example, we estimate that on the average, contested duties are deposited 19 months before an action is commenced in the Customs Court. We therefore have estimated that for each month that is tacked on to the interest accrual period, the United States would have paid an additional \$52,000 in interest in 1979.

We are enclosing a memorandum which describes our calculations and assumptions in greater detail.

Sincerely,

Richard H. Abbey
Richard H. Abbey
Chief Counsel

Enclosure

ENM:ehj
Chief Counsel

MEMORANDUM ON CALCULATION OF INTEREST

Applicable equation: In general terms, the interest paid (I) equals the annual interest rate (i) times the amount of principal held (P) times the length of time (T) in years that the principal is held. In mathematical terms, this concept would be expressed as

$$I = i \times P \times T.$$

Interest rate: We have based our calculations on an interest rate of 10% per year, not compounded. This figure has been used for simplicity in calculating the effect of other interest rates. For example, if it is desired to learn the effect of a 6% rate, multiply the total interest paid by 0.6.

Duty estimates: The figures for the amount of duties contested in each case (the principal) have been taken from estimates previously calculated by our office. These estimates are based on a small sample of the entry papers before the Customs Court or on discussions with import specialists in the field. As a result, we are not able to determine the degree of accuracy of these estimates.

Time over which interest is calculated: The calculations we have made are based on the duties deposited earning interest from the date an action is commenced in the Customs Court by the filing of a summons to the date the Customs Court renders its decision in each case. However, other starting and ending points could conceivably be implemented. Based on a small sample of entries in cases decided in 1979, we estimate that the following events occur at the times indicated:

Date of entry	25 months prior to filing of summons
Date of liquidation	14 "
Date of filing protest	12 "
Date of denial of protest	5 "

Another possible trigger event is the payment of the contested duties. However, the court records would not necessarily have shown the date of payment. In some cases payment may have been made at the time of entry, and in others, it may have been made upon liquidation. We estimate that on the average, payment of the contested duties occurs 19 months before the filing of the summons, that is, half way between the dates of entry and liquidation.

Another possible termination date is the date of payment of the refund. We have no statistics on the amount of time required to process a refund, but we estimate that it is on the order of three months from the date the Customs Court renders its decision.

Breakdown into three categories of decisions: Decisions of the Customs Court fall into three different categories, depending upon the kind of issue involved and manner by which the case is resolved. We have calculated the amount of interest which would have been paid on each category of decision separately.

Calculation of interest estimate for Customs Decisions (decisions bearing a "C.D." number): In 1979 there were 18 decisions in the C.D. category that were favorable to the importer. We obtained duty estimates for all 18 cases and computed the amount of interest which would have been paid in each case. We estimate that a total of \$100,000 of interest would have been paid and that \$300,000 of duties were refunded. For each additional month that is stacked on to the time from the filing of the summons to the rendering of the decision, \$2,500 of additional interest would have to be paid. This estimate includes judgments for the plaintiff which may later be reversed on appeal. We have not adjusted our estimate to account for such reversals on appeals, but we believe the error we have introduced by not making this adjustment is negligible. Our estimate for the C.D. decisions does not include decisions of the Customs Court favorable to the Government which are later reversed by the CCPA. However, the amounts involved in this kind of situation are included in the abstracted protest and reappraisal decisions.

Calculation of interest estimate for abstracted protest decisions (decisions bearing a "P79/" prefix): There were 226 abstracted protest decisions in 1979. By their nature, all of these cases involve judgments favorable to the importer. Our calculation of the interest payable is based on a study of 57 of the decisions, in the second half of 1979. We have taken into account the fact that several summonses relating to the same merchandise can be decided in a single protest decision.

We calculate that in 1979 the United States became obligated to refund duties of over \$5.5 million as a result of the 226 abstracted protest decisions and would have paid \$1.3 million in interest if a requirement to pay interest had been in effect in 1979. An additional \$46,000 of interest would have accrued for each month that is added to the period during which interest accrues.

Calculation of interest estimate for abstracted reappraisal decisions (decisions bearing an "R79/" prefix): There were 266 abstracted reappraisal decisions in 1979. These cases tend to be somewhat older. Indeed, 179 of the reappraisal decisions in 1979 involved cases filed prior to 1971. Under the procedures then in effect, the importer did not necessarily pay contested duties before going to court. It is therefore impossible to determine whether these 179 decisions resulted in the refund of duties by the Government or the payment of additional duties by the importers. From the remaining 87 cases, we have taken a sample of 37 decisions from the second half of 1979. Our calculations take into account the fact that several summonses relating to the same merchandise can be decided in a single reappraisal decision. Also, where a compromise settlement is involved, our estimates are based on the duty difference between the assessed and the compromise values, not on the difference between the assessed and claimed values.

We estimate that in 1979 the United States became obligated to refund about \$440,000 in duties and would have paid about \$220,000 in interest if a requirement to pay interest had been in effect. For each month that is added to the period during which interest accrues, an additional \$3,700 of interest would have been paid.

Mr. SEIBERLING. Our final witnesses this morning are William Melahn, a private practitioner from Boston, Mass.; and John Pellegrini and Barry Nemmers of the American Importers Association. We'll ask you to appear as a panel, gentlemen, and we will hear your testimony.

TESTIMONY OF JOHN B. PELLEGRINI, CHAIRMAN, CUSTOMS POLICY COMMITTEE, AMERICAN IMPORTERS ASSOCIATION; ACCOMPANIED BY BARRY NEMMERS, STAFF ATTORNEY

Mr. PELLEGRINI. Good morning, Mr. Chairman and members of the Committee.

Mr. SEIBERLING. You are Mr. Pellegrini?

Mr. PELLEGRINI. Yes, sir.

Mr. SEIBERLING. Do you have a prepared statement?

Mr. PELLEGRINI. Yes. I have a few remarks summarizing my statement.

Mr. SEIBERLING. We will put your entire statement in the record, if you would summarize it.

Mr. PELLEGRINI. We'll be happy to do that.

Mr. SEIBERLING. Without objection, the entire statement will be put in the record and you may proceed.

[Complete statement follows:]

TESTIMONY

re

H.R. 6394
CUSTOMS COURT ACT OF 1980

by

JOHN B. PELLEGRINI
chairman, AIA Customs Policy Committee

BARRY NEMMERS
staff attorney, American Importers Association

to

SUBCOMMITTEE ON MONOPOLIES AND
COMMERCIAL LAW
UNITED STATES HOUSE OF REPRESENTATIVES

February 13, 1980



AMERICAN IMPORTERS ASSOCIATION 

11 West 42nd Street, New York, N.Y. 10036 • 212 - 944 - 2230

Mr. Chairman and Members of the Committee:

My name is John Pellegrini. I am a Senior Attorney with J.C. Penney Company, Inc., New York City. I appear here in my capacity as chairman of the Customs Policy Committee of the American Importers Association. I am accompanied by Barry Nemmers, staff attorney for AIA.

The American Importers Association is a non-profit organization formed in 1921 to represent the common interests of the United States importing community. AIA is the only association of national scope not limited to specific commodities or product lines. As such it is the recognized spokesman for American companies engaged in the import trade.

At present, AIA is composed of over 1300 American firms directly or indirectly involved with the importation and distribution of goods produced outside the United States. Its membership includes importers, exporters, import agents, brokers, retailers, domestic manufacturers, customs brokers, attorneys, banks, steamship lines, insurance companies, and others connected with foreign trade.

We welcome this opportunity to present our views on the Customs Courts Act of 1980.

I. INTRODUCTION

The Customs Courts Act of 1980 will accomplish much needed reform of the powers, jurisdiction, and status of the Customs Court. It contains numerous features which will improve access to judicial review, facilitate court procedures, and expand the range of remedies available in litigation arising out of import transactions. It will largely eliminate the severe jurisdictional problems of the past decade. The import community, domestic industry, the government, and other interested parties will be well served by these proposed reforms, and AIA hopes they will be enacted.

However, the bill includes other amendments not necessary to accomplish these purposes; some are likely even to discourage the use of the judicial system as a check on the administration of the customs laws. Despite our commitment to much of the substance of this bill, these objectionable provisions cause us sufficient concern that AIA must reluctantly withhold support for enactment of H.R. 6394 pending satisfactory resolution of these issues.

Before discussing our specific objections, we would like to restate to this Committee what is ultimately the fundamental purpose of this reform exercise. We are seeking changes in the jurisdiction and procedures of the Customs Court in order to improve the quality of justice available to the corporate and individual citizen engaged in or affected by international trade. We are seeking to facilitate the tasks of private attorneys, government agencies, and the courts, but only secondarily - as a means in pursuit of the primary goal: improvements in the quality of justice. As we become immersed in legal concepts and technical problems, it will be natural to lose sight of this goal. The purpose of any reform of the Customs Court and CCPA is not to write a law which embodies

jurisdictional and procedural efficiency, but to ensure that the rights of Americans affected by international trade are protected by adequate judicial oversight of government action.

II. SMALL CLAIMS PROCEDURE

The fact that H.R. 6394 does not provide either Congressional authorization or endorsement for a small claims procedure in the Court of International Trade (the "Court") is of particular concern to AIA. The AIA membership has expressed regularly over the years, and particularly since the enactment of the Customs Court Act of 1970, dismay that many valid claims against the government are not litigated because the costs of pursuing a claim under the Court's procedures substantially outweigh the amounts at issue in the disputes. A small claims procedure would provide these importers their "day in court" and would be a clear affirmation of the basic American principle that the judicial process must be open to all nonfrivolous claims. Disputes over smaller dollar amounts cannot be assumed to be unimportant to the importer. By neglecting to provide for review of small claims, this bill fails to create a truly comprehensive judicial system.

The validity and fairness of small claims procedures have been recognized across the nation; increasingly courts are authorized to implement such a procedure or division. The United States Tax Court has utilized a successful small claims procedure for a number of years, and its judges have been publicly enthusiastic about its merits and its effect on the public's perception of the government's willingness to provide justice for all. (See, e.g., Sterrett, "Small Tax Cases" TAXES - The Tax Magazine, October 1972; and Dawson, "Small Tax Case Procedures in the United States Tax Court," The Tax Advisor, March 1972.) AIA feels that the

Tax Court procedure is an appropriate model.

To this end, we have prepared an outline of principles for a small claims procedure in the Court of International Trade (Appendix). The Tax Court's procedure -- upon which these principles are based—is authorized at 26 U.S.C. Sec. 7463, and is provided for in Rules 170-179 of the Tax Court.

We hope that you will find this concept as meritorious as we do. A small claims procedure will fulfill a perceived need and is consistent with the efforts of both the Department of Justice and the Congress to make justice accessible to all.

III. COUNTERCLAIMS AND TIME FOR COMMENCEMENT OF ACTIONS

AIA has serious reservations with the following two provisions and urges that the Committee actively consider our recommended revisions.

A. Section 1583 - Counterclaims

Section 1583 would allow the government to assert counterclaims arising out of an import transaction pending before the Court. These claims need not be related to the import transaction that is the subject of the case at bar. Under the unique features of Customs Court litigation, which result from the fact that each entry is a separate cause of action, an importer may have numerous cases pending before the Court, as many as several hundred. Many of the cases are not actively pursued but are in the Court's suspension file awaiting the decision in another case which raises the same issues. If the importer is successful in the active case, the suspended cases may be the subject of a stipulation. If the government is successful in the active case, the

active case, the suspended cases will either become active, or more likely, will be abandoned. In either circumstance, the decision to activate the case remains with the importer. Section 1583 would allow the government to preempt these decisions with no attendant increase in judicial efficiency since the counterclaim is unlikely to have any relation to the case at bar.

We suggest, therefore, that section 1583 be amended to read as follows:

"The Court of International Trade shall have exclusive jurisdiction to render judgment upon (1) any counterclaim asserted by the United States which arises out of ~~an~~ the import transaction that is the subject matter of ~~a~~ the civil action ~~pending~~ before the Court, or (2) any counterclaim of the United States to recover upon a bond or customs duties relating to such transaction."

We are also concerned that section 1583 may be read to permit the government to assert counterclaims based upon penalties assessed under section 592 of the Tariff Act of 1930 or other penalty provisions. Either the Committee's report or the section itself should clearly state that penalties may not be enforced in any fashion under this section and must be brought as a separate action.

B. Section 2463(a) - Relief

This proposed section read in conjunction with proposed section 1583 would appear to allow the Court to enter a judgment assessing additional duties against the importer in cases instituted under proposed section 1581. This reading is confirmed by the Senate Report (S. Rep. No. 96-466, 96th Congress, 1st Session, 20 (1979)). This represents a radical change from present law and practice and will have a profound, chilling effect on potential litigation in the Court.

While we do not object to the government being allowed to demonstrate that a claimed classification or value is incorrect by showing that

another classification or value is more accurate, we do not believe that the government should be allowed to recover additional duties. This limitation is justified by both legal and commercial equities and is consistent with our understanding of income tax litigation. At time of entry the government dictates the entered value and classification. After entry and before liquidation, the government may change the classification or value. After liquidation both the importer and the government have 90 days in which to claim alternative classifications or values -- the importer through the protest procedures of section 514 of the Tariff Act of 1930, and the government under the reliquidation authority in section 501 of the Tariff Act of 1930. It would be inequitable to permit the government to recover additional duties after the importer and the government have exhausted the administrative process and after which the importer has made a decision to seek judicial review based upon the government's position stated at liquidation. The government should not be allowed to assess additional duties unless it does so within the time limits set by section 501.

Present law is designed to encourage, not to inhibit, judicial oversight of the administration of the customs laws. The government has yet to offer any justification for this radical change.

In testimony before the Senate Subcommittee on Improvements in Judicial Machinery, the Department of Justice argued for the ability to seek additional duties because review of classification and value questions would be de novo. Review of these questions has always been de novo; H.R. 6394 does not alter the standard of review.

We recommend that section 1583 be further amended by adding the following language at the end thereof:

"provided, however, that nothing contained herein shall be deemed to permit a claim barred by section 501 of the Tariff Act of 1930."

IV. OTHER RECOMMENDATIONS

A. Section 1581. Civil actions against the United States

Early drafts of S. 1654 proposed that the Customs Court be granted concurrent jurisdiction with the district courts over all other civil actions under the Constitution, laws, or treaties of the United States which involve disputes arising from import transactions. We strongly endorse this jurisdictional grant and believe it should be included in H.R. 6394. The provision has many useful applications both for the importer and the government. Cases which might be brought to the Court of International Trade under this jurisdiction would include, for example, claims regarding importations regulated under the Federal Food, Drug, and Cosmetics Act or the Toxic Substances Control Act (TSCA). In our association's discussions with the Environmental Protection Agency (EPA) concerning regulation of imported chemicals under TSCA, EPA has recognized that import transactions present very different questions than do wholly domestic ones and has made an effort to learn enough about the trade to write realistic and enforceable rules. Despite their extensive efforts, we continue to have difficulty explaining the many subtle differences which have a significant influence on the ultimate effects of the rules. When import cases under these rules begin to reach the courts, a similar education will be necessary, but in the pressure of litigation such efforts may or may not be sufficiently effective. It would be a distinct advantage to both sides to be able to bring these questions to the judges of the Court of International Trade with their extensive background and expertise in trade. Because jurisdiction will be concurrent, the importer or the government may still choose the district court if the issues do not require the Court's special expertise. Concurrent jurisdiction will also prevent the possibility of separate bodies of law for imported and domestic chemicals.

B. Section 1581(c) - Review of certain findings of the International Trade Commission

The AIA endorses the testimony of the American Bar Association before the Senate Subcommittee on Improvements in Judicial Machinery regarding the limitation of review of certain actions of the International Trade Commission to a determination of the procedural regularity of those actions after the decision of the President has become final.

We recognize the inappropriateness of review of Presidential acts in the conduct of foreign affairs. Nevertheless there is a serious inequity in denying review of the actions of an independent regulatory agency -- even if the President's acts are based on the actions of that agency -- if such review can be provided after the agency's actions become final but before the President has acted. To emphasize our point, we note the difference between review of ITC actions and actions of the Office of the United States Trade Representative pursuant to sections 302(b)(1) and 304 of the Trade Act of 1974 where such limited review is more likely to be appropriate. We urge the Committee to amend section 1581(c) to allow court review of these ITC actions, before the President's action, to determine whether they are based upon substantial evidence on the record made by the ITC.

C. Section 1582 - Civil actions commenced by the United States

AIA supports the bill's provisions for initiating customs penalty cases in the Court of International Trade and for transferral of such cases to the district court at the importer's option. This provision permits the utilization of the more appropriate forum on a case by case basis. In penalty cases where an important classification issue is involved, for example, the importer may well wish to have the benefit of

the Court's expertise in such matters and to have both disputes heard in a single action.

The bill also should provide the importer the opportunity to institute judicial review in the Court of International Trade of penalty cases at any time after the administrative process is complete and before collection action is commenced by the government. In penalty cases the importer may be required to carry very large contingent liabilities until the government decides to institute an action for its claim -- often a period of years. The importer should be allowed the opportunity to resolve the matter by initiating judicial review proceedings at an earlier date. To this end, we suggest that a new section 302 be added to H.R. 6394 as follows:

SEC. 302. Section 592 of the Tariff Act of 1930 is amended--

(1) by designating the existing language in subsection (e) as paragraph (1); by redesignating paragraphs (1) through (4) as (A) through (D) respectively; and by adding the following new paragraph (2):

"(2) A proceeding under this subsection may not be commenced until after the 90th day following the date of the issuance of a written claim under subsection (b)(2) or of a final determination in a proceeding under section 618 of this Act, whichever is the later: Provided, That the running of the period prescribed under section 621 of this Act for the institution of any suit or action shall be tolled during such 90-day period;"

and,

(2) by adding the following new subsection:

"(f)(1) Notwithstanding any other provision of law, within 90 days after the date of the issuance of a penalty claim under subsection (b)(2) or of a final determination in a proceeding under section 618 of this Act, whichever is the later, any person affected adversely thereby may commence a civil action against the United States to challenge such claim or determination, as the case may be, in the United States Court of International Trade.

"(2) In any civil action commenced under paragraph (1), subsection (e) shall apply, provided that, when the monetary penalty is based on negligence, the plaintiff shall have the burden of proof.

"(3) The commencement of a civil action under paragraph (1) shall bar institution of any suit or action for the collection of any monetary penalty assessed under this section and shall toll the running of the period prescribed under section 621 of this Act for the institution of any suit until such civil action is finally decided."

D. Section 2631(g). Persons entitled to commence a civil action.

Adversely affected parties should be allowed to intervene in actions brought under subsection 1581(b). Importers not a party to a section 516 action often will have a substantially different position on the issues before the court than the importer whose entries have been selected for trial by the plaintiff. These importers should be allowed to intervene.

On the other hand, intervention should not be allowed in actions brought under subsection 1581(i).

E. Section 2642 - Analysis of imported merchandise

This section provides that a judge of the Court of International Trade may order an analysis of imported merchandise by laboratories or agencies of the United States. We see no reason to limit the court's authority to government laboratories or agencies. There could well be situations where government laboratories do not possess the necessary expertise. Under these circumstances, the court should be allowed to engage a private laboratory to perform the required analysis.

V. CONCLUSION

The proposed Customs Courts Act of 1980 is a commendable bill which with the addition of an authorization of a small claims procedure in the Court of International Trade and certain other modifications, the AIA will strongly support.

The express grant of equity powers, resolution of existing jurisdictional uncertainties, and the elevation of the status of the Court are needed reforms. The coming years in international trade will challenge these Courts with an array of unique and difficult legal questions. By enacting H.R. 6394 with the additions and modifications we suggest, this Committee and the Congress will have equipped the Courts with the ability to serve its constituents.

AIA thanks the Committee for this opportunity to present its views.

APPENDIX

OUTLINE OF PRINCIPLES FOR A SMALL
CLAIMS PROCEDURE IN THE COURT OF
INTERNATIONAL TRADE

1. Small claims cases should be limited to questions protested under sections 514 and 515 of the Tariff Act of 1930. A "small" claim should be one in which the total amount of duty in dispute does not exceed \$5000, the amount in dispute being the difference between the amount of duty claimed due by the government and the amount the importer asserts is due. We note in this regard that while the present ceiling in the Tax Court is a deficiency of less than \$1500, a bill in the 95th Congress, H.R. 13082, which was passed by the House of Representatives on October 10, 1978, would have increased that amount to \$5000. (Congressional Record, October 10, 1978, at H 11902.)
2. The case would be brought to the Court by a summons, but we suggest that a separate summons form be devised for these cases. (See Tax Court Form 2 - Petition (Small Tax Case); the petition for regular cases is Tax Court Form 1.)
3. Discovery should be kept to an absolute minimum. At most the rules could provide that with the consent of the parties, the testimony of all witnesses, in affidavit form, be deposited with the Clerk to be released by him simultaneously to each opposite party. Each party would then have the right to serve "cross-interrogatories" on deposing witnesses which the party would satisfy with supplementary affidavits. Alternatively the Court could permit oral testimony of witnesses at trial.
4. The hearing or trial should be as informal as possible - perhaps even held in chambers. The making of a record should be optional. The importer should be allowed the option of having an attorney or broker present.
5. The decision should be final and nonappealable.
6. The decision should not be published but a summary of the bases for the decision should be given to both parties.
7. The decision must not stand as a precedent and should be binding only on the entries that were before the Court.
8. If the Court decides that the jurisdictional ceiling has been exceeded, the importer should have the option of proceeding as in a normal case. (See 26 U.S.C. §7463(d).)
9. Corporations must be allowed to appear through an authorized agent.
10. Small claims cases should be heard throughout the country wherever a judge is present on Court business. If the Court becomes too burdened in the future, magistrates might be authorized as in the Tax Court.

11. The success of a small claims procedure depends very much on the perceived receptivity of the Court and, to a lesser extent, the Customs Service and the Department of Justice. The Court not only should be committed to making this procedure as informal, inexpensive, and unthreatening as possible, it also should include a statement of policy to that effect in the Rules. The importer should be made to feel that the Court welcomes these cases. (We made this statement not as a comment on the Court's attitude but as an indication of what the importer may need to hear.)
12. Further, explanations of the means of access to this procedure should be made widely available and written in lay language. With every eligible Notice of Deficiency the Internal Revenue Service mentions the small claims procedure of the Tax Court. Similarly the Customs Service should include a notice with eligible denied protests and let the importer know that a small claims case kit is available from the Court. The Tax Court includes in its kit the applicable forms and rules and, best of all, a pamphlet "Election of Small Tax Case Procedures & Preparation of Petitions" written for the layman.

Mr. PELLEGRINI. The American Importers Association believes that the Customs Courts Act of 1980 will accomplish many of the needed reforms of the jurisdiction and procedures of the Customs Court. It will expand access to judicial review, facilitate court procedures, and expand the range of remedies available through litigation. In particular, it will solve the severe jurisdictional problems of the past decade and for that purpose we would like to support the bill.

However, there are a couple of provisions in the bill which give us serious problems.

The first is the failure of the bill to provide an authorization to the Customs Court to establish a small claims procedure. The members of AIA have said regularly that a small claims procedure is necessary. This is particularly so since the passage of the Customs Courts Act of 1970 which changed procedures in the court. We believe it's necessary to have a small claims procedure.

To that end we have attached to our statement an appendix which sets forth a list of principles which we believe should govern any small claims procedure. We are not asking that the statute specify specific procedure but merely that it authorize a small claims procedure in the Court of International Trade.

There are two other provisions as proposed which give us problems. The first is the counterclaim provision. We believe that the language as is contained in the bill is much too broad. It would permit the Government to raise a counterclaim with respect to any action before the Customs Court. It's not limited to the particular import transaction pending before the court or at bar.

Perhaps a little background as to the types or the number of cases that an importer might have before the court will explain and justify our concern. Under the court's reserve and suspension disposition files an importer may have numerous cases, in many instances as many as several hundred, which are before the court and which would be considered a civil action pending before the court. We feel the counterclaim provision should be narrowed to limit permissive counterclaims to those which arise out of the particular import transaction which is at trial.

The essential purpose of the counterclaim provision should be judicial efficiency. It's hard for me to understand how permitting the Government to raise counterclaims on suspended cases, many of which will never come to trial, will never really involve active court action—how raising claims with respect to those civil actions could possibly promote judicial efficiency. That is why we are recommending certain changes in the language of section 1583. These changes are included in our statement.

The second problem we have is the ability of the Government to seek and the court to grant additional duties. We believe very strongly that government claims for additional duties should be limited to those cases where they have exercised their rights under section 501 of the Tariff Act, the administrative statute of limitations.

Mr. Cohen this morning indicated that a decision as to the proper classification or value is often made in a hasty fashion by the Customs Service. That is not necessarily the case. At the time of entry the classification and value of merchandise is frequently dictated by the Cus-

toms Service. There are time lags between the time of entry and the date of liquidation which is normally the final administrative process in which the Customs Service has every opportunity to review their determinations and to determine the proper classification or valuation of merchandise. After liquidation the importer and the Government have an additional 90 days in which to change their mind—for the importer to file a protest under section 514 of the Tariff Act and the Government to reliquidate the entry under section 501 of the Tariff Act. We believe that this action should be final.

This, to us, is similar to the situation in the Tax Court in income tax litigation where the taxpayer after he's paid his taxes, if he's filed his protest, could go into court and unless the Government has exercised its right to amend their determination within a certain administrative period the court is not allowed to assess additional taxes.

Now this is not to say that the Government could not attempt to demonstrate that the importer's claim is incorrect by showing a third classification of value is correct. Surely they can do that and if the Customs Court should decide that the third classification or value is correct that would certainly have prospective effect. It would affect subsequent importations. But we believe that in these situations, particularly in Customs Courts where these trials take place many years after importation, that the commercial and legal equities require that the Government not be allowed to recover additional duties.

That covers the major specific problems we have with the bill. Our statement includes a number of other points, largely of a technical nature, which we commend to your consideration. We also intend to file a supplemental statement which will get into more detail and other technical problems we see. We did not see the bill until very recently, and we request your permission to file a supplemental statement.

Mr. SEIBERLING. We will be happy to have that. Without objection, that will also be included in the record.

Mr. Pellegrini. Thank you.

Mr. PELLEGRINI. In general, we do support the bill with the exceptions I have noted today. We think it's a vast improvement over current law or prior drafts of this bill and, again, we would like to thank the committee for the opportunity to appear today.

Mr. SEIBERLING. Thank you. Do you have separate testimony, Mr. Nemmers?

Mr. NEMMERS. No; I do not.

Mr. SEIBERLING. Then, Mr. Melahn.

**TESTIMONY OF WILLIAM MELAHN, ESQ., DOHERTY & MELAHN,
BOSTON, MASS.**

Mr. MELAHN. I have a prepared statement.

Mr. SEIBERLING. Without objection, we will put your entire statement in the record. Would you just summarize it for us?

[Complete statement follows:]

STATEMENT OF WILLIAM E. MELAHN
IN SUPPORT OF
THE CUSTOMS COURTS ACT OF 1980
BEFORE THE
SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW

My name is William E. Melahn. I am a practising Customs attorney with an office in Boston, Massachusetts. I was admitted to practice before the courts of the State of New York in 1969 and before the courts of the Commonwealth of Massachusetts in 1974. In addition, I am admitted to practice before the United States Customs Court and the Court of Customs and Patent Appeals and have been engaged in the private practice of law specializing in Customs matters since 1970. Prior to becoming a practising attorney I was employed by the United States Customs Service for three years as an Import Specialist at the Office of the Regional Commissioner of Customs located at New York City. Following that for the next three years I held the position of Customs Law Specialist at the New York Region in the office of the Deputy Regional Commissioner whose function was to handle Customs penalty matters originating in the New York City area.

As an Import Specialist I was primarily concerned with Customs valuation, classification and related areas which are the subject of proposed Section 1581 of the Customs Court Act of 1980. As a Customs law specialist I was concerned primarily with violations of 19 USC 1592 which are

the subject of proposed Section 1582 of this Act. As a practising attorney I have continued to deal with all of these areas on a regular basis.

I am a member of the Association of the Customs Bar located in New York and member of the Board of Directors; however, I appear today to express my personal views on the Customs Court Act of 1980. I wish to thank the Committee for allowing me to testify on behalf of this Bill.

Since admission to practice before the Customs Court and the Court of Customs and Patent Appeals, I have appeared in both of those courts on numerous occasions. I have participated in all stages of the litigation process from the filing of a summons in the Customs Court to oral argument in the Court of Customs and Patent Appeals. I have worked on a day to day basis on matters such as those outlined in the Customs Court Act of 1980, specifically Chapter 169 relating to court procedures. I have also been involved with a case concerning the jurisdiction of the Customs Court and have served on a Customs Court Committee chaired by Judge Watson which examined the jurisdiction of the Customs Court and related matters. From time to time my views have been solicited by the Court with respect to the formation and amendment of Court Rules.

I have also been involved with the administrative handling of Customs matters from the initial contact with an Import Specialist at the District level up to a formal conference with officials at Customs Headquarters. I am

thoroughly familiar with the administrative protest procedures which lead into the court procedures. These are the administrative remedies referred to in Section 2637 of the new Bill.

I am presently a member of the Boston firm of Doherty and Melahn. As far as I am aware we are the only firm in New England which regularly practices in the Customs Court and the Court of Customs and Patent Appeals on the Customs side of that court. To put it another way, we are non-Washington, non-New York attorneys who specialize in Customs Law. As such we believe that we have a point of view somewhat different from that which you may have heard up to now in connection with this Bill. While we do represent some substantial industrial clients, a large percentage of our clients are small importers, true entrepreneurs in the best sense of that word.

The Customs Court Act of 1980 properly concerns itself with the addition of significant grants of new jurisdiction to the Customs Court. This is long overdue. Undoubtedly much of the information supplied to the staff has been furnished by large Washington oriented organizations which would be affected by this Bill. In my judgment this Bill will also have a profound effect on the many importers throughout the United States who are not represented by any of those organizations. My statement this morning will to a great extent reflect a view from the firing lines, that is a view from one of the outports which is where most of the Customs activities take place. With the Committee's permission

I would like not only to comment upon some technical matters contained in the Customs Court Act of 1980, but I would also like to share with the Committee some of my experience in order to aid the Committee in understanding the potential effects of this Bill.

I support the Customs Court Act of 1980 as drafted by your Committee. The Bill is badly needed and long overdue. It is superior to all earlier versions of this Act which I have had the opportunity to examine. I wish to compliment your staff for the superior work product which they have produced. I expressly commend the Committee for amending Section 1585 of Title 28 of the United States Code to provide that the Court "shall possess all the powers in law and in equity of, or as conferred by statute upon, a jurisdictional court of the United States." I urge the Committee to make it crystal clear that it means exactly what it says by the amendment of Section 1585. If the Committee does nothing else it will have accomplished a great deal by this provision alone. In both the Customs Court and the Court of Customs and Patent Appeals on the Customs side a series of unfortunate decisions have narrowly construed the jurisdiction of the courts and have rendered the courts useless for many individuals who have legitimate disputes which should be reviewed by an Article III court.

Any reasonable observer would have to conclude that the United States Customs Court is the most under-utilized court in the United States. In 1977, as reported in Volumes 79

and 80 of the United States Customs Court Reports, the Court decided 36 classification cases, 10 valuation cases and ruled on 14 reported Motions for a total of 60 decisions. In 1978, as reported in Volumes 80 and 81 of the Customs Court Reports, the Court decided 44 classification cases, 14 value cases, and 18 reported Motions, for a total of 76 decisions. These should be compared to 1970, the last year before the Customs Court Reform Act of 1970 became effective, in which the Court decided 227 classification cases, 54 valuation cases, and 21 Appellate cases, or a total of 302 cases. During the 1970's, there were a number of significant trade bills and the amount of imports into the United States has increased by many millions. Yet the number of reported cases decreased to 20% or 25% of the 1970 base year. These figures speak for themselves; there is something seriously wrong when, despite the explosive increase in importations, there has been a decrease in litigation in the Customs Court to 25% of the former level. The fact of the matter is that the Customs Court as it is presently constituted is approaching the 21st Century with 19th century jurisdiction. The problem is primarily related to the lack of meaningful statutory jurisdiction coupled with overly narrow judicial interpretations as to the jurisdiction of the court. This Bill will go a long way to correct a serious deficiency in the United States Court system and significantly improve the administration of justice.

Even in instances where the Court presently has jurisdiction it often lacks sufficient power to administer meaningful remedies for aggrieved parties. I have had to advise many clients that even though I felt the Customs Service had made an erroneous decision in their case and they had a good claim, that due to the difficulty of obtaining jurisdiction in the Customs Court at a meaningful time, their own best interests would be served by dropping the matter, absorbing the loss, and ceasing to import the product. I have given this advice knowing full well that in many instances the underlying administrative decision was totally erroneous and stood a good chance of reversal in Court.

As the system currently works, an importer pays estimated duties at the time of entry. An entry is a document required to be filed with Customs in order to obtain release of the imported merchandise. Estimated duties and taxes are required to be paid at time of entry. An entry is not finally accepted by Customs until the act of liquidation takes place. Liquidation is the final accounting of all moneys either due to the Government, or to the importer, and is the legal date from which protests may be filed to contest actions of the Customs officials. One can file a protest against an administrative decision within 90 days after the day of liquidation, but not before the date of liquidation. This is significant because it directly affects the present jurisdiction of the Customs Court by limiting access to that Court if the entries are not liquidated.

If a Customs official is of the opinion, that a higher rate of duty or higher value pertains to the imported merchandise he will require the deposit of additional duties at the time of entry. 19 U.S.C. 1505 and Section 141.64 of the Customs Regulations, 19 C.F.R.141.64, require that formal entry papers shall be reviewed to see that the correct values and rates of duties are used. If there are any errors to be found, the papers shall be returned to the importer for correction and payment of additional duties. There is no limitation on the discretion of the official as to how much duty he may require to be paid up front. If the importer disagrees with the assessment, he has a right to file a protest under 19 USC 1514 when the entry is finally liquidated and he may seek relief in the Customs Court. The following scenario is a hypothetical example of what can happen:

An importer has a disagreement with an official concerning the classification of the merchandise. The amount of money requested is significant to the point where the imported item's cost will be prohibitively expensive in the market. The importer is told that if he does not put up the money, he will not be allowed to have the entry accepted. Without acceptance of the entry, he cannot obtain his merchandise. If he obtains his merchandise at the high rate, he may not be able to sell it at a price covering his cost. Assuming he puts up the money to obtain release of the merchandise, the importer then must wait for the District to liquidate the entry before he can obtain a judicial resolution of who is right.

The problem is that even under the Customs Procedural Reform and Simplification Act of 1978, Public Law 95-410, which mandates a one year limitation on liquidation by Customs, with some exceptions, the Customs official may literally sit on the entry until he is good and ready to take action. I assure you that this has happened and I have no doubt that it happens frequently and continuously throughout the United States. The effect of the lack of action or an intentional decision not to liquidate by the Customs official is to totally deprive the importer of access to the Customs Court, or any court for that matter. By not having a liquidation, you cannot file a protest. Without a denied protest the Customs Court cannot gain jurisdiction. Moreover, even if a timely protest is filed after liquidation, at a minimum it takes four months to file a summons in the Customs Court because the only recourse the importer has to speed up action on the protest is request accelerated disposition 90 days after the protest has been filed; with accelerated disposition, by operation of law, at the expiration of 30 days, the protest is deemed denied. The importer may then file a summons in the Customs Court.

When an importer finally gets into court, the matter is generally complex and time consuming in its own right. It may be a year or two before he has a hearing, much less a decision on his case. It may turn out at the end of three years the importer was correct in his position and the Government has improperly collected duties from him. At the

end of three years, he will thus have obtained a judgment on one entry. Generally speaking each entry will be handled as a separate case requiring separate handling in the court. Even where a plaintiff has won its test case, he then must have his attorney obtain a judgment on each of the other entries pending in the Customs Court which itself is a time consuming process. It could be years before the plaintiff receives a refund of his initial overpaid duties. No payment of interest is made, and of course there is no payment of attorney's fees. Bear in mind that the Court has held that he was right in the first place and the Customs assessment was in error. Whatever else one may say about a system such as this, it is certainly not fair or equitable. It is one thing for Congress to set import policy, which is its duty under the Constitution; it is another thing to provide meaningful judicial review at a meaningful time, so that persons may know whether or not they will have to pay higher duties and can make intelligent decisions as to whether they wish to import and item or not. This is simple and elemental justice. As I understand this Bill with its grant of equitable powers, it should be possible to obtain immediate judicial review in those instances where the importer will be irreparably harmed. I do not see how anyone with any sense of fairness can dispute the need of this kind of judicial review. Congress is not saying that the Court should rule one way or another; it is simply saying that an aggrieved party has a right to an impartial hearing by an Article III court. A

citizen should have the absolute right to confront its Government in Court. I commend your Committee for the correction of the presently unacceptable situation.

I next wish to comment upon the amended Section 1582 relating to civil penalties. I would like to say that I think it is an excellent idea to have civil penalty cases in the United States Customs Court. It simply makes good sense. Underlying many of those cases are complex technical import questions. Among other things, many penalty cases have resulted from an honest difference of opinion concerning the classification of merchandise under the Tariff Schedules or valuation statutes. It is unreasonable to expect a District Court Judge, no matter how conscientious, to fully understand the circumstances of these cases.

I think it is a serious mistake, however, to have penalty actions transferred to the District Courts in cases where a party desires a jury trial. I say this for a number of reasons. First, as a practical matter, an attorney defending a penalty case may not know at an early stage whether a jury trial is desirable or not. As a matter of prudence he will wish to preserve this right even though it may ultimately turn out that a jury trial may not be advantageous. Second, what will happen in a situation where a party elects to file his Motion for a Jury Trial, has the case transferred to a District Court, and later decides that he does not want a jury trial? Will the case then be transferred back to the

Customs Court, or will it be tried in the District Court before a District Court Judge? My prediction is that attorneys, especially those unfamiliar with the Customs Court, will opt to have the case transferred to the District Court every time. Few, if any, cases will be tried in the Customs Court clearly defeating a purpose of enlarging the Court's jurisdiction.

Third, one has the impression from reading the Bill that Congress feels that there is something undesirable or unholy about a jury trial. A jury trial is a precious right and should be preserved by Congress. Fourth, the transfer provision may have been placed in the Bill to avoid Constitutional difficulties. The Seventh Amendment provides that "In Suits at common law, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." There may be doubt as to whether the Seventh Amendment applies to civil penalties assessed by administrative agencies. I refer the Committee to the case of Atlas Roofing Company, Inc. v Occupational Safety and Health Review Commission et al. etc., 430 U.S.442, 51 L.Ed.2d 464, 97 S.Ct.1261 (1977) wherein the Supreme Court held that in creating civil penalties, Congress could assign their adjudication to an administrative agency without violating the Seventh Amendment. It seems to me that this is somewhat beside the point when one is speaking of leveling penalties, in some cases millions of dollars, against an individual. That person ought to have the absolute right to a jury trial

in the first instance. Congress should forthrightly grant the right to a jury trial in the Customs Court. I do not believe that there will be any problem impaneling juries in the Customs Court which sits throughout the United States. This could be done easily by utilizing jury pools of the District Court wherein the alleged violation occurred.

I have no doubt that there will be a certain reticence on the part of some of the sitting judges to handle jury trials. I do not think that Congress should be dissuaded from providing for jury trials for this reason. The Court may well be able to solve this problem by assigning members of the Court who are more comfortable with jury trials. In sum, I have not heard anyone express a reasonable explanation as to why jury trials should not be handled in the Customs Court, and as a practical matter as I have indicated above, you will effectively emasculate the penalty jurisdiction of the Court by not providing for jury trials in the Customs Court.

I next refer to the provision on counterclaims, Section 1583 on page 9. It is difficult enough to bring an action in the Customs Court with all the pitfalls that it entails--one has the statute of limitations, the burden of proof on the importer, and the many technical reasons for which one can be thrown out of court. To place this additional threat, and threat is the correct word, in front of an importer because he wishes to contest the decision of an official

seems to be vindictive, and reflective of a mentality which does not wish importers to contest bureaucratic decisions. It is much more convenient for public officials not to have their decisions contested in court. Citizens should have the right to challenge their Government without the threat of reprisal if they assert their rights. I submit that a counter-claim is nothing but a weapon to be used by administrative officials to dissuade parties from pursuing their rights. Congress should not allow this to happen. I would hope that your committee can see this provision for what it is and see fit to eliminate it from the Bill.

I would like to discuss a topic which, as far as I am aware, has not come up with any of the prior proposed bills on the Customs Court--interest on Judgments.

A typical scenario for a plaintiff challenging the Government in a case in the Customs Court would go something like this: A man imports merchandise into the United States in 1980 with the understanding, usually based on information supplied by Government officials, that the rate of duty will be 10%. Instead, at the time he makes his entries he is informed that it is Custom's position that the correct duty is 20%. He is told that he has a right to challenge this decision administratively, which he wishes to do. Remember he cannot challenge the duty assessment until liquidation has occurred. Liquidations may come anywhere from three to six months after the import specialist finishes his action on the entries, primarily because the regional liquidation

offices are incredibly slow in handling the paper work. He then files his protest and the local official invariably turns down the protest. Generally it is the same official who made the decision in the first instance. The importer also has the possibility of obtaining a review of his protest in Washington, but in some regions the regional officials permit very few of these review protests to go to Washington. There is a screening process at the Regional level with virtually no guidelines over the process. In any event, if the importer is fortunate enough to have the protest reach Washington, it will take anywhere from six months to a year to get a decision from Headquarters. If his protest is successful he may get his refund about a year after he made his original payment of duty. Should he be unsuccessful he will then have to go through the process of filing a Summons in the Customs Court. Even the most diligent counsel could not possibly get to trial before nine months to a year and that is assuming a minimum of discovery. After trial, plaintiff's attorney must file a brief and the government files its brief, and the plaintiff has an opportunity to file a reply brief. It is not unusual for two to three years to expire for the completion of these functions because of the complexity of litigating in the Court. In other words, an individual importing in 1980 may expect a decision on his case anywhere from two to four years after his initial importation. If he continues to import the same merchandise, he is required to deposit increased duties on each and every entry, file a protest on each and every entry, and with some

exceptions, file a Customs Court civil action on each and every entry. His counsel must then move to suspend the later entries under the first case or, as it is called, the test case.

An importer winning his test case must then file proposed stipulations with the Attorney General's office in New York, who then will determine whether or not it agrees that the test case covers the stipulations. While in many cases they do agree, in some cases they do not agree for various reasons, some of which are good and some not so good. Assuming that the importer does not have to try a second case on essentially the same issue to collect his money on the remaining entries, and assuming further that the Government goes along with all the stipulations, experience shows that these stipulations are given the lowest priority in the Attorney General's office. There is little recourse that the importer has at this point. He is totally reliant on the judgment of the Attorney General's staff that these other entries are stipulatable. As a practical matter the importer is not in a position to request relief from the Court to hurry the process without seriously damaging his own position.

It is not inconceivable that after having won his case in the Customs Court the importer may not get refunds for a year or more after the test case. Consequently, an importer might not get his refunds until six or seven years after he has actually deposited the duties.

The importer will, in fact, have lost his case because he has lost the use of his money for this entire period. All he is going to get back is the money incorrectly taken from him without payment of any interest and without payment for attorney's fees and out-of-pocket costs of litigation.

Consider the economic significance of being forced to pay an amount in Year One and receiving back the identical amount in Year Seven, having lost the use of that money for seven years which can be estimated at the prevailing commercial interest rate of 11.25% per year compounded annually, and add to that the real dollar loss of an effective yearly inflation rate of in excess of 12%.

I have heard no sensible reason why the Customs Service should not pay a reasonable interest in the same manner as the Internal Revenue Service does when excess taxes have been deposited by a tax payer. Government personnel have stated payment of interest is unnecessary because importers would achieve a windfall. I challenge this assertion; The Government has the use of these funds interest free. After eleven years of counseling clients, I am convinced that these cases clearly involve substantial losses to an importer, and interest could in no way be considered a windfall. Not all importers are industrial giants; some are quite modest and are not in a position to take on a vast institution like the United States Government. They are consequently injured by the process even though Congress did not intend their merchandise to be assessed with a higher rate of duty.

There is also another important policy question underlying this area. All Government action is inherently slow, notwithstanding the best intentions by the officials involved. If the Government were required to pay interest I believe it would have the salutary effect of promoting efficiency, not only in the Customs office but more importantly in the Attorney General's office. I am absolutely persuaded the only meaningful way these files will be moved and given the priority they deserve is when the Government has to pay a reasonable interest.

I should also like to add that even when the stipulations are entered into and Court Orders signed, we have had situations where we have not received actual moneys from the Government for six months after the signing of the Court Orders despite the most diligent efforts of our firm. Customs simply does not pay attention to Customs Court Orders. The only way that the Government will be made to act expeditiously on these files will be to provide for the payment of interest.

There is one area in this Bill which is not new but is a holdover from the present jurisdiction of the Customs Court which warrants the attention of this Committee. Section 2637 of Title 28 requires all liquidated duties to must be paid at the time the action is commenced. I think it is constitutionally permissible to require the payment of duties before providing access to a court. There is an obvious overriding Government interest in collecting duties promptly. However I ask you, what will happen in a situation

where an importer simply cannot pay the duties after he receives a liquidation bill and the duties are not fully covered by a surety? As I read the statute, such an importer would be precluded from bringing an action in the Customs Court to contest the validity of the assessment. He would be precluded because of the exclusive jurisdiction grant contained in this Act from asserting his claim in any other court. In effect, in the instance where the importer cannot pay additional duties, he would be deprived of any forum in which to contest the validity of the decision. There is a line of recent cases in the Supreme Court concerning the question of access to courts. For example, such a case, involving a state action, is Boddie v Connecticut, 401 U.S..371, 91 S.Ct.780 (1971). I seriously question the constitutionality of this provision without some additional provision to allow an importer, in special circumstances, to come into the court without the payment of duties. One could argue that Section 1581 (j) (2) which refers to irreparable harm covers such a situation. In light of many Customs Court cases which have dismissed protests for failure to pay liquidated duties, I am not so sure. I suggest that your Committee take a serious look at this question. It may be possible to add a sentence to Section 2637(a) to provide for instances where the importer is unable to deposit the liquidated duties. I am not certain that I have the answer to this problem, but I do believe it should be brought to your attention before this Bill is finalized.

I also wish to consider the question on Section 1581(a) (3) which relates to "all charges and exactions of any character within the jurisdiction of the Secretary of the Treasury". This language is somewhat archaic. There are many penalties assessed by Customs on behalf of other agencies. It would be desirable to clarify this language to include those penalties to remove any doubt as to jurisdiction in the Customs Court. For example, Customs administers Department of Agriculture questions utilizing Customs penalties. These matters are handled entirely by Customs penalty personnel in consultation with the Department of Agriculture. It would be logical for such actions to be covered by this provision. A sentence could be added which would include all penalties administered by the Secretary of the Treasury on behalf of other agencies.

Finally, I would like to make an observation with respect to a small claims section in the Court. I believe it would be a serious mistake to encumber the present Bill with a provision for a small claims section. I believe that the question of small claims should be the subject of separate investigation and study in its own right to determine if it is needed and, if so, the best way of handling the provision.

I wish to emphasize again that there is an immediate need for this Bill, and anything that would impede it would serve no useful purpose.

In summation, I commend the Committee and its staff for the fine work they have done with this Bill. My only regret is that the Bill had not been offered sooner.

Respectfully submitted,

Doherty and Melahn
79 Milk Street
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Dated: Boston, Mass.

Phone: 617-426-9340

February 8, 1980

By: William E. Melahn

Mr. MELAHN. Yes, Mr. Chairman.

I would like to add, it's with some trepidation that I, as a private practitioner from a rather small law firm in Boston, appear before this committee. Frankly, I have very strong personal feelings as to how this bill will impact on many of the persons on the receiving end of the actions of the U.S. Customs Service. I think you can see from my background I have worked with the agency, extensively in classification and valuation cases, as an import specialist; and I am somewhat familiar with the penalty provisions. In my day-to-day practice I counsel clients and try to give them the best possible advice as to what they should do with their problems with customs.

I would like to say, first of all, that I think that the bill goes a long way in correcting many, many years of injustices in terms of litigating in the Customs Court, where the court has present jurisdiction. I refer especially to the section of the bill which provides unequivocally that the court shall have all powers in law and equity. If the committee or Congress accomplishes nothing else with this bill, you will be putting forward a major correction of a current injustice.

I have outlined in some detail some of the problems that we have now with respect to the current jurisdiction of the court. For example, the court does not have jurisdiction until liquidation occurs. Liquidation is the final accounting process and also the legal date from which an importer may file his protest. I have indicated in my statement a possible scenario. Effectively, prior to that moment, the court is denied jurisdiction over the matter. Even recognizing in the 1978 Customs Procedural Reform Act that the Government is required to act within 1 year of the date of entry, with certain exceptions, the court has no jurisdiction until the liquidation takes place.

It is possible, and I assure you it has happened, that the withholding of liquidation effectively emasculates the court. As I understand this particular grant of power—I don't think there should have been any doubt in the first place—but as I understand what you're doing right now, that situation will be greatly corrected.

I am in favor of the Customs Courts Act of 1980, which includes the other grants of jurisdiction. I think it's a recognition of reality and long overdue.

I would like to refer to a number of measures which are in my statement and have come up during the questioning. I have detailed in my statement a number of points which I think you may find of some interest.

One relates to the question of the civil penalties as it concerns jury trials. I have no idea as to why there should not be an unequivocal statement by the Congress that you have a right to a jury trial, period. My opinion, and it's simply a personal opinion, is that the current practitioners—and by that I refer not only to my brothers in the private bar but also those in the Government service—are probably afraid of this to a certain extent. They are not used to it and are uncomfortable with it. I don't think that's a reason for the Congress not to come out forthwith and say you have a right to a jury trial. I think that should end the matter.

As far as the impaneling of juries is concerned, I don't see, in view of the fact that the court sits throughout the United States that there's

any particular hardship in having jury trials. As a matter of strategy, quite often you will not have a jury trial even though you may have requested it in the first instance. As a matter of prudence, the litigant may wish to have the judge make the decision rather than a jury, but I don't think there should be any question—I can't think of one good reason why this court should not have jury trials and I have heard none this morning.

Another area that is extremely sensitive is the area of counterclaim. As I indicated to you, I would like to give you a view from the firing lines, not that of Government officials and other high officials. I am telling you what it's going to look like on the firing lines. A counterclaim is nothing less than a threat—"If you dare to question my decision, Mr. Importer, we are going to throw the book at you." That's what it stands for. This is a big change from present law. The Government, in fact, under section 501, as Mr. Pellegrini indicated, does now have the opportunity within 90 days of the date of liquidation to file any kind of claim it pleases. I don't see why the Government needs a judicial review. They can take a good look at the protest in the first instance. That's what the law says they should do; and they should do it at that time. I think it's extremely unfair, after 5 or 6 years in court, to have the Government suddenly find new evidence in the file and say, "Mr. Importer, we are going to hit you over the head if you don't stop this case." I think that's a threat and that's a very serious deficiency in this bill.

Another point which I think properly merits the attention of this committee is the question of interest on judgments. If there's one thing that angers a client and they don't understand it's the fact that they are not going to get interest on judgments. It's just not normal. Whatever the reasons are historically, they certainly do not obtain in today's economy.

I have outlined a little formula in my prepared statement using the rate of inflation together with the current rate of interest. It's not unusual for cases to drag on for 5 and 6 years and even when you win your case, how much is left after 5 or 6 years? I just don't think it's simple justice. How could anybody be made whole if he's going to get half his money back after 5 years? It just doesn't make any sense and I haven't heard any reason here, outside of a potential impact on taxes. My opinion is that if you put something like this in the bill, you will probably increase the likelihood that they will act about five times faster than they do now, which would be a tremendous improvement not only administratively as far as the customs service is concerned but also as far as the Attorney General's office is concerned. Even after you win your case in court—your so-called test case—you still have to file a stipulation on all your other cases. I would hate to tell you how much I have to spend in my office pleading to get these stipulations passed by the Attorney General's office. It is given the lowest possible priority by that office. Also any refunds that you get from customs are given the lowest possible priority. Why not? It doesn't cost them anything. I have no doubt that if the customs people on the firing lines had to explain to their superiors why there was double the amount of money being returned to an importer because somebody sat on the file it would have a salutary effect in dispatching the files from that office. I think that itself is ample justification for interest.

There was also a statement made today that interest is a two-way street. I recognize that, but I want to know something. When you go to customs and you have a dispute with them, they make you pay the money up front. If you don't believe it, try importing something. After they take a look at your product, instead of paying 5 percent or 10 percent, they say you're going to pay 20 percent up front. In a case in my office the valuation increased four times over what the initial valuation was at the time of entry. Then the importer waited 2½ years for an administrative decision. It almost wiped the man out. The agency itself ultimately agreed that our position was correct. Does that make sense or is it fair? I don't think so. At least the man ought to get back interest on the money he deposited. The threat of that alone, I think, would make the agency move in a more responsible and quick manner.

There's one other point which I think ought to be brought to your attention and that is, as I read the bill, there's a continuation of current law that an importer is required to deposit liquidated duties in order to get into the court. I recognize that there is a provision for getting into the court in cases of irreparable injury. However, I think the requirement of advance deposit raises a possibility of a constitutional question because if you have a situation—and I know of at least one—where an insurer is not able to pay the increased duties and the importer is without funds—for example, a customs broker who uses his bond and gets hit with a retroactive increase after many years—if the assessment exceeds the money he has and the surety is liable for—as I see it—the man has access to no court in the United States. I may be wrong on that, but it seems to me that it is a real possibility.

As I read some of the current cases, especially those involving State actions, it seems to me, this ought not to be permitted. I don't think an individual should be precluded from having his case looked at by an article III court. There ought to be a provision which allows access to the court in those instances where the person simply doesn't have the money to get into court. I'm sure you don't intend that result, and I would hope that your staff would examine this question.

I would like to refer also to the question of small claims. I would think that it would be a mistake to encumber this bill with a major discussion on small claims. I think that it's something which merits attention in its own right. I don't know what the answer is. I'm not sure what the problem is. There is a problem with this court because you may have a small amount of money involved in a particular entry that could have devastating consequences for an importer and have little impact on our trade policies throughout the United States. Also the answer isn't simply how much money is involved. That's very misleading. You undoubtedly will have a problem with continuing importations of the same product. If I bring in something today and I get hit with a \$2,500 bill, I may have the same problem next year and the year after that and so on. I would question whether you would want to consider that a small claim.

I feel that there are a number of small importers who are being burned and who were not intended to be caught by the prevailing philosophy of trade but yet have no recourse whatsoever to simple justice in their case.

It's proper for Congress to set trade policy, but you have to provide for a fair system which says, is this the item that we intended to preclude or put the particular duty on. I think that's what they're saying here. I think that will end my presentation.

Mr. SEIBERLING. Well, thank you very much. I must say that I have a general reaction that the importers want a situation where if they win that's fine and if they lose why the Government can't take advantage of that fact. In other words, how is that fair? Shouldn't you take the risk? Shouldn't the risk be on you if you make the wrong guess and the Court turns out to uphold the Government or impose an even higher tariff, that that's the way it should be? I don't know of any other situation where that kind of a litigant can be in that kind of a position. It's almost a "heads I win, tails you lose" situation.

Mr. PELLEGRINI. Let me first say I don't think that's necessarily the case. No. 1, the plaintiff has a pretty good idea of what wrong he may have done to the defendant. In these cases, there isn't any way an attorney representing a plaintiff can have any idea of what counterclaims the Government might dream up with all those maybe hundreds of cases pending before the Customs Court or even the particular transaction, and I respectfully submit that the plaintiff is taking a risk. Assume his merchandise is dutied at 10 percent and he's claiming 5 percent and the court finds the correct duty is 15 percent, and it's an ongoing line of business, he's going to pay 15 percent in the future.

There is another fact we should point out here, normally when litigation is started, the customs service suspends liquidation of all entries of that merchandise. So it isn't just prospective importations—that is importations made after the court decision is final—it's all those entries that have piled up since he started his case 2 or 3 years ago. So there is a substantial risk any time you go to Customs Court.

I'm only saying that where the time period has run, the importer ought to be fairly sure he's not going to pay any additional duties on those entries. But he does run a severe risk anytime he litigates because there are lots of entries backed up behind where the Customs Service could use section 501.

Mr. SEIBERLING. Is it your understanding in this bill that the counterclaims could apply to any claim of the Government and not claims that arise out of the importation of a particular type of goods?

Mr. PELLEGRINI. Yes, it is. I think the way the language is drafted now, it says, "in a civil action pending before the court." It can be any civil action pending before the court.

Mr. SEIBERLING. Suppose the counterclaims were limited to goods that were the same kind that were in litigation in a particular case, not particularly those goods, but if there have been other importations of the same goods in the past, so the import question had been decided with respect to them. Why shouldn't the counterclaim apply to them too?

Mr. PELLEGRINI. I don't think that would be a problem. Normally in Customs Court litigation, a few witnesses have discussed the suspension procedures, you have a trial on a particular importation, a particular entry. There may be a number of entries suspended behind the case and the decision in that case will normally be the same—will apply to all the other cases. These are the stipulations that Mr. Melahn

described when the importer wins. When the importer loses, sometimes there may be a second trial, but frequently those other cases are just abandoned.

Mr. SEIBERLING. Well, the way these come up—I don't know anything about the customs cases so pardon me if I ask naive questions, but the way these come up, would it be that your case would be always on the very first effort to import the article or would it be likely that there would have been a lot of importations by a particular importer before he decided to appeal a ruling, and then the Government would go back and try to collect on all the past importations? Is that what you are concerned about?

Mr. MELAHN. Yes. Although as I read this bill I think that is limited to that particular civil action.

Mr. SEIBERLING. It seems to me it ought to be limited to the particular kind of goods that the importer has purchased. I think perhaps that might be a reasonable limitation. I agree that to bring in all other counterclaims that the Government might have, even if they arise out of something totally different than this particular type of product, might be too much of a burden; but if it is the same product I don't know why it should not be applicable.

Mr. MELAHN. May I try to answer that? When an importer brings in a product, he does not bring it in all at once and thus become a subject of a single civil case. Ordinarily what he will do is he will import over a period of time. He will file a particular entry. This is dependent on many circumstances: there are some provisions for consolidation. Each of these entries will become a civil action if it gets into that stage.

The danger that they are concerned about is if you take one of these actions and make your test case, which is the way it is done under court rules, what is the effect going to be of all those other importations involving the same kind of merchandise? That is the devastating effect they are concerned about.

Mr. SEIBERLING. What is the matter with that? He is going to make a decision as to whether or not he is going to go along with the ruling or take a chance that he can upset it. Why shouldn't he take the risk?

Mr. MELAHN. There are two problems with that. They should currently exercise their 501 rights. They should look at least at an earlier stage. They could right now, after you file a protest—if they started looking at them seriously—they could make up their mind right away. All they have to do is state a simple claim—it is a one-line claim—say it's 20 percent instead of 10 percent. I am totally unsympathetic to the agency in that regard. It is nothing less than a threat by an administrative official. That is the only way to interpret it—"If you dare to bring your case against us, that is question our decision, we are going to get you."

Mr. SEIBERLING. I can only say this, and then I am going to recognize Mr. Volkmer, if the administrative official is wrong the importer is right, and if then the Government is going to lose some money, and so the Government takes that risk and that will be a mark against that official in his efficiency rating if he loses. And I don't know why the importer shouldn't be subject to the same restraints.

Mr. MELAHN. I think I can answer maybe this way. I don't think it's just a question of two litigants. You're talking about the U.S. Govern-

ment and its citizens. I think that's the answer. I don't think it's an equal battle here. I think it's a question of a citizen trying to get redress of what he considers to be wrong.

Mr. SEIBERLING All right. Thank you, Mr. Volkmer.

Mr. VOLKMER. Thank you, Mr. Chairman.

I'd like to continue on the same thought and try to understand a little bit about imports and customs' procedures. Being from Missouri, we don't worry too much about Japan. But forget about counterclaim right now. Let's take a person who is importing goods on a regular basis, and it's a question of whether it's duty-free or not duty-free, a higher tariff or a lower tariff. All right. Whatever, there is a disagreement. Now if we do not have a provision for a counterclaim, the way I understand the law is that once the Customs Service says it's 10 percent or 15 percent or whatever it is, that has to be paid in.

Mr. MELAHN. That's right. You cannot get into court without paying it.

Mr. VOLKMER. He's got a shipment coming in, and he pays the tariff.

Mr. MELAHN. He has to.

Mr. VOLKMER. He's got another shipment coming in 2 weeks from now. He pays it. Next month he pays it, doesn't he?

Mr. MELAHN. That's correct.

Mr. VOLKMER. Now that's going to continue to happen, isn't it?

Mr. MELAHN. Yes. If he's a regular importer, he can't import unless he brings in his products and he's going to have to pay the amount every time.

Mr. VOLKMER. Also, last year he brought in a different commodity and there was a different dispute but between the same people. Now you're telling me that it isn't wise to combine those?

Mr. MELAHN. I think it would be disastrous.

Mr. VOLKMER. Why?

Mr. MELAHN. Because on a trial basis alone, I wouldn't want to try the case. They really have no connection with each other. I think they ought to be kept separate.

Mr. VOLKMER. You mean because the judge can't distinguish the two different counts? That's basically what we're talking about—two different counts.

Mr. MELAHN. We have seen 50-page briefs interpreting one line of the Tariff Act. I think as a practical matter that would be disastrous.

Mr. VOLKMER. To me, what I'm hearing from you is you're saying the Customs Service is very vindictive and they are out to get all these importers. They question them. And that sounds to me a little like a paper tiger, to be honest with you. Maybe I'm wrong. Can you tell me instances that you know of personally, without telling any names or anything else, where the Customs Service has taken out after people because those people questioned the Customs Service and their interpretation of the law?

Mr. MELAHN. I know of some instances which are in my office so I feel it would be improper to comment upon them. I will say that I have worked for the agency for 6 years. I'm not talking solely from the plaintiff's point of view. An administrative official doesn't want his judgment questioned, and I stand on that, and I'd rather not detail any particular cases in my office.

Mr. VOLKMER. The other thing I agree with until I hear to the contrary is the payment of interest and attorneys fees, et cetera. I see nothing wrong with that until somebody can tell me different because I wholeheartedly agree with you that any private citizen of this country who has to put up their own money and sits and waits for years to get it back because of an error by the Government, he at least ought to have his interest on it.

Mr. MELAHN. More importantly, it's already been adjudicated by the court that he was correct in the first instance.

Mr. VOLKMER. Yes; you're right.

Thank you, Mr. Chairman.

Mr. SEIBERLING. Thank you. I don't want to leave the impression that by asking that question I'm necessarily biased in either direction, but I figure you're in the best position to answer that question and we need to know what the answer is.

Does staff have any questions?

[No response.]

Mr. SEIBERLING. Well, thank you very much.

Mr. PELLEGRINI. I have one more comment to make on the question of small claims. Mr. Nellis, the general counsel, asked a question of Chief Judge Re with respect to the difference between the number of summons in court and the number of cases that actually go to trial as useful in determining whether a small claims procedure may be necessary. I would submit that this is not necessarily the proper thing to look at. The proper thing to look at is how many cases do not even get to the summons stage because it's not useful to take that step unless you're going to go forward; and also, neither the court nor the government is really in a position to be aware of the type of cases that importers just don't think of taking to court because of the attendant cost of litigation in the Customs Court. Hopefully the study being done by the Federal Judicial Center will give us some handle on what kind of cases might be out there.

Mr. VOLKMER. Mr. Chairman, in that regard, I think I agree with some of the witnesses that that should be apart from this bill, though, that we should take that as a separate matter rather than delay this bill to try to draft up a small claims procedure.

Mr. MELAHN. May I make a comment on that? I think one of the things which is not apparent here is that you have some statutory problems in addition to whether the court has inherent power to take small claims. For example, the burden of proof is always on the importer. I would presume, since most of the evidence in these cases would have to be hearsay, unless you brought a witness in from England to testify what the market value is.

Mr. SEIBERLING. Mr. Gordon.

Mr. GORDON. Mr. Pellegrini, if a small claims procedure was authorized or established, should it be only available with the consent of both parties?

Mr. PELLEGRINI. I hadn't thought of that, but I don't think so.

Mr. GORDON. Because of the nature of the case brought in the Customs Court, regardless of the monetary question, would a small claims hearing be off the record or on the record, in your opinion, and would a right of appeal go along with it?

Mr. PELLEGRINI. I think we address those points in our statement of principles and I frankly don't recall the recommendation we made there. But personally, I think it should be off the record and there would be no appeal. It would be almost a summary proceeding, if that's the proper word, if there's no deleterious connotation there. It would be something you should be ill-advised to use when there's any more than one importation of a unique item.

Mr. GORDON. Mr. Melahn, on page 19 of your statement you indicate the provision contained in section 1581(a)(3) relating to all charges or exactions within the jurisdiction of the Secretary of the Treasury is archaic. Could you amplify on that?

Mr. MELAHN. What I had in mind there was there are a number of other agencies which have their laws enforced by the Treasury Department and most of those agencies are—after all, that language was drafted probably 40 or 50 years ago, and I think the bill should be clarified, that all penalties, whether they be for the Department of Agriculture or FDA and the like should be heard in that court.

I should also point out that it occurred to me after I wrote that, that section 514 of title 19, contains the same language. So presumably if you changed this you would have to change that also.

Mr. GORDON. Would you be kind enough to submit for the record some recommended language?

Mr. MELAHN. Sure.

Mr. GORDON. Thank you, Mr. Chairman. I don't have any further questions.

[The information follows:]

DOHERTY AND MELAHN,
ATTORNEYS AT LAW,
Boston, Mass., April 26, 1980.

Re: H.R. 6394—Customs Courts Act of 1980.

LEO M. GORDON, Esq.,
Counsel, Committee on the Judiciary,
House of Representatives, Washington, D.C.

DEAR LEO: If time permits I would like to add the following points to the Record:

1. Alternative draft of Section 2643:

In your letter to me of March 7, 1980 you asked for comments with regard to an alternative draft of Section 2643. I have had an opportunity to review the March 13, 1980 letter of Andrew P. Vance directed to you which covers the same subject matter. In general I am in agreement with Andy's statement, that the section as originally drafted is superior to the alternative section draft. This is particularly true in those situations where the Court has found the Government action to be erroneous but the Court is unable to determine the proper Customs action on the basis of the record before it. The section as originally drafted covers this point, and I would be very reluctant to change it.

2. Interest on Judgment:

You asked me about the appropriate time from which interest should run on judgments. In my opinion, interest should run from 90 days after payment of the excess duties. In other words, the interest should be computed administratively as well as judicially. The reason I am suggesting this is because this would make it identical to the Internal Revenue Service, which pays interest on late refunds. It should also be easy to administer, and it would not cause an undue increase in cases being filed in the Court. In addition, it would have the salutary effect of making the Customs Service take a look at protests while they are pending administratively. If the case is filed in the Customs Court, then the Court should award interest from ninety days after the date of payment and merely become part of the judgment. If the Committee is of the opinion that interest should only be given

in those instances where there is a case pending in Court, then I would suggest a suitable starting time would be the filing of a summons in the Court. If you have any questions on this point, I would be pleased to discuss them further with you.

3. Third party practice :

I think that there should be a third party practice permitted for all actions commenced under Section 1582 of the proposed Bill. These cases are currently tried in the district courts, and the same kinds of problems undoubtedly will arise in the Customs Court. For example, if someone is sued under Section 592 of the Tariff Act of 1930 he may wish to implead another party. If two persons are sued simultaneously under Section 592 they may wish to cross-claim against each other. In addition, this would be a suitable place to include a counterclaim. An importer may wish to counterclaim for duties against the Government. I suggest that the Bill permit the use of counterclaims, cross-claims and third party practice as is now permitted under the district court rules.

I should make it quite clear however that I adhere to my original position that the use of a counterclaim in a case originating under Section 1581 of the proposed Bill is entirely inappropriate and essentially threatening in nature, and that if the Customs Service promptly and efficiently reads its own files, the Customs Service already has ample counterclaim remedies under the present statutes at the administrative level.

4. Jury Trials :

With respect to jury trials, I agree that these are not properly the subject of Section 1581, the traditional Customs Court practice. On the other hand, Section 1582 is really a district court practice and the right of jury trial should be unquestionably permitted.

5. Charges and exactions :

At the hearing you asked me about specific language in connection with the phrase "all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury" contained in Section 1581(a)(3). Because this language is archaic I suggest that it be changed to read something like this: "All charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury, including the assessment of liquidated damages on behalf of other agencies." I have in mind those situations where the Customs Service acts on behalf of other agencies such as the Department of Agriculture administer quotas. If the importer imports a product in violation of a quota, he may be assessed a penalty under a bond. Quite often these are liquidated for certain amounts, but they are still substantial and the importer should have the right to contest liquidated amounts in Court. This change of language would make it clear that the jurisdiction of the Court would include these cases.

I think I have covered everything, but please feel free to give me a call with any additional request. I cannot tell you how pleased I am to have been given the opportunity to have some input into this bill. I hope that it has been mutually beneficial, and again wish to compliment you on the work product which you and your staff have created.

Best regards.

WILLIAM E. MELAHN.

Mr. SEIBERLING. If there are no further questions, this hearing is adjourned. We thank you very much, gentlemen.

[Whereupon, at 1 p.m., the hearing was adjourned.]

CUSTOMS COURTS ACT OF 1980

THURSDAY, FEBRUARY 28, 1980

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 1:05 p.m., in room 2141 of the Rayburn House Office Building, Hon. Romano L. Mazzoli presiding.

Present: Representatives Mazzoli, Hughes, Volkmer, Synar, McClory and Butler.

Staff present: Joseph L. Nellis, general counsel, Leo M. Gordon, counsel; Franklin G. Polk and Charles Kern, associate counsel.

Mr. MAZZOLI. The Subcommittee on Monopolies and Commercial Law will today hold its final day of hearings on H.R. 6394, the Customs Courts Act of 1980. Currently there is much uncertainty about the authority of the U.S. Customs Court and the statutes governing its jurisdiction and remedial powers. Clearly the law governing the Customs Court has not kept pace with the problems posed by modern international trade litigation. These problems have been exacerbated by the passage of the Trade Agreements Act of 1979.

The result has been the preclusion of judicial relief to various segments of the American public, such as importers, manufacturers, and laborers.

H.R. 6394 seeks to correct these inequities by providing for much needed reform in the court's substantive jurisdiction and type of relief it may award. In so doing the bill will provide for a comprehensive system of judicial review of civil actions arising from import transactions, utilizing wherever possible the specialized expertise of the U.S. Customs Court and the U.S. Court of Customs and Patent Appeals, and insuring uniformity afforded by the national jurisdiction of these courts.

Second, it would insure access to judicial review of civil actions arising from import transactions, which access is not presently assured due to jurisdictional conflicts arising from the present and ill-defined division of jurisdiction between the district courts and the Customs Courts.

In addition, the bill would provide expanded opportunities for judicial review of civil actions arising from import transactions. Finally, and most importantly, it would provide the Customs Court with the plenary powers possessed by other courts established under article III of the Constitution so that it may grant the appropriate relief.

The testimony received in the subcommittee's first day of hearings strongly indicates that H.R. 6394 accomplishes its intended purposes. We look forward today to hearing from this afternoon's witnesses, and we trust they will aid the subcommittee in its understanding of the issues, and I might say the complex issues presented by this important legislation.

This afternoon our first witnesses are Mr. Leonard Lehman, chairman of the American Bar Association's Standing Committee on Customs Law and Mr. Joseph Kaplan, chairman of the Subcommittee on the Customs Court of the ABA's International Law Section. These gentlemen will be paneled with Andrew Vance, who will testify on behalf of the Association of the Customs Bar.

Gentlemen, you are welcome to come forward.

Gentlemen, you can sit and proceed in whatever order you may have already decided upon. We would be happy to hear you. Your statements will be made a part of the record, so you may wish to excerpt from them.

TESTIMONY OF LEONARD LEHMAN, CHAIRMAN, STANDING COMMITTEE ON CUSTOMS LAW, AMERICAN BAR ASSOCIATION; JOSEPH S. KAPLAN, CHAIRMAN, SUBCOMMITTEE ON THE CUSTOMS COURTS, INTERNATIONAL TRADE COMMITTEE, SECTION OF INTERNATIONAL LAW, AMERICAN BAR ASSOCIATION; AND ANDREW VANCE, ASSOCIATION OF THE CUSTOMS BAR OF NEW YORK CITY

Mr. LEHMAN. Thank you, Mr. Chairman. I am Leonard Lehman, chairman of the American Bar Association's Standing Committee on Customs Law. I am accompanied today by Mr. Joseph S. Kaplan, a member of that committee, also chairman of the Subcommittee on the Customs Court of the Committee on International Trade in the International Law Section of the ABA.

As you know, the American Bar Association has a national membership of more than 250,000 lawyers. We appreciate the opportunity to appear before you today at the request of President Janofsky to present the views of the American Bar Association on H.R. 6394. In June 1978, during the 95th Congress, we testified before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on Judiciary on S. 2857, the bill that initiated the current consideration of expansion of the jurisdiction of the Customs Court.

Then we testified again on S. 1654 before the same Senate subcommittee last fall. In our original testimony on S. 2857 we supported the following principles as they had been approved by the American Bar Association.

First, expansion and clarification of the subject matter jurisdiction of the Customs Court; two, plenary judicial powers for the judges of the Customs Court; three, appointment and tenure of Customs Court judges without reference to political affiliation; four, greater access to the Customs Court for parties affected; and five, resolution of apparent jurisdictional conflicts between the Customs Court and the district courts which have the effect of barring access to judicial review.

Because S. 2857, the bill originally introduced in the 95th Congress, did not meet these objectives, in the opinion of the American Bar Association, we opposed its enactment. The following specific policies with regard to the jurisdiction of the Customs Court were advocated by our association.

One, the status of the Customs Court judges should be the same as the status of judges of the district courts and other article III courts.

Two, the powers of the Customs Court should be the same as the powers of the district courts, including the power to grant preliminary relief in appropriate cases.

Three, there should be increased access to judicial review of Federal actions relating to imports.

Four, a comprehensive system of judicial review of Federal actions based on the customs laws, and, when appropriate, other laws regulating the importation of merchandise should be established.

In our testimony on S. 1654 last fall, we stated our general support for that measure with specific reservations and suggestions that we presented for consideration. The American Bar Association takes the same position today with respect to H.R. 6394—a position of firm support for this bill subject only to specific technical reservations and concerns that we shall bring to your attention.

H.R. 6394 makes giant strides toward the realization of the policies and objectives adopted by the American Bar Association. Particularly, it provides tools and resources to this court to realize its full potential as an article III court in its area of special jurisdiction.

I am going to ask Mr. Kaplan, who has been our chief technician in analyzing this legislation, to comment in a moment on those sections which are not yet fully consistent with positions of the American Bar Association, or where some technical problems may be lurking in its present language.

As Mr. Kaplan will indicate, none of these problems is insurmountable, and we believe that many, if not most, of these concerns can be resolved as technical drafting matters.

Before calling on Mr. Kaplan, however, I want to call your attention to an important resolution which was adopted at a meeting of the Board of Governors of the American Bar Association as ABA policy during October 1979:

Resolved, that the American Bar Association endorses the inclusion within S. 1654, the proposed Customs Court Act of 1979, of a provision directing the United States Customs Court to establish, by Court rule, a "Small Claims Procedure," to assure that no person will be deprived of a right to judicial review of his claim before that Court because of the expenses and related burdens of formal litigation procedures. In order to further the objective of providing substantial justice and equity to those parties who may be entitled to invoke such a small claims procedure pursuant to the rules of the United States Customs Court, the American Bar Association recommends that no official court record should be maintained in such proceedings, and that the decisions rendered at the conclusion of such proceedings should be without precedential effect."

The report accompanying this resolution makes clear the intention that the court should be given primary responsibility to ascertain the actual justification for such a procedure, as well as to establish within its rules the criteria to assure that such an exceptional procedure will be invoked only in those circumstances where meaningful

access to judicial review would be precluded. Meaningful access to judicial review is one of our primary objectives.

Administrative decisions affecting returning tourists, or mailed gifts, or other isolated customs-related transactions by persons who are not regular commercial importers, are most likely to fall into this category. The recent testimony of the American Importers Association before this committee indicates the interests of all importers in such a procedure.

The basis of ABA's position is derived from the desire that Congress provide a comprehensive system for judicial review of international trade disputes and the fact that jurisdiction over such suits is and continues to be vested exclusively in the Customs Courts. The ABA considers it fundamental that access to the courts be made as freely available as possible.

We urge this committee to amend H.R. 6394, the Customs Courts Act of 1980, to authorize the newly designated Court of International Trade to consider the establishment of a small claims procedure. Although it has been claimed that the Customs Court already possesses the authority to implement such a procedure by court rule, we believe that the incorporation of the proposed provision in the pending bill would constitute an important expression of legislative support for the right to judicial review for those who might be effectively barred from its benefits for any reason.

Now, with your permission, I will ask Mr. Kaplan to present our comments on other specific provisions of H.R. 6394.

Mr. KAPLAN. Good afternoon, Mr. Chairman, members of the committee. I am Joseph Kaplan, member of the New York Bar. As you said before, Mr. Chairman, in your opening remarks, chairman of the Subcommittee on the Customs Court, which is within the international law section as well as a member of Mr. Lehman's committee.

I should like to join with Mr. Lehman in expressing the thanks of the ABA for the prompt and careful attention which your committee has given to the important issues dealt with in H.R. 6394.

Mr. Lehman has already stated the ABA position with regard to the failure of H.R. 6394 to authorize the creation of an apparatus to permit the efficient and economical disposition of so called small claims in the customs courts. I will therefore not elaborate further on that point.

In addition to this serious omission from the bill, there are several clarifications or changes which would bring the bill into more direct conformity with the principles developed by the ABA. Also, there are several differences between S. 1654 and H.R. 6394 which we believe may result from an inadequate appreciation of the reasons for the phraseology in the Senate bill.

We shall discuss the more important of these situations.

The first section to which we would like to direct the attention of the committee is section 1581(d) of Title 28 as proposed. This incorporates an ABA suggestion that a negative determination of the International Trade Commission should be subject to judicial review. We are pleased to see this forward step.

However, two basic objections to amended Section 1581 remain. The first is that the enumerated cases are reviewable only as to their pro-

cedural regularity. The second is that affirmative determinations are reviewable only after the President has acted. The ABA understands the reluctance of the legislature to permit the courts to interfere in the exercise by the President of the discretion which he must have in order to carry out his constitutional responsibility to conduct the foreign affairs of the United States.

We would agree, therefore, that a review of Presidential action be limited to the issue of procedural regularity. There is no parallel justification for such a limited review of ITC determinations, however. Section 1581(d) ignores the quasi-judicial character of investigations conducted by the ITC and the substantial rights which are determined by that body.

By limiting the review of ITC determinations which are negative to the issue of procedural regularity, the ITC is clothed with a mantle of nonreviewability, which is inappropriate for an administrative agency required by the Congress to determine certain facts and apply laws written by the Congress to those facts in order to reach the findings and determinations upon which its advice or recommendations are based and upon which the President in large part will be expected to act.

Section 1581(d) should be amended to subject the findings and determinations of the ITC to at least the same standard of judicial review as is applicable in antidumping and countervailing duty cases. The argument in favor of review to determine whether findings or determinations are supported by substantial evidence and are in accordance with law is particularly important when the President of the United States will be asked to exercise his discretionary authority based in significant part on those findings and determinations.

The Congress owes it to the President to assure him that the recommendations and advice which he receives are based upon findings and determinations made according to law and as intended by the Congress. Without adequate judicial review of the legal sufficiency as well as the procedural regularity of those findings there will be no way to provide the President with this assurance.

We said in our Senate testimony and repeat now that we are concerned lest the judicial review which we advocate be used as a tool to delay the granting of needed relief. The ABA, therefore, recommends that section 158(d) provide for expedited judicial review, and that those sections of the bill dealing with the precedence of cases be amended to provide a priority for such matters.

We urge the committee to recognize that the failure to provide judicial review at a timely point in the decisionmaking process over the specified findings and determinations of the ITC would be a disservice to the public interest from the viewpoint of both U.S. citizens and our trading partners.

Cases arising under section 1581(d) involve statutes which implement various international agreements regulating trade into which the United States has entered. Since the national interpretation of many of these agreements will be subject to international dispute settlement procedures, it is of great importance that there be a clear, consistent and authoritative source from which the U.S. interpretation of the implementing legislation is derived. This aim can best be met by providing appropriate judicial review in the Court of International Trade.

Section 1581 (1) also confers exclusive jurisdiction on the Customs Courts in circumstances where the matter in controversy may not involve an interpretation or application of a substantive provision of a customs or trade law identified in this subsection. ABA is concerned that providing exclusive jurisdiction in the Customs Courts over cases arising out of import transactions but involving statutes as to which the responsibility of the Customs Service is merely ministerial, such as cases arising under the Clean Air Act or the Toxic Substances Control Act, could lead to separate legal rules for imported and domestic goods.

Jurisdiction over such cases, which do not involve the specialized expertise of the Customs Courts, should be shared by the Customs Courts and the district courts. An additional reason to permit concurrent jurisdiction is to preserve trial by jury, of which right a litigant might be deprived merely because the dispute between the agency and the private party arose from an import transaction.

Another difficulty arises from the phrase "directly and substantially involves international trade" which modifies and limits section 1581-(i) (2) B. It would seem that section 1581 (i) (2) (A) confers exclusive jurisdiction over any case involving the enumerated statutes even though the substance of the dispute may not involve international trade, but section (2) (B) confers exclusive jurisdiction over cases involving the Constitution, treaties, executive agreements and executive orders only if the provision of the Constitution et cetera, which is involved in the case is directly and substantially concerned with international trade.

I shall next focus my attention on section 1582. Proposed section 1582 raises the question of why the Customs Court should have primary jurisdiction over such cases. Those are cases in which, in effect, an action for collection is instituted by the Federal Government or a proceeding to enforce a penalty determination in a civil penalty case is instituted by the Government.

Many civil fraud and negligence cases have little or nothing to do with questions involving the specialized expertise of the Customs Court. The same may be true of violations of agreements to terminate countervailing or antidumping duty investigations or liquidated damage claims arising from alleged bond violations. Most of these involve straightforward factual situations and only a few involve technical questions of trade law. And actions to recover customs duties are ordinary collection actions.

In such cases, ABA believes that jurisdiction should at least be concurrent with the district court. The right of transfer to the district court should not be limited to cases in which a jury trial is demanded.

Section 1582(b) (1) should be amended to refer to section 1581 (a) (1) and not all of section 1581 (a). It is assumed that a right to jury trial was intended to be conferred only in the enumerated civil penalty cases, and not in cases to recover on a bond or to recover customs duties.

Section 1582(b) (2) requires a determination by the Court of International Trade that the moving party is "entitled" to a trial by jury, but fails to provide any standard to measure such entitlement. If transfer to the district court for jury trials is retained, such a request should be granted as a matter of right.

Section 1583 is another important section of the bill. Section 1583 provides for counterclaims to recover "customs duties." If the intended meaning is to permit the recovery of unpaid liquidated duties, the provision is unnecessary—

Mr. MAZZOLI. Mr. Kaplan, we have 10 minutes left to a vote. Do you think in a couple of minutes you could summarize the remainder of your paper?

Mr. KAPLAN. I will be less than 10 minutes, sir, 1 minute or 2 at the most.

Mr. MAZZOLI. Would you go ahead, yes.

Mr. KAPLAN. I thought I was responding by telling you I need less than 10.

Section 1583 is concerned with counterclaims and as I said a moment ago is a very important section of the law. There are two matters of concern. First of all, to the extent that it covers customs duties, the provision is unnecessary, since the payment of such duties is a jurisdictional prerequisite to the maintenance of the action in chief. In other words, if the case involves the same entry as is involved in the case in chief, it couldn't be in the Customs Court unless the duties had been paid. If not, and if the committee had something else in mind by the words "customs duties," we are not sure what it is.

Mr. Chairman, the remaining remarks may be found in the written text. I think I can end my oral testimony at this point.

Mr. MAZZOLI. I thank you and I am sorry for this abruptness. But the bells don't give us much leeway either. At this point, of course, all three of you gentlemen will have your statements inserted in full. The committee will recess for approximately 5 to 7 minutes until we can vote and come back.

[The complete statement follows:]



AMERICAN BAR ASSOCIATION

GOVERNMENTAL RELATIONS OFFICE • 1800 M STREET, N.W. • WASHINGTON, D.C. 20036 • (202) 331-2200

STATEMENT OF

LEONARD LEHMAN, CHAIRMAN
STANDING COMMITTEE ON CUSTOMS LAW

and

JOSEPH S. KAPLAN
CHAIRMAN, SUBCOMMITTEE ON THE CUSTOMS COURTS
INTERNATIONAL TRADE COMMITTEE
SECTION OF INTERNATIONAL LAW

AMERICAN BAR ASSOCIATION

Before the

SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW
OF THE HOUSE COMMITTEE ON THE JUDICIARY

Concerning

H.R. 6394, the Proposed Customs Courts Act of 1980

February 28, 1980

Mr. Chairman, my name is Leonard Lehman. I am Chairman of the American Bar Association's Standing Committee on Customs Law. I am accompanied today by Joseph S. Kaplan, a member of that Committee who is also Chairman of the Subcommittee on the Customs Courts of the Committee on International Trade, Section of International Law of the A.B.A. As you know, the American Bar Association has a national membership of more than 250,000 lawyers.

We appreciate the opportunity to appear before you today at the request of President Janofsky to present the views of the American Bar Association on H.R. 6394. In June, 1978, during the 95th Congress, in our testimony before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on Judiciary on S. 2857 and again on September 10, 1979, when we testified before that same Subcommittee on S. 1654, a successor bill, we identified the following objectives which are supported by the American Bar Association:

1. expansion and clarification of the subject matter jurisdiction of the Customs Court;
2. plenary judicial powers for the judges of the Customs Court;
3. appointment and tenure of Customs Court judges without reference to political affiliation;
4. greater access to the Customs Court for parties affected;

5. resolution of apparent jurisdictional conflicts between the Customs Court and the district courts which have the effect of barring access to judicial review.

Because S. 2857, the bill originally introduced in the 95th Congress, did not achieve these objectives, we opposed its enactment. The following specific policies with regard to the jurisdiction of the Customs Courts were advocated by our Association (The ABA Resolutions are set forth in their entirety in the Appendix attached to this statement):

1. The status of the Customs Court judges should be the same as the status of judges of the district courts and other Article III courts.
2. The powers of the Customs Court should be the same as the powers of the district courts, including the power to grant preliminary relief in appropriate cases.
3. There should be increased access to judicial review of federal actions relating to imports.
4. A comprehensive system of judicial review of federal actions based on the customs laws, and, when appropriate, other laws regulating the importation of merchandise should be established.
5. Jurisdictional conflicts between the Customs Court and the district courts should be avoided.

In our testimony on S. 1654 last fall, we stated our general support for that measure with specific reservations and suggestions that we presented for consideration. The American Bar Association takes the same position today with respect to H.R. 6394, -- a position of firm support for this bill subject only to specific technical reservations and concerns that we shall bring to your attention.

H.R. 6394 makes giant strides toward the realization of the policies and objectives adopted by the American Bar Association. It demonstrates the seriousness with which you and your Subcommittee have considered the comments of our Association, and the energy and dedication with which you and your staff have undertaken to address our concerns.

Customs Court reform legislation is a necessary companion to Title X of the Trade Agreements Act of 1979. That recently enacted statute creates new rights of action and access to judicial review of governmental action and inaction in international trade and Customs matters. Significantly, Title X of that statute grants parity of access to judicial review to both importers and domestic interests over a wide range of such matters.

I am going to ask Mr. Kaplan, who has been our chief technical analyst on this legislation, to comment on those sections which are not yet fully consistent with the position of the American Bar Association, or where some technical problems may

be lurking in its present language. As Mr. Kaplan will indicate, none of these problems are insurmountable, and we believe that many if not most of these concerns can be resolved as technical drafting matters.

Before calling on Mr. Kaplan, however, I want to call your attention to an important resolution which was adopted at a meeting of the Board of Governors of the American Bar Association as A.B.A. policy during October, 1979.

RESOLVED, that the American Bar Association endorses the inclusion within S. 1654, the proposed Customs Court Act of 1979, of a provision directing the United States Customs Court to establish, by Court rule, a "Small Claims Procedure", to assure that no person will be deprived of a right to judicial review of his claim before that Court because of the expenses and related burdens of formal litigation procedures. In order to further the objective of providing substantial justice and equity to those parties who may be entitled to invoke such a small claims procedure pursuant to the rules of the United States Customs Court, the American Bar Association recommends that no official court record should be maintained in such proceedings, and that the decisions rendered at the conclusion of such proceedings should be without precedential effect.

The report accompanying this resolution makes clear the intention that the Court should be given primary responsibility to ascertain the actual justification for such a procedure, as well as to establish within its Rules the criteria to assure that such an exceptional procedure will be invoked only in those circumstances where meaningful access to judicial review would be precluded. Administrative decisions affecting returning tourists, or mailed gifts, or other

isolated Customs-regulated transactions by persons who are not regular commercial importers, are most likely to fall into this category. The recent testimony of the American Importers Association before this Committee indicates the interest of all importers in such a procedure.

The basis of ABA's position is derived from the desire that Congress provide a comprehensive system for judicial review of international trade disputes and the fact that jurisdiction over such suits is and continues to be vested exclusively in the customs courts. The ABA considers it fundamental that access to the courts be made as freely available as possible.

We urge this Committee to amend H.R. 6394, the Customs Courts Act of 1960, to authorize the newly designated Court of International Trade to consider the establishment of a Small Claims procedure. Although it has been claimed that the Customs Court already possesses the authority to implement such a proposal by Court Rule, we believe that the incorporation of the proposed provision in the pending bill would constitute an important expression of legislative support for the right to judicial review for those who might be effectively barred from its benefits by its escalating costs.

With your permission, I shall now ask Mr. Kapan to present our comments on specific provisions of H.R. 6394.

Mr. Kaplan:

Good morning Mr. Chairman and members of the Subcommittee.

I should like to join with Mr. Lehman in expressing the thanks of the ABA for the prompt and careful attention which your committee has given to the important issues dealt with in H.R. 6394.

Mr. Lehman has already stated the ABA position with regard to the failure of H.R. 6394 to authorize the creation of an apparatus to permit the efficient and economical disposition of so-called small claims in the customs courts.

In addition to this serious omission from the bill, there are several clarifications or changes which would bring the bill into more direct conformity with the principles developed by the ABA. Also, there are several differences between S. 1654 and H.R. 6394 which we believe may result from an inadequate appreciation of the reasons for the phraseology in the Senate bill.

We shall discuss the more important of these situations.

Section 1581(d) of Title 28, as amended by H.R. 6394, incorporates an ABA suggestion that a negative determination of the International Trade Commission should be subject to judicial review. We are pleased to see this forward step. However, two basic objections to amended Section 1581(d) remain. The first is that the enumerated cases are reviewable only as to their procedural regularity. The second is that affirmative determinations are reviewable only after the President has acted. The ABA understands the reluctance of the Legislature to permit the courts to interfere in the exercise

by the President of the discretion which he must have in order to carry out his constitutional responsibility to conduct the foreign affairs of the United States. We would agree, therefore, that a review of Presidential action be limited to the issue of procedural regularity. There is no parallel justification for such a limited review of ITC determinations, however. Section 1581(d) ignores the quasi-judicial character of investigations conducted by the ITC and the substantial rights which are determined by that body. By limiting the review of ITC determinations which are negative to the issue of procedural regularity, the ITC is clothed with a mantle of nonreviewability which is inappropriate for an administrative agency required by the Congress to determine certain facts and apply laws written by the Congress to those facts in order to reach the findings and determinations upon which its advice or recommendations are based.

Section 1581(d) should be amended to subject the findings and determinations of the ITC to at least the same standard of judicial review as is applicable in antidumping and countervailing duty cases. The argument in favor of review to determine whether findings or determinations are supported by substantial evidence and are in accordance with law is particularly important when the President of the United States will be asked to exercise his discretionary authority based in significant part on those findings and determinations. The Congress owes

it to the President to assure him that the recommendations and advice which he receives are based upon findings and determinations made according to law and as intended by the Congress. Without adequate judicial review of the legal sufficiency as well as the procedural regularity of those findings, there will be no way to provide the President with this assurance.

We said in our Senate testimony and repeat now that we are concerned lest the judicial review which we advocate be used as a tool to delay the granting of needed relief. The ABA, therefore, recommends that Section 1581(d) provide for expedited judicial review, and that those sections of the bill dealing with the precedence of cases be amended to provide a priority for such matters.

We urge the Committee to recognize that the failure to provide judicial review at a timely point in the decision making process over the specified findings and determinations of the ITC would be a disservice to the public interest from the viewpoint of both United States citizens and our trading partners. Cases arising under Section 1581(d) involve statutes which implement various international agreements regulating trade into which the United States has entered. Since the national interpretation of many of these agreements will be subject to international dispute settlement procedures, it is of great importance that there be a clear, consistent and authoritative source from which the United States interpretation

of the implementing legislation is derived. This aim can best be met by providing appropriate judicial review in the Court of International Trade.

Section 1581(i) also confers exclusive jurisdiction on the customs courts in circumstances where the matter in controversy may not involve an interpretation or application of a substantive provision of a Customs or trade law identified in this subsection. ABA is concerned that providing exclusive jurisdiction in the customs courts over cases arising out of import transactions but involving statutes as to which the responsibility of the Customs Service is ministerial, such as cases arising under the Clean Air Act or the Toxic Substances Control Act, could lead to separate legal rules for imported and domestic goods. Jurisdiction over such cases, which do not involve the specialized expertise of the customs courts, should be shared by the customs courts and the district courts. An additional reason to permit concurrent jurisdiction is to preserve trial by jury, of which right a litigant might be deprived merely because the dispute between the agency and the private party arose from an import transaction.

Another difficulty arises from the phrase "directly and substantially involves international trade" which modifies and limits section 1581(i)(2)(B). It would seem that section 1581(i)(2)(A) confers exclusive jurisdiction over any case involving the enumerated statutes even though the substance of the dispute may not involve international trade, but section

(2)(B) confers exclusive jurisdiction over cases involving the Constitution, treaties, executive agreements and executive orders only if the provision of the Constitution, etc. which is involved in the case is directly and substantially concerned with international trade. There are several problems; first, the provision of the Constitution, etc. may involve international trade, but the substance of the dispute may not. Second, the Court of International Trade and a district court could reach inconsistent conclusions about whether the provision in question "directly and substantially involves international trade". If the Court of International Trade says "no" and the district court "yes", the plaintiff is out of court. Third, a court could find that the Court of International Trade has exclusive jurisdiction over a (2)(B) case only if the substance of the dispute involves a provision of the Constitution, etc. which "directly and substantially involves international trade". We recommend that the intended meaning of the phrase be clarified in a manner that answers these questions so that the courts need not become embroiled in the question of what the Congress really intended.

Section 1582 raises the question of why the customs courts should have primary jurisdiction over such cases. Many civil fraud and negligence cases have little or nothing to do with questions involving the specialized expertise of the customs courts. The same may be true of violations of agreements to

terminate countervailing or antidumping duty investigations or liquidated damage claims arising from alleged bond violations. Most of these involve straightforward factual situations and only a few technical questions of trade law. And actions to recover customs duties are ordinary collection actions. In such cases, jurisdiction should at least be concurrent with the District Court. The right of transfer to the District Court should not be limited to cases in which a jury trial is desired if the decision does not depend on an issue requiring interpretation of international trade statutes.

Section 1582(b) (1) should be amended to refer to section 1581(a) (1) and not all of section 1581(a). It is assumed that a right to jury trial was intended to be conferred only in the enumerated civil penalty cases, and not in cases to recover on a bond or to recover Customs duties.

Section 1582(b) (2) requires a determination by the Court of International Trade that the moving party is "entitled" to a trial by jury, but fails to provide any standard to measure such entitlement. If transfer to the District Court for jury trials is retained, such a request should be granted as a matter of right.

Section 1583 provides for counter-claims to recover "customs duties". If the intended meaning is to permit the recovery of unpaid liquidated duties, the provision is unnecessary since the payment of such duties is a jurisdictional prerequisite to the maintenance of the action in chief. If not, it is not clear what customs duties the committee has in mind.

Sections 2631(e) and (g) are unduly restrictive in excluding the real party in interest, such as heirs, trustees or receivers, assigns and sureties, from standing to contest the denial of a protest. Section 514 of the Tariff Act permits agents and other designated persons to file administrative protests for the real party in interest. Section 2631(a) should provide commensurate standing. Furthermore, importers whose transactions are contested by domestic interests as well as other parties in interest in Section 516 proceedings, should be permitted to intervene in such proceedings as a matter of right by Section 1581(g).

References in section 2635(b) to the "Secretary of the Treasury" or "Secretary" should be deleted as they do not accord with transfers of authority under the recent reorganization, and "the administering authority" is a sufficient reference.

Section 2637 continues to permit unjust enrichment of the Government even though the Department of Justice in its testimony on this bill concedes that the retention of funds to which the Government is not entitled is unjust. Any balance of funds in excess of the surety's bond should be returned to the party who made the payment or its successor in interest.

Section 2639(b) should be amended to include in its scope cases involving a determination of the component material in chief value. A specific reference is necessary since Section 2639 is derived from statutes pre-dating the customs courts

and Administrative Act of 1970 and has historically related only to cases involving the customs value of merchandise but not its classification.

Section 2626(b) refers to "Court of Claims". This is a typographical error. The intended reference should be to the "Customs Court".

Mr. Chairman, that concludes our technical comments on the bill.

APPENDIXRESOLUTIONS ADOPTED BY THE HOUSE OF DELEGATES
OF THE AMERICAN BAR ASSOCIATION

1. August, 1976

Be It Resolved, That the American Bar Association recommends that Section 251 of Title 28, United States Code, be amended to provide that:

(a) The United States Customs Court shall have, in any matter within its jurisdiction, the same powers in law and equity of, or as conferred by statute upon, a district court of the United States;

(b) The present requirement in Section 251 that not more than five of the nine Judges of the United States Customs Court shall be appointed from the same political party be deleted.

2. August, 1976

Be It Resolved, That the American Bar Association recommends a new statutory provision be added to the existing statutory provisions concerning the jurisdiction of the United States Customs Court, to provide that in an appropriate case the Court may assume jurisdiction prior to the otherwise required exhaustion of all administrative remedies.

3. June, 1978 (Adopted by the Board of Governors)

BE IT RESOLVED that the Association recommends the adoption of new legislation concerning the jurisdiction of the United States Customs Court, to achieve the following objectives:

1. Increased access to judicial review of cases and controversies arising out of the importation of merchandise;

2. A clear statement of the subject matter jurisdiction of the customs courts;

3. A comprehensive system of judicial review in the customs courts of executive and administrative decisions, involving imported merchandise, when such decisions are based on the customs laws and, when appropriate, other laws regulating the importation of merchandise (but such jurisdiction not to be exclusive in cases involving the question of compliance of imported merchandise with general regulatory statutes that apply to both domestic and imported merchandise); and

4. Avoidance of jurisdictional conflicts between the customs courts and other federal courts.

Mr. VOLKMER (presiding). Subcommittee will come to order.

We will now hear the testimony of Andrew Vance on behalf of the Association of the Customs Bar. I understand he is speaking in support of H.R. 6394.

I notice, Mr. Vance, that you have a very detailed statement. That will be incorporated as part of the record by reference.

[The complete statement follows:]

THE ASSOCIATION OF THE CUSTOMS BAR
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JAMES H. LUNDQUIST
PRESIDENT

February 28, 1980

STATEMENT OF ANDREW P. VANCE
ON BEHALF OF
THE ASSOCIATION OF THE CUSTOMS BAR
IN SUPPORT OF H.R. 6394
THE CUSTOMS COURTS ACT OF 1980

My name is Andrew P. Vance. I am a member of the Bars of Washington, D.C. and New York and a practicing attorney in the field of customs law and international trade. From 1962 to 1976, I was Chief of the Customs Section, Civil Division, United States Department of Justice, and, since June 1976, have engaged in the private practice of law. I appear this morning to present my views as an active practitioner and also to submit for the record comments on behalf of the Association of the Customs Bar.

The Association of the Customs Bar is a national organization of practicing attorneys who specialize in the field of international trade including, of course, customs law. The Association was chartered in the State of New York over 50 years ago and its representatives have in the past presented views to the Congress on legislation affecting trade. Since the Association's members practice continuously before federal administrative agencies charged with the regulation of foreign trade and import regulations, representatives

of the Executive Branch, as well as before appropriate federal and state judicial bodies, we regard the Customs Courts Act of 1980 as a major step forward in conforming our traditional judicial procedures to the ever-changing and complex world of international trade.

The Association of the Customs Bar supports H.R. 6394, The Customs Courts Act of 1980.

This Bill has obviously evolved from efforts initiated in the 95th Congress by the introduction of S. 2857 to effect the laudatory purposes of the instant legislation. Extensive hearings were held on S. 2857 with the result that an improved Bill was introduced, S. 1654, in the first session of this Congress and following hearings on that legislation, was passed by the Senate, in revised form, on December 18, 1979. It is obvious that this Committee and its staff have carefully reviewed the legislation enacted by the Senate and the comments made at the 1978 and 1979 hearings and has succeeded in introducing a Bill which has improved on the very fine work which the Senate had done. The efforts of the Chairman, the Committee, and the Staff are deeply appreciated by those of us who practice in this very vibrant, significant and complex field of law. We are confident that those who are affected by governmental action involving international trade will be equally grateful for the benefits and order brought to the rights of judicial review in this field.

While the Association does have suggestions which we believe will improve the Bill, and while we are particularly concerned with the counterclaim, notice of protest denial, and 337 review procedures presently included therein, this Bill is one which but with a few changes should be speedily enacted as an uncontroversial and landmark piece of legislation.

We particularly commend and endorse the following achievements of the Bill:

1. The granting of plenary powers to the Customs Courts, the necessary and ultimate completion of their transformation to Article III courts [Section 201, 28 U.S.C. 1585];
2. The elimination of the requirement of partisanship in the selection of judges of the Customs Court, or the Court of International Trade as it is proposed to be called [Section 101];
3. The emphasis and clarification of the Congressional intent that the customs courts' expertise in international trade matters be utilized to resolve conflicts and disputes arising out of the tariff and trade laws [Section 201, 28 U.S.C. 1581, 1582];
4. The transfer of original jurisdiction to the Court of International Trade of civil actions to recover a civil penalty under customs laws, to recover upon a bond relating to importations, and to recover customs duties [Section 201, 28 U.S.C. 1582];
5. The enlargement of the class of persons who can litigate or intervene in actions in the customs courts to now include exporters, foreign governments, trade associations, consumer groups, unions, and

those otherwise adversely affected by administrative decisions or litigation involving our international trade and tariff laws (Section 301, 28 U.S.C. 2631);

6. The availability of judicial review at an earlier stage in extraordinary circumstances [Section 201, 28 U.S.C. 1585; Section 301, 28 U.S.C. 2643 (c)(1)];

7. The clarification of the record requirements and scope of review [Section 301, 28 U.S.C. 2635 and 2640]; and

8. Removal of the anomaly of having the Government prevail even when the Court has concluded it erred by permitting the courts to take such further steps as necessary to enable it to reach "the correct decision" [Section 301, 28 U.S.C. 2643(b)].

As stated, we generally endorse the Bill and urge its speedy adoption with the changes which we recommend.

COMMENTS AND RECOMMENDATIONS

TITLE II - JURISDICTION OF THE COURT OF INTERNATIONAL TRADE

Section 201, 28 U.S.C. 1581. Comment. We endorse the proposed 28 U.S.C. 1581(a), (b), (c), (d), (e), (f), (g), (h), and (i). We are pleased to note the expansion of jurisdiction in subsection (a)(4) to include jurisdiction over "a demand for redelivery to Customs custody (including a notice of constructive seizure) under any provision of the customs laws, ...". We agree with the comment in Senate Report No. 96-466 that "a demand for redelivery ... is in

reality no different than a decision to exclude merchandise from entry or delivery - a decision which the Customs Court may now review." However, we believe that it is necessary to complement this enlargement of jurisdiction by including similar language in Section 514 of the Tariff Act of 1930, as amended, since the ability to file a protest, and the filing and denial of a protest, are prerequisites to Customs Court jurisdiction which are retained in the Bill. We assume that that can easily be taken care of in Title VI of the Bill.

We are pleased with the intent to provide in subsection (j) for review of administrative rulings which are really final in nature and effectively foreclose importation and thus the opportunity to test the validity of the ruling. However, as drafted, the last clause beginning with "except that this exclusion shall not apply" appears to effect the opposite result in that to avail himself of the exception a person would have to show he would be irreparably harmed if he didn't have the opportunity to obtain judicial review under the very subsections which require exhaustion of administrative remedies available only after there has been an importation. Perhaps the insertion of the word "except" between "judicial review" and "under subsection (a) ..." would make clear the apparent intent of the drafters.

We assume that in excluding the Court of International Trade from jurisdiction over civil actions arising under 19 U.S.C. 1305, the Committee had in mind the provision therein for jury trial. This would be consistent with the Committee's provision in 28 U.S.C.

1582(b) for transfer of cases arising under 19 U.S.C. 597, 704(i)(2), or 734(i)(2) if the Court determines that the party seeking a jury trial is entitled to one. However, as we note in commenting on the 1582(b) provisions, we see no reason why the Court should be ousted of jurisdiction just because a jury trial is sought. In view of the logical purpose of this legislation to vest in these specialized courts all questions having to do with import transactions, we believe that litigation involving the articles prohibited from importation under 19 U.S.C. 1305 should also be conducted in the specialized customs courts. We would therefore propose that subsection (j)(1) be stricken and there be a new subsection in 1582 giving the Court of International Trade exclusive jurisdiction over any civil actions arising under section 305 of the Tariff Act of 1930.

Recommendation: Strike the proposed subsection (j)(1).

Redesignate the proposed subsection (j)(2) as (j) and have it read as follows, including the revision in the last four lines discussed above:

"(j) The Court of International Trade shall not have jurisdiction to review any ruling or refusal to issue or change a ruling relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, and similar matters issued by the Secretary of the Treasury other than in connection with a civil action commenced under subsection (a), (b), or (c) of this section, except that this exclusion shall not apply if a person demonstrates that he would be irreparably harmed without an opportunity to obtain judicial review except under subsection (a), (b), or (c) of this section."

Section 201, 28 U.S.C. 1582. Comment. We heartily endorse the proposed changes in 28 U.S.C. 1582 which will vest jurisdiction in the Court of International Trade of civil penalty, customs bond, and recovery of customs duties cases. We believe that such litigation logically belongs in the Court of International Trade. We see no need to transfer such litigation to the district courts because one of the parties may desire that the action be tried before a jury. We see no reason why the judges of the Court of International Trade should not conduct jury trials as well as non-jury trials. Presumably, since they are able to be assigned to a District Court pursuant to 28 U.S.C. 293(b), where they can conduct jury trials, such trials could also be conducted by them in the Customs Court. We would propose that if it is deemed that the right to a jury trial should be preserved in these cases, provision be made in the statute for the Customs Court to afford such a trial and that, in those circumstances, they avail themselves of the jury list compiled by the Clerk of the nearest District Court to where the Court of International Trade is sitting.

We have already expressed the opinion in our comments on the Section 1581 provisions that litigation under 19 U.S.C. 1305 should be commenced in the Court of International Trade and are therefore recommending a new paragraph (4) to subsection 1582(a).

Recommendation: (a) Strike "or" at the end of paragraph (2); add the "or" to the end of paragraph (3); and add the following as a new paragraph (4):

"(4) to forfeit, to confiscate, or to destroy the book or the matter seized pursuant to section 305 of the Tariff Act of 1930.

Strike the proposed 19 U.S.C. 1582(b) and (c) and substitute in their place:

"(b) Where a trial by jury is requested in accordance with the rules of the Court of International Trade, the Court shall call upon the Clerk of the District Court in the district in which it is sitting for assistance in empaneling a jury from the jury list maintained in that district. For trials at its headquarters in New York City, the Court of International Trade may avail itself of the assistance of the clerks of either the Southern or Eastern Districts of New York, or may maintain its own jury list."

Section 201, 28 U.S.C. 1583. Comment. We strenuously oppose the proposed provision providing for judgment upon counterclaims asserted by the United States in litigation commenced in the Court of International Trade seeking to rectify alleged errors of Government officials in the administration of customs laws. A provision for counterclaim permitting a money judgment for the United States can only have a chilling effect on the commencement of litigation in the Court of International Trade and fails to recognize the unique nature of that litigation.

Basically, litigation in the Court of International Trade is of an in rem nature with class action overtones. Under constitutional precepts, the Court's decision on classification questions or in cases involving principles generally applicable to imports will affect not only the particular importation(s) or merchandise before the Court, but all such or similar importations or merchandise. The Congressional policy heretofore has sought to facilitate resort to

this specialized judicial forum when importers, small or big, feel that their importations are not receiving the administrative treatment contemplated by the Congress and by the Constitution. It should be noted that absent the initiation of an action by an importer, the Government's administrative decision on the importation in question would be final unless reliquidation occurs within 90 days, in accordance with statutory prerequisites.

Merchandise and its uniform treatment for customs purposes is at the heart of litigation in the Court of International Trade, not the individual importer or plaintiff. The Constitution requires uniform treatment of merchandise at any port in the United States. Importer A should not receive more favorable treatment than Importer B, and one should not be able to seek out a port in State A over a port in State B because the customs treatment in State A will be different than the customs treatment in State B.

The appeal and protest provisions in the Tariff Acts and the resultant review, first exercised by the Board of General Appraisers under the 1890 Tariff Act, and since 1926 by the Customs Court, have signified not only the importance which the United States gives to judicial review but the recognition by Congress of the need to satisfy the Constitutional command that there be uniform treatment. Customs litigation is looked upon as a means of assuring uniform administrative interpretations of legislative initiatives and commands. Historically, the intent has been to encourage and facilitate review of Customs administrative decisions.

Until the Customs Courts Act of 1970, judicial review was automatic after the administrative filing of an appeal for reappraisal or of a protest against classification. With the tremendous increase in the volume of trade and importations, the number of cases automatically referred to the Customs Court was deemed to be drowning the judicial process, so changes were made which equated the initiation of actions in the Customs Court with initiations of actions in other courts. But at no time was it intended to inhibit the importer from seeking judicial review: the effort was merely to assure that judicial review was desired when administrative review was completed. In fact, emphasizing the desire that access to the Court be facile, the filing fee in the Customs Court was kept considerably lower than that in other federal courts and the initial filing paper a summons, as contrasted with a complaint, was decided upon as not only underscoring the greater ease of obtaining judicial review but as recognition of the fact that many actions are filed in the Customs Court which are dependent upon the result in so-called test cases. This is so because importations of merchandise are the core of a civil action in the Customs Court. Therefore, before an issue or question of law is resolved with regard to particular merchandise, there may be many importations of such or similar merchandise by a number of importers.

To the present day, the recognition that normally the essence of, or concern in, customs litigation is the correct (uniform) tariff treatment of merchandise rather than the individual importer is underscored by the fact that no interest is paid to an importer upon his

establishing that more than the duty legally due the Government was exacted from him, and that no impediment has been placed to his initiating or taking the risk and the financial cost of litigation by threatening him with a higher duty should he challenge the duty originally assessed. The Government's overriding interest is the correct tariff treatment of merchandise and the importer's unfettered recourse to the Court of International Trade is a means of assuring the realization of that goal. The proposed language would drastically alter this whole concept and chill the initiation of litigation. In effect, it says to an importer that if you are so brash as to challenge the Government you will run the risk of a judgment that can be higher than what we have assessed, and it is likely that counterclaims for higher assessments of duty will be asserted often as a defensive tactic. Defense against such kinds of claims would appreciably increase the cost of litigation, and on this basis alone will deter recourse to the judicial forum. Further, as drafted, the statute contemplates that a counterclaim can be asserted which arises out of "an" rather than "the" import transaction before the Court, and therefore the trial and resolution of individual cases may be made more complicated by the addition of counterclaims based on other importations of the same importer of different merchandise involving different facts and issues of law.

It is important to note that the Government is able to assert a counterclaim at present as a defense to plaintiff's claim and,

if the Customs Court agrees with it, to be able to use the Court's declaration to that effect as a basis for Customs treatment of unliquidated entries. This is a benefit which the Government derives from the initiation of litigation by an importer - it may never attain that correct treatment at a higher duty if its erroneous decisions are not challenged because of unreasonable risks - all undertaken by the importer. The proposed provision is further contrary to recent legislation which has recognized the desirability of settling an importer's liability to the Government at the earliest practical date. The law now sets a limit on the liquidation of entries. Customs Procedural Reform and Simplification Act of 1978. This was enacted by Congress in response to the reasonable business request that an importer know at some reasonably fixed date the outside limit of his obligation to the Government. In the past, the liquidation of an entry had no set outside limit. The proposed provision for counterclaim in 28 U.S.C. 1583 coupled with the right given to the Court in 28 U.S.C. 2643 to enter a money judgment for the United States would remove that finality from any liquidations challenged by the importer in the Court of International Trade. We urge that the Congress not overturn the present law in this regard in the absence of compelling arguments otherwise, of which we have heard none.

As far as the recovery of customs duties or recovery on a bond, we would frankly not have as much problem with a provision for a

setoff or a demand limited to the same import transaction pending before the Court in a particular action. We should note, however, that an importer could not be before the Court in a challenge of an administrative decision subject to the protest procedure without having paid the contested duties. Further, it seems pertinent to point out that no provision is made with regard to matters commenced by the United States pursuant to 28 U.S.C. 1582 for the defendant to be able to plead as a defense any counterclaim which it may have against the Government relating to customs duties. It would seem that equity would require that the defendant have the right to counterclaim, setoff or demand in litigation commenced by the Government pursuant to 28 U.S.C. 1582, if the Government is to be given that right with regard to actions commenced under 28 U.S.C. 1581.

In conclusion, it seems to us that the principle of facilitating recourse to judicial review of the usual customs administrative decisions outweighs any imagined need for money judgments for setoffs, demands, or counterclaims which have not hitherto been available in the usual customs litigation and which can only be viewed as an attempt to deter or chill recourse to judicial review. We are not aware of any demonstrated need by the Government for these provisions. Absent an overwhelming public policy need to overcome the historic nature of customs litigation, we believe that this proposed provision should be stricken in its entirety.

Recommendation: Strike 28 U.S.C. 1583 as proposed, deleting the proposed section heading under Chapter 95 and renumbering 28 U.S.C. 1584 as 1583, and 28 U.S.C. 1585 as 1584, correcting the chapter headings as appropriate.

TITLE III - COURT OF INTERNATIONAL TRADE
PROCEDURE

Section 301, 28 U.S.C. 2631. Comment. Section 2631(a) in S. 1654 as enacted, permitted the commencement of civil actions by the estate, heirs, or successors of a person who had filed a protest, or by a surety of the protestant in the transaction the subject of the protest. We understand that the omission of the surety's right to bring an action was an inadvertence. We would suggest that provision also be made for estate, heirs or successors so as to remove any doubt as to their right to commence an action, as this has not been certain in Customs Court proceedings.

We have no objections to the proposed provisions of 28 U.S.C. 2631(b) and (c), although we note again the omission of the phrase "or his estate, heirs, or successors" included in the Senate version. We believe the additional phrase would be helpful. At any rate, there should be a consistency. If the Committee feels that the phrase is not necessary in view of the state of the law as they understand it, then the legislative history should show that and the phrase should not be included in any of the paragraphs so that no inference could be drawn from its inclusion in one paragraph and not in another.

We have no objection to the proposed provisions of 28 U.S.C. 2631(d), (e), and (f).

Civil actions described in Section 1581(a) or 1581(b) have been excepted from the provisions of 28 U.S.C. 2631(g). We believe the same exception should apply to the civil actions described in Section 1581(c) as those cases include the classical types of litigation, or extensions thereof, described in Sections 1581(a) and (b).

We support and endorse the provisions of 28 U.S.C. 2631(h) and (i).

Recommendations: (a) Add the phrase "or by his estate, heirs, or successors, or by a surety of such person in a transaction which is the subject of the protest" after the words "such Act" at the end of the present proposed subsection (a).

(b) and (c). Add the phrase "or his estate, heirs, or successors" to the end of each of these subsections.

(g) Substitute the phrase "Section 1581(a), 1581(b), or 1581(c)" for the phrase "Section 1581(a) or 1581(b)."

Section 301, 28 U.S.C. 2632. Comment. We have no difficulty with the proposed provisions of 28 U.S.C. 2632(a), (b), and (d).

Section 516A of the Tariff Act of 1930 permits the commencement of actions in the Customs Court by the filing of a summons and a complaint, or by the filing of a summons followed thirty days thereafter by a complaint. As drafted, we believe that proposed 28 U.S.C. 2632 (c) is subject to a construction that that provisions has been altered.

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Since we understand that that is not the intention of the Committee, we recommend that the words "or a summons" be inserted after the word "summons" in the third line of that subsection.

Recommendation: (c) Add the phrase "or a summons" following the word "summons" at the end of the third line of subparagraph (c) so that the third and fourth lines will read as follows:

"Commence by filing with the Clerk of the Court a summons or a summons and a complaint, as prescribed in such section with the"

Section 301, 28 U.S.C. 2635. Comment. We support and endorse the proposed provisions of 28 U.S.C. 2635(a) and (b). We believe that the confidential information provided for transmittal in 28 U.S.C. 2635(c) should be accompanied by a non-confidential description of the nature of the information being transmitted as provided for in 28 U.S.C. 2635(h)(2) and (d)(2). We endorse and support the provisions in 28 U.S.C. 2635(d).

Recommendation: (c) We recommend that the following sentence be added to 28 U.S.C. 2635(c):

"Any such information shall be accompanied by a non-confidential description of the nature of such confidential information."

Section 301, 28 U.S.C. 2636. Comment. We strenuously oppose the change in current law wrought by the proposed 28 U.S.C. 2636(a)(2). Section 515(a) of the Tariff Act of 1930, 19 U.S.C. 1515(a), requires that notice of the denial of any protest shall be mailed in the form and manner prescribed by the Secretary. The denial of

the protest is the action which triggers the right of a protestant to commence litigation in the Customs Court. The provision for mailing of notice is one that was sought and fought for by importers, and the legislative history of the Customs Courts Act of 1970 makes it clear that the Customs Service is required to give the importer notice of the action it has taken on a protest; it is also clear that an importer is entitled to this notice and that he can await its receipt before counting the start of the running of the statute of limitations for the commencement of an action in the Customs Court. It is also clear from the legislative history that this provision is for the protection of the importer and that any action taken by Customs after two years is of a ministerial nature. Therefore, it had been the position of the Department of Justice in the past that after the two year period had expired there is nothing in the statute to prevent an importer from initiating an action in the Customs Court without waiting for the notice of denial, should he so desire, since the notice would be merely formal advice of denial, issued for his protection, and that could be waived by the importer. The Senate analysis to the contrary is apparently based on the misreading of Knickerbocker Liquors v. United States, 78 Cust. Ct. 192, C.R.D. 77-5 (1977), which did not involve a situation where the protestant commenced an action in a situation where he had not received a notice of denial. At any rate, we are proposing a new 2636(a)(2)

which we think will assure the importer's right to proceed in the Court of International Trade after two years, or to await the notice of denial, which we believe was the intent of Congress in 1970 and which we hope continues to this day.

Further, we are concerned that the Committee's proposed provision herein would invite the Customs Service, as a management decision, not to mail notices of denial, in the view that, pursuant to the proposed Section 2636(a)(a), the mailing of notices is an unnecessary management burden since the two year period starts to run without such mailing. In fact, any incentive to act on protests would be removed from a managerial view, and the protest be turned into a meaningless dilatory piece of paper. This is exactly what the importers did not want to occur and why they fought so hard to obtain the requirement of a notice of denial in the 1970 Act. Under the 1970 Act, it is clear that Customs must act on a protest by at least giving a notice of denial after the two years have expired and that an importer has a right to rely on that notice before having the statute run on him. The Committee's proposed language would effectively relieve the Government of any obligation to respond to an importer's protest. Under all the circumstances, if the change that we propose is not acceptable, it would be preferable from our point of view to strike the second subparagraph of 2636(a), leaving the present state of the law extant, as set forth in the two subparagraphs remaining.

With regard to 28 U.S.C. 2636(d), we note that the Committee has lessened the time for the filing of an action in the Court of International Trade from the 10 days provided in the Senate Bill to

five days after the date of publication of the determination that the case is extraordinarily complicated. We believe that five days is unreasonably short considering delays in receipt of the Federal Register, etc., and recommend that the ten day period should be restored.

Recommendation: (a) Substitute the following as Section 2636

(a) (2):

"(2) If no notice is mailed within the two-year period specified in section 515(a) of the Tariff Act of 1930, as amended, at any time after the date of the expiration of the two-year period specified in said section 515(a) prior to the mailing of a notice of denial; or"

(d) Substitute the word "ten" for the word "five" in the proposed 28 U.S.C. 2636(d).

Section 301, 28 U.S.C. 2643. Comment. In view of our position on counterclaim asserted earlier in our comments on 28 U.S.C. 1583, we oppose the words "or in any counterclaim asserted under Section 1583 of this Title,".

We particularly commend the Committee in making possible through the proposed provisions of 28 U.S.C. 2643(b) for the Court of International Trade to reach the correct decision in those instances where the Government's decision has been proven erroneous but there has been a failure or difficulty of proof of what the correct decision should be.

We endorse the proposed language in 28 U.S.C. 2643(c).

Recommendation: (a) Strike the words "or in any counterclaim asserted under section 1583 of this Title," so that the section will read as follows:

"(a) In any civil action commenced under section 1581 or 1582 of this title, the Court of International Trade may enter a money judgment for or against the United States."

TITLE VI - TECHNICAL AND CONFORMING
AMENDMENTS TO OTHER ACTS

Section 601(a), 19 U.S.C. 1305. Comment. We recommend a new section in Title VI, which for the sake of convenience we are designating 601(a) for this presentation although its adoption in final form would call for the subsequent renumbering of this and succeeding sections. At any rate, consonant with our recommendations on the sections 1581 and 1582 provisions for the vesting of exclusive jurisdiction in the Court of International Trade over 19 U.S.C. 1305 actions, we propose the following conforming and technical amendments to the said section.

Recommendation: Section 305 of the Tariff Act of 1930 (19 U.S.C. 1305) is amended

(1) by striking the phrase "and no protest shall be taken to the United States Customs Court from the decision of such customs officer;"

(2) by striking out "district court" and inserting "Court of International Trade" in lieu thereof;

(3) by striking out "district attorney (U.S. Attorney)" and inserting "Attorney General" in lieu thereof; and

(4) by striking the phrase "of the district in which is situated the office at which such seizure has taken place,"

Section 602, 19 U.S.C. 1337(c). Comment. We oppose this provision and frankly continue to be surprised to find it in the technical and conforming amendments title of this Bill. There not only is no basis for this provision in the other titles of this Bill, as the Senate Report concedes, but we deem it to be an attempt to make a change in the substantive law contrary to provisions recently enacted in the Trade Act of 1974 and the Trade Agreements Act of 1979.

19 U.S.C. 337(c) currently provides that:

" (c) The Commission shall determine, with respect to each investigation conducted by them under this section whether or not there is a violation of this section. Each determination under subsection (d) or (e) of this section shall be made on the record after notice and opportunity for a hearing in conformity with the provisions of subchapter II of chapter V of Title V. All legal and equitable defenses may be presented in all cases. Any person adversely affected by a final determination of the Commission under subsection (d), (e), or (f) of this section may appeal such determination to the United States Court of Customs and Patent Appeals. Such court shall have jurisdiction to review such determination in the same manner and subject to the same limitations and conditions as in the case of appeals from decisions of the United States Customs Court."

This provision was enacted in the Trade Act of 1974, and amended (by the inclusion of the reference to subsection (f)) in the Trade Agreements Act of 1979. It is obvious that the Congress in 1974 intended to enlarge the scope of review of the Court of Customs and Patent Appeals over determinations of the International Trade Commission under Section 337. Hitherto, the Court's scope of review had been limited to questions of law only (28 U.S.C. 1543). However, the President's role was diminished under the Trade Act of 1974

amendments and the Commission was required to make its decisions with regard to "the effect of such exclusion upon the health and welfare, competitive conditions of the United States economy, the production of like or directly competitive articles in the United States, and the United States consumers," in 19 U.S.C. 337(e) upon the record and after notice of an opportunity for a hearing (19 U.S.C. 337(c)).

While we question whether this substantive change in the tariff law is within the jurisdiction of the Judiciary Committee rather than the Committee on Ways and Means, we do not understand the basis for its inclusion in the statute. The aggrieved parties from an ITC decision have been given the right of an appeal to the Court of Customs and Patent Appeals as if they were going there from a trial court. In many respects, the Commission's proceedings do parallel those of a trial situation. Since the judgment of a trial court is a nexus of an appeal, and the appellate court considers all aspects of the trial court's consideration going into that judgment, including the appropriateness of the judgment, we submit that the appellate court should be able to treat the final determinations in the 337 proceeding in a similar vein.

We understand that this provision was sought by the International Trade Commission, and the Senate Report seems to base support for this position on Congress' failure to amend 28 U.S.C. 1543 when it amended section 337 in the Trade Act of 1974. We think too much is made of

an obvious technical oversight. The Congressional intent on the substantive aspect was clearly voiced in the 1974 legislation and reinforced in the Trade Agreements Act of 1979 amendment. This was apparently what influenced the Court of Customs and Patent Appeals in its 1978 decision Solder Removal Company v. U.S. International Trade Commission, 582 F.2d 628, referred to in Senate Report 96-466.

There has been no showing of which we are aware that the appellate court has sought to overstep the usual appellate considerations and forbearance exercised in review of administrative proceedings such as those under 19 U.S.C. 337. We would hope that under the circumstances there would be no diminution in the scope of review available to an aggrieved party in 337 cases. As to the claimed distinction between adjudicative and non-adjudicative determinations between decisions made under subsections (d) and (e) and (f), we question whether orders issued pursuant to subsection (f) are not to be based on record considerations since among the factors to be considered are those enumerated in subsection (e) and the decision based on an adjudicative proceeding.

Recommendation: Section 602 of Title VI should be amended by striking paragraph (2); and thereafter by striking the number (1), the semicolon after "thereof" and the word "and" appearing thereafter, and inserting a period after "thereof."

Section 603. Comment. In order to carry out the expansion of jurisdiction to embrace a demand for redelivery to Customs custody as contemplated by the provision in section 201 of the Bill regarding

28 U.S.C. 1581(a)(4), it is necessary to create a right to protest such demand by including it among the administrative decisions which may be protested in 19 U.S.C. 1514.

Recommendation: Renumber section 603(2) as section 603(3) and insert the following as a new section 603(2):

"(2) by amending (4) to read: '(4) the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody (including a notice of constructive seizure) under any provision of the customs laws except a determination appealable under section 337 of the Tariff Act of 1930;' "

Section 605. Comment. The reference to Section 2643(d) in Section 605(b)(3) in amendments to Section 516A(c) of the Tariff Act should be to 2643(c)(1).

Recommendation: Substitute the phrase "section 2643(c)(1)" for "section 2643(d)" in Section 605(b)(3).

Section 606. Comment. In the event that the Committee agrees with our proposal that actions commenced in the Court of International Trade under 28 U.S.C. 1582 should be tried in that Court, whether jury or non-jury, then the phrase "or transferred from the Court of International Trade to a district court under section 1582 of title 28, United States Code ..." in the amendment to 19 U.S.C. 1592(e) should be deleted.

Recommendation: Delete the phrase "or transferred from the Court of International Trade to a district court under section 1582 of title 28, United States Code ..." from the proposed amendment to 19 U.S.C. 1592(e) of Section 606 of the Bill.

Section 609. Comment. While we have no objection to the proposed amendment to Section 3 of the Act of July 5, 1884, we question the propriety of its being included in Title VI of the Bill. It would appear to be better suited to inclusion in Title II of the Bill having to do with the jurisdiction of the Court of International Trade either as a subpart of Section 1581(i) or as a new subsection between the present subsections (h) and (i) of Section 1581.

Recommendation: Shift the amendment of 23 Stat. 119 effected by the present Section 609 of the Bill to Section 201 of the Bill.

TITLE VII - EFFECTIVE DATES AND MISCELLANEOUS
PROVISIONS

Section 701. Comment. (a) We don't believe it appropriate to have as an effective date for legislation as broad and encompassing as this Bill a date that is in the past. In fact, it seems to us to create problems. An example would be if the Bill were to retain the proposed provision of Section 2636(2). We feel that certain rights would be extinguished ex post facto. There are also places in the legislation that make references to the rules of the Court of International Trade. Obviously, many of the procedures in the Court of International Trade, and in the Court of Appeals for International Trade, Patents, and Trademark legislated under this Bill will require the Rules of these courts to be amended. Neither the requisite amendments nor the promulgation thereof could have occurred prior to January 1, 1980, when Title VI of the Tariff Act of 1930, as added by Title I of the Trade Agreements Act of 1979, took effect. Further,

we do not think that the Committee means to approve retroactively of any powers which the courts may have invoked which they were not empowered to do prior to the passage and approval of this Act. Finally, as some of the provisions for scope of review could be deemed a change in the rights of parties and the procedures of the courts, such an effective date provision could raise questions with regard to the propriety and finality of judgments rendered after January 1 and before the enactment and approval of the Act.

Under all the circumstances, and to avoid unintentioned mischief, we would suggest that the Act should be effective on the date of approval as to the powers conferred upon the courts and no sooner than 45 days thereafter with regard to the remainder, giving the courts the necessary minimum time to make any procedural and other changes which the Bill will require the courts to plan for and to announce.

(b) We assume that there is some technical reason in the budgetary provisions of the Government that requires the effective date for Section 405 of the Act to be October 1, 1980, and of course we have no objection to that.

(c) The proposed language in subsection (c) does not appear applicable to actions brought under subsections (c), (d), (e), and (f) of 28 U.S.C. 2631 since entries do not seem to be the crux of the matters to be litigated in those actions.

(d) We oppose the proposed provision in subsection (d) (2) as it operates retroactively and is basically in conflict with the provision in (d) (1) assuring the litigants that determinations made prior to January 1, 1980, on which changes were effected in the applicable countervailing duty and antidumping laws by the Trade Agreements Act of 1979, would be reviewed judicially on the basis of the law as it existed on the date of such determinations. The scope of review and procedures thereof available prior to January 1, 1980 determinations are presently being actively litigated in the Customs courts. We suggest that those are legal decisions best left to the courts as to rights legislated in prior statutes. If those rights are broader than those legislated in 1979 prospectively for post-January 1, 1980 determinations, we don't believe it appropriate to extinguish or diminish them by legislative fiat after the fact. We hope that the Committee will delete subsection (d) (2) from the Bill.

Recommendation: (a) Strike everything that follows "effective" in the proposed section 701(a) and substitute in lieu thereof the following:

"45 days after approval of this Act."

(c) . Strike the entire proposed section 701(c) and insert in lieu thereof the following:

"(c) The amendments made to 28 U.S.C. 1585 by section 201 of this Act; to section 2644 by section 301 of this Act; by section 402 of this Act; by Title V of this Act; and by sections 702, 703, and 704 shall be effective on the date of the approval of this Act."

(d) Strike the proposed subsection (d) (2) and the "(1)" after "(d)."

Mr. VOLKMER. If you would like to read it, you may do so, or if you prefer, you may give us a synopsis of it, and we can proceed to the question and answer phase of the hearing.

**TESTIMONY OF ANDREW P. VANCE, ON BEHALF OF THE
ASSOCIATION OF THE CUSTOMS BAR**

Mr. VANCE. Thank you, Mr. Chairman. I will not read the 28-page statement, but I'll make a summary of the position in a brief oral statement.

My name is Andrew P. Vance. I am a practicing attorney in the field of customs law and international trade. From 1962 to 1976, I was Chief of the Customs Section, Civil Division, U.S. Department of Justice; and since June 1976, have been engaged in the private practice of law.

I appear this morning not only to present my views as an active practitioner but also to submit for the record the comments and recommendations on behalf of the Association of the Customs Bar. The association is the national organization of attorneys specializing in the field of customs law and international trade.

I might note in that regard that when the witnesses were announced earlier this afternoon, I was announced as appearing on behalf of the Association of the Customs Bar of New York City. To correct any impression that the association is only an association of New York City, New York City should be read as the place where the headquarters is. But this is a national association of all practitioners in the field. It has been in existence for over 50 years and has testified on numerous other occasions before Congress on matters relating to customs and international trade matters.

We participated quite actively in the Senate consideration of S. 1654, enacted last December 18, and its predecessor in the 95th Congress, S. 2857.

On behalf of the association and as a person who's been keenly interested in this area of law, we commend the Congress for its interest and concern in this area. We particularly wish to express our thanks and our congratulations to the chairman, the committee, and the staff for the improvements in substance in drafting over S. 1654. The care and attention given to this legislation by both the Senate and this committee gives us not only hope for, but anticipation of, the enactment of this legislation.

I am glad to record the support of the association for H.R. 6394. We have some reservations and recommendations which are set out in the statement which is being offered for the record. In this oral summary, I will only highlight two areas of major concern to us, and let the statement speak in more detail and for the remainder of our comments and recommendations.

We feel that the granting of plenary powers to the Customs Courts is the final realization of their transformation to article III courts. We are anxious for this realization and for the resolution of the dilemmas as to jurisdiction of import-related litigation. For these reasons we urge the speedy passage of this legislation so that its landmark reforms can be fully effectuated in the shortest time possible.

However, as stated, there are two provisions in the bill, as introduced, which are of major concern to us and to those whom we normally represent, and we hope that you will listen to these concerns and amend the bill accordingly.

The provisions in sections 201 and 301 of the bill, amending 28 U.S.C. 1583 and 2643, permitting counterclaims, setoffs, and demand relating to an import transaction and money judgments in connection therewith in customs litigation represent a concept which brings forth what appears to me to be unanimous criticism from members of the private bar and of the importing public who have learned of the proposal.

Our statement emphasizes that while litigation in the Customs Courts is basically in rem in nature, involving a particular entry or entries of such merchandise, the adjudication of that litigation and its impact is that associated generally with class action litigation.

Indeed, the importance to the Government, and to the public, of the Customs Courts lies basically in their ability to resolve issues of general application in the areas of tariffs and international trade, which decisions will contribute to the uniform administration of the laws applicable in that area.

There is no doubt in our minds that the enactment of the counterclaim provisions will be counterproductive to the public's interest in facilitating the resolution of customs disputes through the administrative and judicial processes. The counterclaim provisions proposed in this bill can only result in a chilling effect on the initiation of litigation in the Court of International Trade.

The comments in our statement point out the inequity of the one-sided counterclaim provisions which will be seen as threats to be realized against any importer who seemingly has the audacity to take on Government officials whom he believes to be acting contrary to law. This threat can work to deprive other importers, the consuming public at large, and even the Government of the benefits derived from his efforts and his willingness to assume the considerable financial expenses involved in litigation.

To add to the importer-plaintiff's risk those of other matters for which the Government has other recourse can only appear as an effort to inhibit importers from questioning or challenging customs' administrative decisions.

It is worthy of special note to observe that the proposed provisions have not been thought necessary from 1890 to the present even though from 1890 to 1970 administrative appeals and protests were referred automatically to the Customs Court and its predecessor.

No need for this basic change has been demonstrated, and its proposal not only does violence to the essential nature of customs litigation, but goes counter to the congressional purpose recently enacted as Public Law 95-410, the Customs Procedural Reform and Simplification Act of 1978, that within a year of entry of his merchandise an importer should be able to know the outside limit of his financial or duty obligation to the Government on that entry.

To the present, the fact that the importer has challenged the Government's assessment of duties on his entry has not altered the finality of that assessment as far as the highest amount thereof. Even the

court's agreement with a defensive counterclaim asserted by the Government which would result in a higher assessment has been given prospective effect only, with regard to unliquidated entries.

For these reasons and those expressed in our written statement, we hope that the committee will reconsider the proposal contained in sections 201 and 301 with regard to 28 U.S.C. 1583 and 2543, and delete those proposals relating to counterclaim, setoff, and demand from the bill.

We believe that, in that way, the importer's unfettered recourse to the Court of International Trade will continue not only to assist the Government in its overriding interest in the correct tariff treatment of merchandise but in benefiting it in those instances where, through litigation initiated by an importer, subsequent liquidations may be made at an even higher rate than that which was contested.

Our second major concern is with the proposal in section 301, section 2636(a)(2), which would start the 180-day statute of limitations for commencement of an action to run 2 years from the day a protest had been filed, if no administrative action had been taken on the protest.

Not only will this impose a tremendous burden on importers or their agents in keeping track of thousands of protests and approve the denial to them of a written response to a protest, but can have the ultimate effect of turning the protest into a meaningless and patently dilatory procedure.

We urge that you substitute our proposal for U.S.C. 2636(a)(2) set out at page 19 of our statement, or delete the proposal entirely. Should you nevertheless decide to enact that provision, then we suggest that, in all fairness, the effective date of the provision should be 2 years after enactment, for you would otherwise be penalizing importers who heretofore have had the right to rely on receiving advice from customs of action taken on a protest.

In closing, I would highlight the two other concerns:

1. Our hope that you will permit jury trials to be conducted in the Court of International Trade rather than transferring such trials to the district court, negating in part the goal of conformity in customs decisions. If transfers are to be endorsed, then we suggest appeals from such district court decisions should be to the Court of Appeals for International Trade, Patents and Trademarks.

2. The second concern which we highlight, treated fully in our statement, is with the limitation of section 602 of the scope of review of the court of appeals in section 337 cases. We hope that change will not be made.

In conclusion, I reiterate the Association of the Customs Bar's overall support for the proposed legislation, and our thanks to the chairman, the committee, and its staff for their work in proposing and in considering this important legislation of concern to the international trade community.

We hope that this legislation with the changes we have recommended will receive prompt favorable consideration by the subcommittee, the committee, the House, and the Senate.

Thank you, Mr. Chairman.

Mr. VOLKMER. Recognize the gentleman from New Jersey if the gentleman has any questions.

Mr. HUGHES. Well, thank you very much, Mr. Chairman.

I want to thank you, Mr. Vance. I am particularly concerned about your argument that the enactment of a counterclaim provision will be counterproductive, that it will have a chilling effect.

Are you suggesting that the Government should have to resort to the Federal district court, or other remedies that might be available if they have, indeed, a counterclaim that is relevant to the particular protest involved?

Mr. VANCE. No, Congressman. I think, first of all, we have to understand what we're talking about when we talk about a counterclaim.

Mr. HUGHES. Maybe that is part of the confusion. Why don't you do that.

Mr. VANCE. All right. Now, presently when the importer files an action in which he contests either the classification or valuation of merchandise, the Government as a defense can say, "OK, we may not have been right, but we probably should have done it under this provision of the law. And if we'd done it there, it would have been a different and even higher rate of duty." That position can be successful under present law to defeat the claim of the importer in the Customs Court.

But the judgment will not disturb the final result which the Government set forth in its liquidation. So the importer is not frightened of going into court and saying, "Hey, look, the Government assessed me a hundred, and if I go to the court it may be a thousand." Now, on the basis of that happy result to the Government, future unliquidated entries, even those that had come in years past but had not yet finished the administrative process, can be liquidated in accordance with the higher decision.

That is the present law. As we read the intention here, it is, one, that the Government would be able to get a judgment for that higher amount in the case that is brought, even though had the importer not filed the action, the decision on the original entry could not have been disturbed except in that first 90 days.

Second, that as presently framed, the Government could raise as a counterclaim its claims with regard to any other importations of merchandise which would really very well complicate litigation.

Mr. HUGHES. Let's separate that out. That gives me additional concern. I can see the logic of your argument there. From what you are saying it seems pretty much like what is happening in some States now when a defendant has a right to appeal a sentence.

When he does, he takes a chance that when he goes on appeal the court will feel the court below was indeed too lenient and will increase the sentence. It's been argued that that in itself has a chilling effect because it would chill a defendant's exercise of his right to appeal.

What you are saying, in essence, is that it would deter, perhaps, importers from filing a protest and taking it to Customs Court for fear that another section imposing a higher tariff, which may or may not be relevant, would be imposed by the Government.

And I say to you, what is wrong with that?

Mr. VANCE. Well, I think you have to balance against that the basic intent of the Government in setting up this review procedure. Our country was the first in the world to do it and is one of the few that permit it, and it is that the Government is interested in uniform and correct tariff treatment.

Mr. HUGHES. We are not trying to encourage litigation. If, in fact, an importer realizes he may be stuck under another section, why should we encourage him to go ahead and file the appeal, then tie the Government's hands once they discover they have cited the wrong section of the tariff law?

We are not in the business of trying to encourage litigation.

Mr. VANCE. I don't think you're discouraging it either.

Mr. HUGHES. It seems to me that if an importer recognizes he has a pretty good deal, realizes he's being hit with a tariff under a section that is going to cost him less money, and he realizes that by going to court he will not run the risk of increased exposure to liability, are we not encouraging litigation?

Furthermore, why should you tie the Government's hands under those circumstances?

I see the argument about counterclaims that are not relevant to that particular transaction. I share that concern.

But I find it very difficult to accept an argument that we should not permit the Government to counterclaim to see that justice is done by asking the Customs Court to determine the proper classification or valuation of an imported good.

If in fact the law imposes a different tariff, or if the classification was erroneous and the importer wants to challenge that, and the Government wants to see that the correct law is applied, why shouldn't the Government be able to do that as part of the pleadings before the Customs Court?

Mr. VANCE. Well, the Government is able to do it as part of the pleadings, and to get a judgment which it will be able to use as against all unliquidated entries. So it has that advantage. It seems to me if the Government wants to keep encouraging someone to come in to challenge improper administrative decisions so it can even get that—

Mr. HUGHES. We don't want to encourage those who got a good deal to come in.

Mr. VANCE. He thinks he should have had a better deal or he wouldn't be in there.

Mr. HUGHES. Well, no. If he feels he got a good deal, the Government can't get smart and counterclaim. I would think you are going to encourage additional litigation.

I understand your point. I thank you.

Mr. KAPLAN. Mr. Volkmer, may I make an additional observation in connection with a point Mr. Hughes has raised?

The ABA position is set forth in our testimony, so some of what I say reflects my personal opinion. I think there is another dimension to the issue. Ordinarily we think of counterclaims as something which—or as occurring in a situation where each side has a claim against the other. And they are provided for in order to expedite litigation and to make the process more efficient and quicker.

There is a difference here. I think the difference is important. The difference arises from the fact that the importer, in making entry of his merchandise, must do what the Government tells him. He must present a document which is prepared in accordance with the judgment of the Customs Service as to what the law requires and he must pay duty based upon that judgment of the Customs Service.

The Customs Service then has the right to change its mind in the liquidation and again has the right to change its mind in the 90 days following the liquidation. To do so unilaterally, and to force its decision upon the importer, and the importer has no choice in the matter, and the only recourse that he has is to proceed with an administrative protest.

If he doesn't prevail on his administrative protest to proceed in court so that there really isn't a balance between the position of the Government and the position of the importer. To say that a counterclaim merely provides a balance is more apparent than true. The Government does have the right to demand that the entry be made in a certain way, to liquidate the entry in a certain way, then to reliquidate in accordance with its own thoughts on the subject within 90 days thereafter. I think that is an important difference.

Mr. VOLKMER. I would like to see your reaction to a question that staff and I have been discussing to see if we might arrive at a satisfactory solution to everybody.

The proposed section would permit the United States to assert a counterclaim which arises out of an import transaction that is the subject matter of a civil action pending before the court. That is the present language of the bill.

Do you believe that the draft language is over-broad?

No question about that. The answer to that is "Yes"; correct?

Mr. KAPLAN. Yes.

Mr. VOLKMER. Should we limit the provision to the import transaction pending before the court?

Mr. KAPLAN. Yes.

Mr. VOLKMER. That is one possibility. Now, I am going to give you an alternative. We have been talking about the 90-day time period in which the Government can change its mind and decide, "Hey, since you are contesting this, we are going to say that that goes within another category, and therefore your tariff is 20 percent instead of 10 percent."

Now, you're going to have to pay us this much money; right? That is what you are afraid of; right? That is one of your main concerns.

What if we require the Government to make its counterclaim within the time constraints of section 501 of the Tariff Act of 1930 or be forever barred from doing so?

Mr. VANCE. But that's the present law. If they do that they can reliquidate within 90 days. If they had liquidated first at 10 percent and changed their mind within 90 days, they can reliquidate and make it 20 percent.

Mr. VOLKMER. What if we eliminate the reliquidation time and don't let them do that?

Mr. LEHMAN. It's actually a mechanical process for postauditing their decision, allowing a reasonable 90-day period to change their mind. Reliquidation is the mechanics of it.

Present law says simply if the Government does change its mind and wants more duty, it must do it within 90 days of the first liquidation, and then reliquidate to lock it up. But after that 90-day period, you have a statute of limitations that is binding against the United States—that is binding as to the import transaction.

Mr. VOLKMER. What you're telling me is that it's that 90-day change-of-mind reliquidation process that concerns you?

Mr. LEHMAN. No; what concerns us is that 2 years later, after a protest process and after the case has gone to court because the importer has brought it into court, the Government can then disregard the 90-day limit and reopen.

Mr. VOLKMER. Where does it say that—that they can disregard it?

Mr. KAPLAN. There is nothing in the bill that would prevent them from filing—

Mr. VOLKMER. Is there anything in here that says they can disregard that?

Mr. LEHMAN. There is nothing clearly on the face of the bill that indicates how you reconcile those two provisions.

Mr. VOLKMER. My point is, I don't care when the counterclaim comes, but at any time after this 90-day period they are forever barred from changing the claim?

Mr. KAPLAN. I think it wouldn't work.

Mr. VOLKMER. Why?

Mr. KAPLAN. I think there is a small problem with it, that is that the importer doesn't have to notify the Government that he challenges the liquidation until up to 90 days from the date of liquidation. So the importer could file his protest at 5 o'clock on the 90th day. That is when the Government might first become aware of the claim, then just never have time to assert a counterclaim.

Mr. VOLKMER. What if we gave the Government 30 days after time of filing the protest?

Mr. KAPLAN. Mechanically it would be a workable option.

Mr. VOLKMER. We could give them 30 days; but at the end of this time forever bar them from changing their minds so they couldn't come back later after there is a contest—

Mr. KAPLAN. I think that is correct, Mr. Chairman. The Government would be required to assert its position—its counterclaim—during the administrative proceeding.

Mr. LEHMAN. We do understand that would be a counterclaim arising out of the same transaction.

Mr. VOLKMER. That is what we are discussing. I am not sold on that part yet myself, personally.

Mr. VANCE. Could I say something more on this point before we leave?

And I am sorry Congressman Hughes left.

I want to give an explanation also of our position.

Realize this, the importer who has relied on the Customs' decision is bringing in subsequent merchandise. He has a right to say, "The Government has said to us it's 10 percent on this merchandise." He's got to make business decisions and judgments based on that.

Mr. VOLKMER. We understand that.

Mr. VANCE. That is why we're different than the other kind of person who comes into court.

Mr. VOLKMER. We understand that; and we're trying to find a way out of the problem right now. We don't want to eliminate the counterclaim yet. Let's put it that way.

Mr. VANCE. Leave the counterclaim, but no judgment on it, which is the present way.

Mr. VOLKMER. I don't know that we want to do that.

The gentleman from Illinois.

Mr. McCLORY. Thank you, Mr. Chairman.

And thank you, gentlemen, for your very helpful testimony.

I was very much impressed with President Carter's 1976 campaign pledge to strongly support the merit selection of all Federal judges and district attorneys. However, it wasn't until we had a Democrat President and a Democrat Congress that we succeeded in getting additional Federal judges.

Now, we have 152, I believe, additional Federal district and court of appeals judges. We have no merit selection system. I believe that well over 90 percent of the Carter appointees are members of the Democrat Party, in contrast to President Ford who had about a 60-to-40, Democrat-Republican ratio.

The present law provides that the court we are considering reforming has nine judges, no more than five of whom can be from one party.

The American Bar Association recommends we delete that provision. I happen to feel that we can get a lot of merit from the selection of Republican judges. Why can't we continue with this existing provision?

Is there any constitutional or other bar to doing so? It doesn't seem to have been working too badly in the past.

Mr. VANCE. Would you like me to comment at all?

Mr. McCLORY. Sure.

Mr. VANCE. I think that provision goes back to the Board of General Appraisers in 1890, and when that was really basically a tariff administrative thing. I think in making this an article III court, we—you lessen that fact when you have the partisan requirement for appointment and always label a judge as a Democrat or Republican.

Once he's on the bench, the fact of party affiliation should have nothing to do with his decisions, even on tariff matters.

Mr. McCLORY. Right.

Mr. VANCE. Unfortunately, the heritage of that requirement of party has been that we are dealing administratively with a tariff. You have to have high and low tariff people on a Board of General—on an article III court. Therefore, I think it's good to drop that requirement.

Certainly I would hope that appointments would be from both parties to any court—the best person. It shouldn't have to do with a party label.

Mr. McCLORY. Has there been something objectionable in the past? I asked whether or not there is any constitutional objection?

Mr. VANCE. I think years ago there was an attack when a Customs Court sat in a district court and sentenced someone. The unfortunate defendant there took it up to the Supreme Court and said he's not an article III judge because he's appointed on the basis of party. He lost in the Supreme Court, but that was an unfortunate thing that hangs over the Customs Court.

I think the court prestige is enhanced by not having that requirement.

Mr. McCLORY. Would the American Bar Association wish to comment?

Mr. LEHMAN. I think our position has been that judges on article III courts have not traditionally been selected on the basis of party affiliation. For this court to achieve its full stature as an article III court it seems to me that condition is inappropriate.

Mr. KAPLAN. At least statutes don't provide—

Mr. McCLORY. This new court has small claims jurisdiction, I don't think anybody has said anything about utilizing the magistrate system. We have been trying to get small claims handled by a magistrate and relieve the district courts. Is there any reason why we can't give this jurisdiction to magistrates?

Mr. KAPLAN. The ABA as such has no position on that question. We simply believe that it's appropriate for the Congress to ask the court to set up such a type of mechanism in the Customs Court, and let the Customs Court answer that question. I think it's well within the competence of the Customs Court to set up special master system or magistrate system, or something of that kind.

Mr. VANCE. The Association of Customs Bar does not support the small claims proposal, Congressman.

Mr. McCLORY. Why not?

Mr. VANCE. Well we really don't think it necessary. We think that also would create problems with the concept of uniform treatment of tariff matters. Basically, I'm not aware of any instance where a person cannot handle his case per se, the small individual importer. In all the years that I was in government I haven't seen a case that really didn't have precedent value. Seeing some of these comments reminded me of cases I handled personally where someone was complaining. There was a time when there was a \$600 duty exemption when you went abroad. Congress changed that in the middle of the summer.

Some people went abroad thinking they had \$600 to buy and not be taxed on, it was decreased to \$200. Someone came back, brought a suit, bought a fur coat for his wife and he wanted a \$1,200 exemption instead of the \$400 he obtained. He lost in the Customs Court. He went up to the Court of Customs and Patent Appeals.

I kept trying to figure out why an individual would have gone all that way.

A few years later I heard, don't you know, he had let word out that he was taking this action and, had he succeeded, he had 3,000 claims he was ready to file. We thought we were fighting one fur coat. We should have been smarter to know we weren't.

Merchandise is to be treated uniformly throughout the country. Again, this goes to the whole concept. It's not an individual against the United States. It's the effort to classify merchandise. You just don't have a single instance of where it's going to be treated one way one time and another way another time.

I am chairman of the Committee of the Association of Customs Bar which will represent any indigent or person who can't afford to conduct his litigation in the Customs Court. I have yet to have a matter referred to me.

Mr. VOLKMER. The gentleman from Virginia.

Mr. BUTLER. Thank you, Mr. Chairman.

Did the American Bar Association comment on the jury trial question?

Mr. LEHMAN. I believe we did take a position on the question of jury trial. Our position was essentially that we had favored originally the provision in the Senate bill which would have provided for cases of the kind described in that statutory provision originating in the district court, being referred back to the Customs Court at the request of a party to transfer jurisdiction. But we did not take a position as to whether we favored jury trials in the Customs Court itself.

I don't think the American Bar as such has a position on that question, although I do have some personal views on it which I would be happy to state.

Mr. BUTLER. We would be anxious to hear your views.

Mr. LEHMAN. Well my own view is that, historically, specialized courts of expert jurisdiction are set up to make findings of fact in technical situations. They are created primarily in order to engage in the findings of fact process.

It seems to me if you have experts on a specialized court of special jurisdiction, you really don't need the jury to make finding of fact. If you have a question, on the other hand, that is of a general nature and should be the subject of consideration by a jury, then you want a court of general jurisdiction to handle it and not the Customs Court.

Mr. KAPLAN. There is some interesting history here in which you may be interested, Mr. Butler. That is that prior to the time that the Board of General Appraisers was created, customs matters were heard in what were then the circuit courts and were tried to juries. It's since the 1890's, therefore, that such cases have not been tried to juries.

There has never been a great demand to have a jury in the Customs Court to hear cases of this kind. I think one of the important reasons why that is true is the reason which Mr. Lehman gave, which is to say you have a highly specialized subject matter.

So there has been, we have seen manifested in a very practical sense a preference that the trier of the fact should be an expert in the issues that are presented. So there never has really been a demand for a jury trial in the Customs Court.

Now the question arises whether, in these specialized cases, there ought to be a jury trial, and it makes one wonder what is the purpose of the jury. Of course, one of the first answers that one comes to in directing attention to that question is that the purpose of the jury is to let the people in the community have a chance to look at the facts as they see them and say how the law ought to be applied as to those particular facts.

That would seem, in the case we are talking about here, to mitigate in favor of having the jury trial in a court other than the Customs Court, which doesn't sit in every community, which is national in its scope, its very purpose is to make sure that there will be uniformity in the application of the customs laws throughout the United States.

So I think that a good case could be made for the proposition that, if there is to be a jury trial, the case should not be tried in the Customs Court and only those cases truly invoking the specialized expertise of the Customs Court should be tried there.

Mr. VANCE. Mr. Butler, if I may comment.

Mr. BUTLER. Yes.

Mr. VANCE. I'm afraid I would have to disagree again. In the 592 cases where the jury trial might be appropriate in mitigating circum-

stances, there are other circumstances and facts relating to that case that would require a specialized knowledge and background of the Customs Court judge.

Yet we think the jury factor should not remove the case from that court because that court does sit nationally and can use a jury list of a locality where it goes to, just as the bill presently requires when they go away from New York, they will utilize the district court clerks and the district court marshals in the districts in which they are sitting. They can also utilize the jury panels in the districts in which they are sitting.

In those cases in which a jury is appropriate, we are talking now of not the usual classification and value cases, but we are talking about the 592 penalty cases. And I don't see any reason why a judge of the Court of International Trade should not be able to preside at a jury trial there, as he can in the district court to which he can be assigned.

Mr. BUTLER. It seems to me that the objection is to the competence of the judges? Is that the objection?

Mr. LEHMAN. Not at all. It is a question of whether the kind of questions that the judges are considering is properly before that court. If so, the objection is to the jury's competence being substituted for the judge's competence.

If the subject matter is truly a matter that should be the subject of the expertise of the Customs Court, then the judge should make the determinations of fact based upon his expertise.

Mr. BUTLER. I believe I was addressing my question to the problem, of finding ourselves in a situation where we do have to have a jury trial. Should it be held in the Court of International Trade, or the district court. Mr. Vance says he thought it could all be handled in the Court of International Trade. I understand you gentlemen from the American Bar Association to say otherwise. Have I misunderstood you?

Mr. LEHMAN. It seems to be not uncommon, for example, in a tax situation to force the party who has an interest in the litigation to make a choice. If he wants the benefits of not having to pay his taxes first, he goes to the tax court but waives his right to a jury trial. If he wants a right to a jury trial, he pays his taxes and goes to the district court to sue for a refund. I don't think there is an absence of precedent for the kind of suggestion we are making.

Mr. BUTLER. No; but I need a candid response to my question.

Mr. KAPLAN. The Congress passed a law, Public Law 95-410, in which there was a substantial reform of section 592 of the Fair Tariff Act of 1930. One of the issues debated in connection with that law was the issue of whether 592 cases, let's call them by that shorthand, civil fraud and negligence cases arising under the customs laws, should be heard in the Customs Court.

The Congress, in its wisdom at that time, decided that that should not be part of Public Law 95-410 and left jurisdiction over those cases in the district court. Now in the discussions among interested parties, and I can't say for sure in the testimony, but at least in the debate which took place, one of the issues which was addressed is whether it was correct to leave jurisdiction over those cases in the district courts.

The argument was made in many cases by attorneys practicing in the Customs Court that that is the wrong thing to do because these

cases shouldn't be tried to a jury because they involved the specialized expertise of the Customs Court.

The compromise position a lot of people outside of Government took in connection with that legislation is exactly what appears in the House version of the present bill, which is to say that where a party believes that the gravamen of the case does involve the specialized expertise of the Customs Court, he should have the privilege to transfer it to the Customs Court and waive the right of the jury. It seems a reasonable way to look at the situation.

If you are talking about whether a person as an ordinary citizen in a community believed in a way that is in conformity with the ordinary standards of the community, and that his perception of the law was that of an ordinary, reasonable, and prudent citizen, that is a case that the district court is quite competent to handle. It's a case which is ordinarily and in many circumstances addressed to the attention of a jury.

But if you are talking about a technical question of the customs laws, well, perhaps that is another story. Then perhaps you are involved in the same debate we hear from time to time with regard to patent cases and with regard to antitrust cases, and other cases where the district court still presently has highly specialized jurisdiction and where there is a lot of discussion over the wisdom of that.

Now in those cases, we agree that the House bill providing for transfer to the Customs Court in order to take advantage of its specialized expertise is appropriate. If that is what you want to do, then shouldn't the court be the trier of the facts?

Mr. BUTLER. I am still not satisfied that I have received an answer to my question. Basically, is the Customs Court, in your judgment, presented with a fact determination which could be submitted to a jury? Is there any reason why it should not have that power?

Mr. KAPLAN. Other than reasons that I gave I think are essentially functional reasons. They have to do with what the case is mostly about.

Now if you ask me is it inconceivable that that situation should occur I have to answer, No, it's not inconceivable. It's quite conceivable it could occur, and Customs Court judges are article III judges, quite competent to try a jury trial.

Mr. BUTLER. In fact they are fungible, you can get a bankruptcy case—maybe not a bankruptcy case.

Mr. KAPLAN. Indeed, the Customs Court judges do sit in the district courts and hear cases which are tried to juries. So it's really not a question of competence.

Mr. VOLKMER. The gentleman from Virginia's time has expired. We have a vote on, too. Before we go, I recognize staff for one question.

Mr. NELLIS. Thank you, Mr. Chairman.

The committee's record is now a sorry mess on the need for a small-claims procedure. I need to tell you quickly that when Chief Judge Re testified here, he stated, in essence, that the small-claims problem was not a great one in his court; that there were very few claims. That the rules of the court already permitted a procedure to be established if such became necessary.

And I read your statement, you gentlemen from the ABA, and I read your statement, too, Mr. Vance. I would like to know for the purpose of the committee's record, is there a need for a small-claims

procedure in the proposed Court of International Trade, yes or no?
Mr. Vance?

Mr. VANCE. I don't believe that there is.

Mr. NELLIS. We don't know if there is. Therefore our proposal was that the court should have the discretion if there is.

Mr. NELLIS. Mr. Kaplan.

Mr. KAPLAN. I personally believe there is. That is not an ABA position. That is my personal position.

Mr. NELLIS. Personally, what do you think, Mr. Vance?

Mr. VANCE. In all the years that I have been practicing, from 1962, on, both in the Government and on the outside, I have not seen the need for it. In fact, I am concerned with the push for it as a way of circumventing the full consideration of important trade matters that have to be given uniform application. I believe any real small claim can be taken care of.

Mr. VOLKMER. I am going to have to go vote. I will return right away. Staff does have some additional questions if you will remain for a few minutes.

[Recess.]

AFTER RECESS

Mr. VOLKMER. I would appreciate it if the panel would remain. We do have some more questions. I will announce to the panel and the remainder of the witnesses so that you will know. We are under a time constraint right now. It appears from what is going on over at the floor that we have one more funding resolution to complete debate on. It's anticipated a half an hour to 45 minutes on that.

Once that is concluded we will go into a series of votes. It looks like it's going to be between 10 and 14 votes, which means we are running right at an hour and a half during those votes. We won't be able to do anything. That would probably take us to around 5 o'clock. I don't think the rest of the witnesses would want to stay that long.

We will try to conclude this panel as soon as possible and go on to Judge Markey and then the rest and try and hear from them. We will have additional questions for you and for the others that will be submitted to you in writing. We would appreciate it if you would submit your answers and those will be incorporated into the record just as if they were asked here.

I am sorry this has happened.

Mr. KAPLAN. Mr. Chairman, may I inquire whether the committee would be interested in having us provide personal opinions in those cases where the issues go beyond the scope of our testimony?

Mr. VOLKMER. Yes; we would be glad to.

Mr. POLK. I would like to ask Mr. Lehman and Mr. Kaplan, in particular, what is a small claim? Is Mr. Vance's example of the fur coat a small claim?

Mr. LEHMAN. Well, the examples we gave in our direct testimony were examples dealing with isolated noncommercial types of transactions geared to the kinds of importation rather than any fixed dollar amount.

I think if you describe a small claim in terms of dollar amounts you may be misled. I think it's more the nature of the transaction that makes it a small claim rather than the amount involved.

The fur coat's value, if it's an isolated transaction, may be a small claim. If it's just a leader for a series of what are really commercial transactions, then I think it's not a small claim.

Mr. POLK. All right. Now with regard to the proposal that if there is a small-claims procedure that the decisions not have any precedent value, as a practical matter, is that really possible? If Judge Re decided a case in a small-claims procedure and comes to a decision, doesn't he remember that decision when he decides a case not in small-claims procedure?

Mr. LEHMAN. I would think if the procedure is informal and it's clear what is being done is equity, an equitable procedure that doesn't necessarily involve the formalities that would provide the kind of assurances you need in a precedential decision, I think he would take that into account on a more complete record in a subsequent case, and would not be bound.

I don't say he necessarily wouldn't remember what had happened in another proceeding, but he would be in a position to determine whether those principles and findings of fact should be considered binding in the matter currently before him.

Mr. KAPLAN. I would like to suggest something different is likely to happen. He won't remember he decided before and decided the same way. He will remember he decided it before and think, this person is abusing the small claims jurisdiction. It seems to me in any reasonable structure of rules which the court might create, the judge, whoever is hearing the case, would have the authority to direct it be prosecuted in a normal way.

Mr. VANCE. The concern I have is not as much with the judge as with the effect of that decision on the Customs Service and in the international trading community. An importer who has gotten a favorable decision from the court is certainly going to tell import specialists at other ports of entry: "That was before judge so-and-so; this is what I got." That is going to be a precedent. I don't care what you are saying. That is why it's impossible to say a judge's determination in those kind of cases is not going to have any effect.

Mr. POLK. Would the distinction between the informal small-claims procedure and the formal procedure run afoul of the constitutional requirement of uniformity?

Mr. LEHMAN. I would think not. It's clearly identified as an informal nonprecedential procedure. I think this is the reason it was described that way in the resolution that the ABA considered.

Mr. POLK. Thank you. Thank you, Mr. Chairman.

Mr. VOLKMER. Thank you. That will conclude the testimony from the panel. There will be written questions submitted to you.

[Information to be furnished:]

RESPONSE TO SUPPLEMENTAL QUESTIONS
SUBMITTED TO LEONARD LEHMAN ON BEHALF OF THE ABA

1. Question: At the first hearing, the Subcommittee received testimony on the issue of authorizing the award of interest on judgments for or against the United States in Customs litigation. Would you comment on the desirability of such?

Answer: Although no specific ABA policy position has been taken with regard to the award of interest on money judgments in Customs litigation, I believe that the payment of interest is basically incompatible with the stated ABA objective of achieving maximum access to judicial review. Particularly in the present climate of interest rates that have reached an all time high, the potential cost of interest to parties suing or being sued by the U.S. must invariably have a "chilling affect" on the pursuit of their rights, as they perceive them, through the judicial review process. I personally believe that the collection of interest in prospective litigation in this Court is less important than the maximizing of the opportunity for complete judicial review of all contested issues that may arise in the highly complex area of international trade law.

2. Question: Currently, civil actions challenging the revocation or suspension of a Customs broker's license are to be heard in the Federal Circuit Courts of Appeal. Proposed section 401(c)(1) on page 32 of the bill would transfer jurisdiction over these cases to the Court of Appeals for International Trade, Patents and Trademarks (presently the C.C.P.A.).

- A. Do you believe this transfer of jurisdiction will unduly burden or deny justice to Customs brokers who may be party to such an action?
- B. Mr. Tompkins, on behalf of the National Customs Brokers and Forwarders, has recommended that H.R. 6394 not grant exclusive jurisdiction to the Court of Appeals for International Trade, Patents and Trademarks but that there be concurrent jurisdiction in such cases with that court and the Circuit Court of Appeals. Would you comment on that recommendation?
- C. With regard to this provision, the Department of the Treasury has recommended that civil actions commenced by the United States for the suspension or revocation of a Customs broker's license should be commenced in the Court of International Trade as opposed to the Court of Customs and Patent Appeals.

Would you oppose this recommendation? If the Subcommittee accepts this recommendation, would it have to provide for an appropriate standard of review? Should that standard be de novo or that as required under the Administrative Procedures Act?

Answer - 2A: Based on my Customs experience over two decades, an average of less than two cases per year involving the revocation or suspension of a Customs broker's license will require litigation. The present process before the Federal Courts of Appeal is an appellate legal process which, as I understand it, would remain unchanged before the Court of Appeals for International Trade, Patents and Trademarks. Aside from relatively minimal travel costs for appellate attorneys, I perceive no burden, and certainly no denial of justice, to a broker who may be a party to such an action following the proposed transfer of jurisdiction.

Answer - 2B: In view of the minimal number of cases involved in this kind of appellate litigation, concurrent jurisdiction among the new Appellate Court and the Circuit Courts of Appeal would be extremely inefficient, in my opinion, and would defeat the purpose of the proposed change. I disagree with this recommendation.

Answer - 2C: I would personally oppose the Treasury recommendation that civil actions for a suspension or revocation of a broker's license should be initiated in the Court of International Trade. It may well be that greater formality, and perhaps full adherence to the minimum requirements of the Administrative Procedure Act, should be instituted in the Administrative Hearing Procedure. I believe, however, that Executive Branch agencies should take maximum responsibility for effectively disciplining those whom they license to deal with the public, subject to the APA standards for administrative review. Since judicial review of formal APA hearings is traditionally limited to a determination, on the record, whether the administrative decision is arbitrary, capricious or unsupported by substantial evidence, I believe that such a review (particularly in the small numbers that we have discussed) should be left at the Federal Appellate level, where such reviews are traditionally conducted.

Court of International Trade jurisdiction in such cases would be justified, in my opinion, only if it is concluded that the Executive Branch agency is unable and/or unwilling to establish an appropriate record of the kind that would normally be subject to appellate level limited review in the courts. In those circumstances, the Court of International Trade should conduct a de novo trial of the issues; the de novo standard of judicial review should be incorporated in the statute; and the burden should be placed upon the government to establish the facts that would justify revocation or suspension of the license.

3. Question: Proposed section 1582 provides that the United States may commence a civil action to recover upon a bond. Assuming such a case was brought against a surety, should this legislation provide the surety with the right to file a cross-claim or institute a third party action against the bond principal?

- A. If the Subcommittee includes a cross-claim provision, would it have to grant the Court of International Trade original jurisdiction to hear the action or can the Court hear the case on the basis of pendent jurisdiction?

Answer - 3A: There is no specific ABA position on the issue of cross-claims or third party actions for purposes of H.R. 6394. However, in my opinion, such a procedure would contribute to the effectiveness of the judicial process, since it would permit the Court of International Trade to dispose of all claims arising out of the same underlying transaction in the one proceeding which it must conduct in any event. I personally believe that the Court should hear the claim against the third party on the basis of pendent jurisdiction. Should there be any question regarding the existing scope of the pendent jurisdiction of this Court, it would be prudent to articulate this grant of jurisdiction within the bill itself.

4. Question: Proposed section 1581(d) provides the Court of International Trade with the authority to review the actions of the I.T.C. on rendering advice to the President for the sole purpose of determining "the procedural regularity" of those actions.

- A. Does the Customs Court or any other Federal Court currently have the authority to hear this type of case?
- B. Assuming the Court of International Trade hears a case involving this section, what relief should the Court provide if it determines that the actions of the I.T.C. were procedurally irregular? Should it order the I.T.C. to review the matter again and issue a second advisory opinion to the President?

Answer - 4A: The U.S. Customs Service has in fact exercised jurisdiction in past cases over "escape clause" actions processed through the International Trade Commission and its predecessor and culminating in actions by the President, e.g. Schmid, Fritchard & Co. v. U.S., 41 Cust. Ct. 108 (1958). In such cases, the Court has in fact invalidated Presidential actions under a standard substantially equivalent to "procedural regularity", although it has not used that specific phrase. In the case cited above, the Presidential action was invalidated because the action taken was not one of the alternatives authorized by the Congress in its legislative delegation of authority to him to take certain

actions by Presidential Proclamation. In the course of that opinion, the Court also noted that the Tariff Commission, predecessor to the ITC, had in fact also violated the notice and other procedural requirements imposed upon its actions as the agency recommending to the President, under the same governing statute.

Answer - 4B: If the Court should determine that ITC actions were procedurally irregular, it would appear to be reasonable to order the ITC to review the matter again, following proper procedures and to issue a second advisory opinion to the President. The party initiating the action in the first instance should still be entitled to have its claims considered on their merits.

5. Question: Proposed section 1581(j)(2) contains a limited exception which would allow a party to gain direct access to the Court of International Trade for the review of a ruling issued by the Secretary of the Treasury if the party would be irreparably harmed because he would be unable to obtain judicial review under proposed sections 1581(a), 1581(b), or 1581(c). Do you believe that the proposed language accomplishes its intended purpose? In the alternative, would you favor the Senate language in section 1581(i)(2)?

Answer: The language of proposed section 1581(j)(2) of H.R. 6394 appears to achieve its objective, in my opinion, allowing parties who can establish that they would be irreparably harmed by a ruling or other interpretation of the Secretary of the Treasury, if they had to await the normal judicial review process, to obtain a direct judicial review of the ruling without awaiting a later commercial importation. The Senate counterpart provision in S. 1654 is more restrictive, and attempts to establish a new standard of review based on what is "commercially impractical" as well as a more limited scope of review (i.e., a determination of whether the Secretary's action is arbitrary, capricious or otherwise contrary to law). If the intention is to allow the new Court of International Trade to function as a full Article III court, there appears to be no reason why it should be required to utilize a standard other than the traditional standard of "irreparable harm" before permitting direct judicial review of the kinds of legal rulings or interpretations described in 1581(j)(2).

6. Question: On page 6 of Andrew Vance's testimony he recommended that the Court of International Trade have jurisdiction over civil actions arising under 19 U.S.C. 1305 which governs the importation of obscene materials. The latest Supreme Court pronouncements on the subject require obscenity to be determined on the basis of the standards of the local community. In light of that Supreme Court holding, would it not be impossible for the Court of International Trade to impose on national rule?

Answer: In my opinion, the Court of International Trade is as fully qualified as any other court to ascertain and apply the "local community" standards test prescribed by the Supreme Court with regard to cases arising under 19 U.S.C. 1305. Under that Supreme Court test, if it is impossible for the Court of International Trade to establish a national rule, it would be equally impossible for any other federal court to do so. The only issue in determining whether this statute should be allocated to the jurisdiction of this court is whether the statute is in fact a statute directly affecting imports in the manner of other Customs and trade laws, or whether its concepts are so much like those found in other statutes that are being interpreted by the courts of general jurisdiction for domestic purposes that there is no justification for assigning exclusive jurisdiction of this statute to this national court of special jurisdiction.

7. Question: It is the intention of the bill that exclusive jurisdiction of the Court of International Trade not be invoked in matters involving imports and the Toxic Substances Control Act. Yet, on page 9 of your testimony you indicate a concern over the breadth of proposed section 1581(i). Do you believe that this problem needs to be cured by amendment or can it be handled through the use of strong legislative history?

Answer: The three major problems identified in our testimony with regard to proposed section 1581(i) are extremely important problems. However, I believe that strong legislative history, specifically utilizing concrete examples, would resolve the problem area that we have identified. In all probability, the complexity of these problems would not lend themselves easily to precise statutory drafting.

To restate the essence of these problems, the objectives are, first, that this Court should have jurisdiction only where the substance of the dispute uniquely involves international trade, and not merely because the issue (such as the "Toxic Substances Control Act" issue) happens to arise with respect to imported merchandise; second, if the Court of International Trade should determine that the issue does not "directly and substantially involve international trade", its determination should be binding on that threshold question, and a plaintiff should not be denied judicial review because a district court disagrees with that conclusion and wishes to avoid taking jurisdiction; and, finally, the question should not be whether the Constitution, treaty or executive action by the President "directly and substantially involves international trade", but whether a particular claim or transaction in controversy, which invokes those documents or executive actions, involves international trade.

8. Question: Do you see any need for the inclusion of the transfer provision in proposed section 1582(b)(1)?

Answer: There is no need for a transfer provision in proposed section 1582(b)(1), provided that the new Court of International Trade is authorized, in appropriate circumstances, to conduct a jury trial with respect to those issues of fact that do not involve its specific expertise and that would normally be an appropriate subject for a request for a jury trial in the district courts.

9. Question: If the Subcommittee decided to amend proposed section 1582 to permit trial by jury in the Court of International Trade, should that right be limited only to civil penalty actions or should it run to civil penalty actions, recoveries upon a bond and recoveries of Customs duties?

Answer: In the event that jury trials were to be authorized under proposed section 1582 in the Court of International Trade, it should be authorized for any of those actions proposed to be made subject to the exclusive jurisdiction of this Court in which that right presently exists in district courts with respect to the same actions.

10. Question: On page 15 of Andrew Vance's statement he recommended the inclusion of the estate, heirs, or successors of a person as having standing under proposed section 2631(a). Is the case law clouded in this area so as to currently deny these people standing in the Customs Court? Does the A.B.A. concur in this recommendation? Can this concern be resolved through the use of clear language in the legislative history indicating such coverage?

Answer: The ABA concurs in Mr. Vance's recommendation that the estate, heirs or successor of a person having standing under proposed section 2631(a) should have independent standing to commence an action under that provision. This is consistent with the position taken by the ABA in Senate hearings on S. 1654, which ultimately led to the inclusion of such persons within the scope of section 2631(a) of S. 1654. In addition, the ABA recommends that sureties should also be included within the scope of that provision. It is our understanding that such persons would not have standing in the Customs Court under present law to contest the trial of a protest. Consequently, we do not believe that this matter can be resolved through legislative history.

11. Question: Proposed section 2636(a)(2) would allow an importer to commence an action within 180 days after the expiration of the two-year period within which the notice of denial of a protest was to be mailed by the Customs Service. Some witnesses have commented that this places an undue burden on importers to keep a log of his protests filed with the Customs Service.

- A. Do you believe this is an unnecessarily heavy burden for an importer to bear?
- B. Have there been numerous instances where the Customs Service has neglected to mail a notice of denial within the required two year period?
- C. Will enactment of this provision provide the Customs Service with an opportunity to effectively shift the burden of tracking denied protests to the importer?

Answer - 11A: It may be arguable whether it is "an unnecessarily heavy burden" for an importer to keep a log of protests filed on his behalf with the Customs Service. However, basic due process has traditionally recognized the right of a person who is disadvantaged by governmental action to be given proper actual notice of that action. For this reason, section 515 now affirmatively requires the Customs Service to give specific notice of the denial of a protest within the two year period allowed to act on that protest. When this two year period was first created under the Customs Courts Act of 1970, Congress specifically refused to create a "constructive denial" procedure, under which protests would be presumed to be denied if not acted upon within the two year period. We believe that this position is the proper one, and that it can be made effective only by allowing an importer to compel the issuance of an actual notice of denial, and by affording to an importer a full 180 days following the mailing of that notice within which to commence his action in the Court of International Trade, even in circumstances where that actual notice is mailed long after the expiration of the two year period.

Answer - 11B: It is my recollection that within the past several years, the Customs Service studied the instances in which a notice of denial was not mailed within the two year period and determined that this failure occurred in almost one percent of all instances. Although this percentage appears small, it represents thousands of protests and must be considered extremely significant.

Answer - 11C: I believe that the provision as proposed in section 2636 of the bill, unless modified to enable a protesting party to compel actual notice and to preserve his 180 day period to litigate from the time of actual notice, will inevitably result in an abdication by the Customs Service of its responsibility to provide actual notice within the required two year period.

12. Question: Proposed section 2636(d) provides for expedited treatment of civil actions commenced pursuant to section 516A of the Tariff Act of 1930 to review 703(c) and 733(c) determinations. Should these civil actions be given similar expedited treatment under other provisions of this Act, such as proposed section 2635 which governs the filing of official documents?

Answer: It was apparently the intention of the Congress, in enacting the Trade Agreements Act of 1979, that actions commenced pursuant to section 516A of the Tariff Act of 1930 should be expedited in all respects. I believe the present wording of proposed section 2635 provides sufficiently shortened periods for the filing of official documents consistent with the complexity and the difficulty of compiling those documents to satisfy the Congressional intent.

13. Question: Proposed section 2643(b) limits the remand power of the Court of International Trade to civil actions commenced pursuant to section 515 or section 516 of the Tariff Act of 1930. Is this limitation sufficient under the circumstances or should the power be broadened to be co-extensive with that of the Federal District courts?

Answer: The remand power provided in proposed section 2643(b) appears to be sufficient to meet the needs of this Court as a national court of specialized jurisdiction.

14. Question: Subsection (d)(1) of section 1581 provides for Court of International Trade review of the procedures followed by the International Trade Commission in advising the President regarding certain actions to protect domestic industries against injury from imports, but such review is possible only if the International Trade Commission has provided affirmative advice and only after the decision of the President has been made final. Why should we not authorize procedural review by the Court of International Trade, on an accelerated basis if necessary, before the President acts?

A. Why should we require the advice to have been affirmative as a prerequisite to review? Could not negative advice based on defective procedure be just as harmful?

Answer: As indicated in our testimony as submitted for the record, the Presidential action with respect to the protection of domestic industries from potential injury is essentially a political action carried out within very general constraints authorized by the Congress. We believe that any effort to interpose a judicial review procedure, even when limited to the question of procedural regularity on the part of the body designated to advise him in his role, might well serve to interfere with his action. The review of the ITC procedure following the Presidential action would appear to protect all necessary rights involved without restraining the ability of the President to act on the substance of the matter before him.

We do not perceive the problem raised in the question with regard to "affirmative" in contrast to "negative" advice. As we understand the procedure, a determination by the ITC that no injury has occurred or is likely to occur is intended to be covered by section 1581(d)(2), and would in fact be reviewable for procedural regularity immediately following any negative ITC determination or recommendation.

15. Question: Subsection (e) of section 1581 provides that the Court of International Trade review of the procedures followed by the Office of the U.S. Trade Representative in making recommendations to the President regarding the enforcement of U.S. rights under any trade agreements or responses to certain foreign trade practices may only be had after the decision of the President has been final. What is the purpose of a procedural review at such a late date? Why not authorize it before the Presidential order becomes final, so that it may prevent an erroneous determination before it is made by the President?

Answer: As in the matter involving the previous question, decisions made pursuant to recommendations by the U.S. Trade Representative require the maximum of discretion on the part of the President, and are often very sensitive in their timing. Any attempt to interpose a judicial review of the procedures followed by the U.S. Trade Representative in making his recommendations would, in my opinion, create the potential for an unwarranted interference with the President's political prerogatives.

16. Question: Would you kindly comment on the proposal by the American Importers Association that the bill be amended to provide the importer with the opportunity to institute judicial review of penalty cases in the Court of International Trade at any time after the administrative process is complete and before collection action is commenced by the government?

Answer: I perceive no benefit to be derived from the proposal by the American Importers Association that the importer be permitted to seek judicial review of penalty cases in the Court of International Trade before a collection action is commenced by the government. Under the civil penalty procedure proposed in H.R. 6394, the Court of International Trade would have exclusive jurisdiction over civil penalty litigation and the defendant would not have been required to pay the assessed penalty before the litigation is concluded. If the American Importers Association proposal is accepted, so that the agency penalty determination is contested in the same way as duties determined on liquidation, there would also appear to be a justification for requiring that the importer pay the assessed penalty in order to invoke the Court jurisdiction, as he must now pay liquidated duties in order to obtain judicial review.

17. Question: Section 2637 requires that all liquidated damages must be paid at the time the action is commenced, but situations will undoubtedly arise in which an importer simply cannot pay

the duties and they are not fully covered by a surety, precluding him from bringing an action to contest the validity of the assessment. I understand there may be some question regarding the constitutionality of an absolute denial of access to the Court. Would you favor or oppose adding a provision to this bill to allow an importer, in special circumstances, to come in to Court without the payment of duties? In the alternative, does the irreparable harm exception in section 1581(j)(2) sufficiently address this issue?

Answer: Judicial review of duty liability cases in the Customs Court is dependent, under existing law, on the payment of the duties assessed; such payment is a condition to the Court's exercise of jurisdiction. I would personally oppose a provision allowing an importer, in any circumstances, to come in to Court without previously paying the assessed duties. It is possible that the "irreparable harm exception" which would authorize the Court to review agency legal interpretations without an actual importation (a procedure very analagous to declaratory judgment procedures in the district courts) will remedy any inability that might otherwise be alleged to prevent an importer from obtaining adequate judicial review.

Attachment 1

Responses by Andrew P. Vance on Behalf of The Association of the Customs Bar to Written Questions from the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary with Regard to H. R. 6394.

Question 1. At the first hearing, the Subcommittee received testimony on the issue of authorizing the award of interest on judgments for or against the United States in Customs litigation. Would you comment on the desirability of such?

Answer. From an importer's point of view, we feel it would be desirable to have interest awarded since the importer must have paid all assessed duties before he can commence an action in the Court of International Trade.

Question 2. Proposed section 1582 provides that the United States may commence a civil action to recover upon a bond. Assuming such a case was brought against a surety, should this legislation provide the surety with the right to file a cross-claim or institute a third party action against the bond principal?

- A. If the Subcommittee includes a cross-claim provision, would it have to grant the Court of International Trade original jurisdiction to hear the action or can the court hear the case on the basis of pendent jurisdiction?

Answer. It would appear to make sense to permit a cross-claim or the institution of a third party action by a surety in a suit filed by the U.S. to recover upon a bond. In this way, the entire matter can be resolved at once in one law suit. Thus the administration of justice is facilitated in a more economical use of court and attorneys' time and at less expense to the litigants.

- A. If the Subcommittee includes a specific cross-claim provision, that would appear to be sufficient. However, if the Committee is going to include such a provision, it would appear to be a good idea to grant the Court original jurisdiction of private civil litigation involving liability on a Customs bond so that one

court may develop a uniform body of law on it and so that sureties who desire to bring the principals into the Court of International Trade won't have to invite suit by the Government to be able to do so. By giving the Court original jurisdiction the surety may pay the Government where appropriate and still sue the principal in the tribunal dealing with international trade matters.

Question 3. Proposed section 1581(j)(2) contains a limited exception which would allow a party to gain direct access to the Court of International Trade for the review of a ruling issued by the Secretary of the Treasury if the party would be irreparably harmed because he would be unable to obtain judicial review under proposed sections 1581(a), 1581(b) or 1581(c)? Do you believe that the proposed language accomplishes its intended purpose? In the alternative, would you favor the Senate language in section 1581(i)(2)?

- A. On page 5 of your testimony you recommend that the word "except" be inserted between "judicial review" and "under subsection" in order to clarify the intent of the exclusion in proposed section 1581(j)(2). Could this problem be cured by amending proposed section 2637 (exhaustion of administrative remedies) to include a provision not requiring the exhaustion of administrative remedies in this instance?

Answer. We believe that the proposed language in 1581(j)(2) accomplishes its intended purpose and we frankly prefer it over the Senate language in section 1581(i)(2). The Senate language represents a compromise statement acceptable to us. However, the proposed language in H.R. 6394 appears to be less inhibitive of the Court's application of its plenary powers in appropriate cases and, therefore, more agreeable to us.

- A. While we suppose the problem presented on page 5 of our testimony with regard to the insertion of "except" in proposed section 1581(j)(2) could be cured by amending proposed section 2637, on reflection we believe that it is less cumbersome to have the intent clarified in 1581(j)(2) itself.

Question 4. On page 6 of your testimony you recommend that the Court of International Trade have jurisdiction over civil actions arising under 19 U.S.C. 1305 which governs the importation of obscene materials. The latest Supreme Court pronouncements on the subject require obscenity to be determined on the basis of the standards of the local community. In light of that Supreme Court holding, would it not be impossible for the Court of International Trade to impose one national rule?

Answer. Our recommendation for the transfer of jurisdiction over cases arising under 19 U.S.C. 1305 to the Court of International Trade is grounded on the desirability of having this one specialized court deal with all cases involving importations. While 19 U.S.C. 1305 does not involve only the exclusion of obscene materials, even cases involving such materials can involve issues dealing purely with technical Customs questions (see United States v. 10,000 Copies New York Nights, 10 F. Supp. 726 (S.D.N.Y., 1935)) or with Customs administration (see United States v. 77 Cartons of Magazines, 444 F. 2d 80 (C.A. 9, 1971); United States v. A Motion Picture Film Entitled "Pattern of Evil", 304 F. Supp. 197 (S.D.N.Y., 1969); United States v. One Book Entitled "The Adventures of Father Silas", 249 F. Supp. 911 (S.D.N.Y., 1966); United States v. One Carton Positive Motion Picture Film Entitled "491", 247 F. Supp. 450 (S.D.N.Y., 1965), rev'd on other grds., 367 F. 2d 889 (C.A. 2, 1966); Id v. Id, 248 F. Supp. 373 (S.D.N.Y. 1965); United States v. 18 Packages of Magazines, 227 F. Supp. 198 (N.D. Cal. 1963)).

Even assuming that the question of obscenity of imports is to be determined on the basis of the standards of the local community (see Hamling v. United States, 418 U.S. 87 (1974); c.f. United States v. One Reel of Film, 481 F. 2d 206 (C.A. 1, 1973); United States v. One Carton Positive Motion Picture Film Entitled "491", 247 F. Supp. 450 (S.D.N.Y. 1965), rev'd on other grds., 367 F. 2d 889 (C.A. 2, 1969)), we do not see that as presenting any problem with regard to the transfer of jurisdiction to the Court of International Trade, since the case would undoubtedly be tried in the involved community with jurors drawn from the locality and the Court able to instruct the jurors properly with regard to the law, including the standards to be applied.

In summary, 19 U.S.C. 1305 is a statute dealing with the exclusion from importation of certain enumerated articles. Since its exception from the Court's jurisdiction in the proposed section 1581(j)(1) was apparently based on the premise that jury trials would not be conducted in the Court, we do not see any reason to

include that exception from the Court's natural subject matter jurisdiction, i.e., imports or attempted imports, if it is concluded that cases will not be transferred to the district courts merely because a jury trial is requested.

Question 5. It is the intention of the bill that exclusive jurisdiction of the Court of International Trade not be invoked in matters involving imports and the Toxic Substances Control Act. Yet, on page 9 of the A.B.A.'s testimony they indicate a concern over the breadth of proposed section 1581(i). Do you believe that this problem needs to be cured by amendment or can it be handled through the use of strong legislative history?

Answer. We frankly don't see the problem with 1581(i) which the A.B.A. does since 1581(i)(1) and (2) is written in the conjunctive. We see no need for an amendment and feel that the perceived problem can be handled best through the use of strong legislative history.

Question 6. Do you see any need for the inclusion of the transfer provision in proposed section 1582(b)(1)?

Answer. No - in fact, we oppose the transfer provision.

Question 7. If the Subcommittee decided to amend proposed section 1582 to permit trial by jury in the Court of International Trade, should that right be limited only to civil penalty actions or should it run to civil penalty actions, recoveries upon a bond and recoveries of customs duties?

Answer. The proposed section 1582(b)(1) speaks of "Any party to a civil action described in subsection (a) of this section [1582]" desiring a jury trial, and thus appears to give parties to bond or duties recovery actions the right to jury trials. If this was preserving a right which these parties already have, i.e., a right to trial by jury, we would assume, and support, the preservation of that right in the transfer of jurisdiction to the Court of International Trade.

Question 8. On page 15 of your statement you recommend the inclusion of the estate, heirs or successors of a person as having standing under proposed section 2631(a). Is the case law clouded in this area

so as to currently deny these people standing in the Customs Court? Can your concerns be cured through strong language in the legislative history?

Answer. We believe that the case law is clouded in the area as to the right of the estate, heirs or successors of a person having standing under proposed section 2631(A). We would agree that our concerns should be effectively met through strong language in the legislative history.

Question 9. Proposed section 2636(a)(2) would allow an importer to commence an action within 180 days after the expiration of the two-year period within which the notice of denial of a protest was to be mailed by the Customs Service. Some witnesses have commented that this places an undue burden on importers to keep a log of his protests filed with the Customs Service.

- A. Do you believe this is an unnecessarily heavy burden for an importer to bear?
- B. Have there been numerous instances where the Customs Service has neglected to mail a notice of denial within the required two year period?
- C. Will enactment of this provision provide the Customs Service with an opportunity to effectively shift the burden of tracking denied protests to the importer?
- D. In your statement you recommend an amendment to this provision. If the Subcommittee amended this provision based on the Association's comment, should the amendment provide a time limitation on the right of the importer to file suit after the original two-year statute regarding the mailing of the notice of denial?

Answer.

A. Yes, as testified to by importers and brokers at the hearings on the Customs Courts Act of 1970. Importers are likely to be some miles, if not a half continent or more away, from ports of entry and rely, in great part, on a number of brokers for the filing

of protests. A large importer may file protests in the tens of thousands at various ports on numerous kinds of merchandise and issues. The job of keeping a tickler file by either or both the broker or importer would be a heavy one, particularly if the extinguishment of rights depended thereon.

B. Yes.

C. No - because denied protests have to be tracked by the importer. What would be shifted to the importer is the burden of tracking all protests, not just the denied ones. What we also fear is that this provision will inevitably lead to inaction on protests by the Customs Service because of the automatic feature of their being deemed denied after two years.

D. We don't think so. First, the notice provision is for the protection of the importer who is relying on notice, i.e., a response from the Government to his protest. We would assume that if an importer were aware of non-action after two years he would commence an action without waiting for the notice. However, after the enactment of the Customs Courts Act of 1970, there were numerous instances of Customs' location of appeals for reappraisalment 4, 5 and more years after those documents were filed with Customs for automatic referral to the Customs Court. Thankfully, those rights were not extinguished (at least procedurally) by age or delay. We would hope that the retention of the present statute (or the substitution we have submitted for the proposed section 2636(a)(2), which substitution we consider to be a restatement of the present state of the law) would not only preserve the Government's responsibility to act and to notify, but emphasize the importance of treating these protests promptly and responsibly. Finally, we assume that under the plenary powers being granted them the Courts could deal effectively with any purposeful delay by a knowledgeable importer which amounted to laches.

Question 10. Proposed section 2636(d) provides for expedited treatment of civil actions commenced pursuant to section 516A of the Tariff Act of 1930 to review 703(c) and 733(c) determinations. Should these civil actions be given similar expedited treatment under other provisions of this Act, such as proposed section 2635 which governs the filing of official documents?

Answer. Yes. We propose that section 2635 be amended so as to provide for transmittal of official documents within 10 days after the date of service of the summons and complaint.

Question 11. Proposed section 2643(b) limits the remand power of the Court of International Trade to civil actions commenced pursuant to section 515 or section 516 of the Tariff Act of 1930. Is this limitation sufficient under the circumstances or should the power be broadened to be co-extensive with that of the federal district courts?

Answer. We do not read proposed section 2643(b) as a limitation of the Court's power but, with regard to cases commenced under section 515 or 516, as an emphasis of the fact that the Court should seek the proper assessment of duties in those instances where the Government's assessment has been proven erroneous but the Court is unable to state the correct assessment on the basis of the record before it. We think that the provisions of proposed section 2643(b) are sufficient as drafted to do that.

However, we think the legislative history should be clear that this is not a limiting provision on the Court's exercise of its full plenary powers to order a retrial, rehearing, or remand in any appropriate case before it.

Question 12. Subsection (d) (1) of section 1581 provides for Court of International Trade review of the procedures followed by the International Trade Commission in advising the President regarding certain actions to protect domestic industries against injury from imports, but such review is possible only if the International Trade Commission has provided affirmative advice and only after the decision of the President has been made final. Why should we not authorize procedural review by the Court of International Trade, on an accelerated basis if necessary, before the President acts?

- A. Why should we require the advice to have been affirmative as a prerequisite to review? Could not negative advice based on defective procedure be just as harmful?

Answer. Because the ITC is giving advice to the President which the President may reject or only partially accept. At any rate, until

he has acted there is no final Executive action which it seems to us could have been considered to have ripened into a cause of action. There being no case or controversy until the political decision has been made and is final, i.e., after the Congress has had its opportunity to disapprove, we question whether it would be consonant with the law to permit judicial review at the advisory stage. We also question whether the timing of such review could not hinder the effectiveness of any political decision or resolution in the matter. We would not alter the proposed language.

- A. We assume that the short answer here is that section 1581(d) (2) is to be utilized where the advice is "negative." We understand that in those situations the ITC would not be forwarding "advice" to the President because there is no action he could take. If there is any question as to our assumption, we would suggest that the subsection be amended to read:

"(2) If no advice, or negative advice, findings, recommendations, or determinations have been provided to the President by the International Trade Commission, the Court of International Trade shall have exclusive jurisdiction to review the lack of advice or negative advice, findings, recommendations, and determinations of the Commission under the sections specified in paragraph (1) of this subsection, solely for the purposes of determining the procedural regularity of such actions."

Question 13. Subsection (e) of section 1581 provides that the Court of International Trade review of the procedures followed by the office of the U.S. Trade Representative in making recommendations to the President regarding the enforcement of U.S. rights under any trade agreements or responses to certain foreign trade practices may only be had after the decision of the President has been final. What is the purpose of a procedural review at such a late date? Why not authorize it before the Presidential order becomes final, so that it may prevent an erroneous determination before it is made by the President?

Answer. Before answering your specific questions, we feel it necessary to disagree with the apparent assumption in question 13 (and perhaps also underlying your question 12) that a party aggrieved by reason of the ignoring of the procedural requirements in chapter 1 of Title III of the Trade Act of 1974, as amended by the Trade Agreements Act of 1979, would have no recourse to the Court of International Trade until the President had acted. We assume that in an appropriate situation an aggrieved party may obtain relief and require procedural adherence under the provisions of proposed section 2643(c)(1).

The answer to your specific question is that the purpose of a procedural review after Presidential action has become final is, we assume, not only to help assure procedural regularity but to give to an aggrieved party the right to set aside the Presidential action if it is procedurally defective. This is an old concept in trade law. (See e.g., The Best Foods, Inc. v. United States, 50 Cust. Ct. 94, C.D. 2396 (1963)). The procedural irregularity can be one that is not even apparent until the President has acted. (Id v. Id) At any rate, barring the ability to show irreparable injury meriting an injunctive proceeding, any review prior to Presidential action would be review of advice which may not be followed and therefore not ripen into a cause of action. Further, the area is one which has both political and foreign relations aspects which, except for procedural requisites, lies basically in the discretion of the President. These latter two considerations explain why judicial review prior to Presidential action, except as noted, is not warranted.

Question 14. Would you kindly comment on the proposal by the American Importers Association that the bill be amended to provide the importer with the opportunity to institute judicial review of penalty cases in the Court of International Trade at any time after the administrative process is complete and before collection action is commenced by the government?

Answer. We support the proposal.

Question 15. Section 2637 requires that all liquidated damages must be paid at the time the action is commenced, but situations will

undoubtedly arise in which an importer simply cannot pay the duties and they are not fully covered by a surety, precluding him from bringing an action to contest the validity of the assessment. I understand there may be some question regarding the constitutionality of an absolute denial of access to the court. Would you favor or oppose adding a provision to this bill to allow an importer, in special circumstances, to come in to court without the payment of duties? In the alternative, does the irreparable harm exception in section 1581(j)(2) sufficiently address this issue?

Answer. We would favor the addition of a provision which would allow an importer, in special circumstances, to come in to court without having paid any increased duties, liquidated damages, or penalties assessed. This seems fair, particularly if an interest provision is enacted. However, we note our assumption that if the Government sues to collect duties, damages, or penalties, the importer will be able to defend by contending that he does not owe them as a matter of law, and in that manner litigate the merits of the controversy. This has not been possible in the past because collection actions were filed in the District Court which did not have subject matter jurisdiction of Customs disputes. Since the Court of International Trade would have jurisdiction over both kinds of actions (that commenced by the importer or that commenced by the Government) it would seem a denial of due process if the importer could not defend a collection suit on the merits, provided he had exhausted his administrative remedies.

The proposed section 1581(j)(2) provision does not sufficiently address the issue in every situation where the payment of increased duties would be the problem with obtaining the Court's jurisdiction. A provision spelling out the special circumstances would be necessary, and desirable.

Mr. VOLKMER. We will now hear from Judge Howard T. Markey, Chief Judge for the U.S. Court of Customs and Patent Appeals.

Judge Markey, we have a copy of your prepared testimony. That will be incorporated in the record. For the purpose of brevity and because of our time constraints, I would appreciate it if you would just give us a brief synopsis basically of your position on the bill and then on major problems you see with it.

TESTIMONY OF HON. HOWARD T. MARKEY, CHIEF JUDGE, U.S. COURT OF CUSTOMS AND PATENT APPEALS, ACCOMPANIED BY GEORGE HUTCHINSON, CLERK OF THE COURT

Judge MARKEY. Thank you. It's a pleasure to be here this afternoon to appear before the subcommittee and submit ourselves to whatever questions may be in the minds of the subcommittee.

We have submitted our statement and appreciate the privilege of submitting it as it is. It's so short, I see no great value in any extended comment on it. We are obviously, as is clear from the statement, pleased and appreciative of the work of the committee and the staff for preparing this bill. I think it is one of the clearest examples of the Congress carrying out its responsibility under the Constitution not only to ordain and establish courts, but in my view that role includes the monitoring, managing, and modernizing of the courts.

I think, Mr. Chairman, in view of the pressing time on the subcommittee, I would be pleased to stand at that point and suggest questions.

I would like the privilege before I subside in introducing the clerk of our court, George Hutchinson. Mr. Hutchinson is the finest clerk with whom I have ever worked. The fact that he is the only one is merely coincidental.

Mr. VOLKMER. Mr. Butler, do you have any questions?

Mr. BUTLER. No; except to welcome Judge Markey. We had the benefit of his judgment at the conference at Williamsburg.

We have your statement. We appreciate your presence.

Judge MARKEY. Thank you, Mr. Butler.

Mr. VOLKMER. I have a couple of questions. I haven't had time to read your statement and I apologize for that.

Judge MARKEY. All right.

Mr. VOLKMER. If your statement covered this question, just say so. Of course, the bill itself revises jurisdiction of the Customs Court. You are going to have appeals coming up from that court. Will those appeals from the increased caseload of the Customs Court impose any undue burdens on the ability of the Court of Customs and Patent Appeals to dispense justice?

Judge MARKEY. No; Mr. Chairman, we don't see any difficulty. While the number can be expected to rise, our court now operates throughout its entire jurisdiction, of which the international trade cases run about 26 percent.

But throughout the entire jurisdiction—we operate on an average of 7 to 8 months from the time the appeal is filed until it is completed. We have what we think is a very, very fine set of standard operating procedures. Portions of the committee staff have visited the court and I think they will confirm that.

We have taken a hard look at what this would do to us. As reflected in the statement, we see no problem whatever in handling the appeals. I was very interested in the testimony I have heard here this afternoon about matters in the Court of International Trade.

Since the bill is devoted almost entirely to that, those portions that change our name, of course, we are perfectly in accord with. The portions that have some substance to them, Mr. Chairman, either repeat or confirm what is already in statutory authority, or, happily, recognize and establish statutorily the practices the court has adopted and has found to be very effective up to this point.

So we say we are very pleased with the bill as it stands. We see no problem with it from our standpoint.

Mr. VOLKMER. We do have additional questions. We will submit those to you in writing. If you will again correspond back to us on it we will make them part of the record. I have one last question, then we will go to the next panel.

Would you comment, if you can, on the question of the jury trial?

Judge MARKEY. Yes, Mr. Chairman, I would be pleased to. I was, as I indicated, very interested in the testimony the committee has just heard. I was impressed with two things, Mr. Chairman. First, a good bit of concern seemed to be expressed, if I heard it correctly, with what has existed in the past. The Board of Appraisers, Customs Court as it now operates, and so on.

I would respectfully suggest that we should look to the future, look to what we are doing, what is going to happen under the bill and after the bill rather than what has existed previously.

Second, I was impressed with a tendency to look upon a jury trial and a nonjury trial as things totally distinct. As though there were an iron curtain between them. As lawyers know very well, so many cases are a mixed bag.

For example, a 592 case, which may involve fraud, negligence, and so on, may also involve, whether this is a container or a household article or a work of art or whatever it is. The question of what the title of the judge on his letterhead is is irrelevant, it seems to me. He can handle the jury trial and jury elements of the trial just as well.

Third, I think the district courts themselves would find it amiss if the Congress were to have said, all right, we are going to give the Customs Court all the powers of equity and and so on of all district courts. But if somebody asked for a jury trial, this customs matter may show up in the district court.

I think if you had all the district judges, and I don't know them all, Mr. Chairman, I have had the privilege of sitting with every circuit court in the land and as a district judge in a few cases, but I suspect if you had all 500 of them here and had a vote, the vast majority would vote to get anything to do with customs completely out of their courtrooms. A long answer to a short question. I'll try to do better.

Mr. VOLKMER. That is one of the things I think that some of us have believed all along. We have heard other testimony to the contrary. We will try to ferret it out to the best of our ability. Thank you very much.

Judge MARKEY. May I add one last thing, Mr. Chairman? I cannot associate myself with whatever the committee has heard on the testi-

mony, with one very important consideration, I think. We deal, in our business, with in rem considerations. Under the Constitution, as the committee knows, our duty is to do the best we can to create uniformity throughout the country, duties and so on.

I have been 8 years now as chief judge of this court. It has never occurred to me, nor to any of the other judges, or to anybody on the staff, or to any of the other lawyers, to even ask or even have the slightest interest in the amount involved, so I would respectfully suggest it should be continued to be considered irrelevant.

[The complete statement follows:]

STATEMENT
THE HONORABLE HOWARD THOMAS MARKEY

CHIEF JUDGE
THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

before the
SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL
LAW OF THE HOUSE COMMITTEE ON THE JUDICIARY
February 28, 1980

It is a pleasure, Mr. Chairman, to appear before you today and to offer our views on H.R. 6394. That legislation represents an outstanding example of the role of the Congress in ordaining and establishing courts under Article III, Section I of the Constitution. That role does not, of course, end with the mere establishment of a court, but necessarily includes the monitoring and modernizing of established courts and their procedures. That continuing role, Mr. Chairman, through which Congress insures that the courts are best serving the people, has been well exemplified in H.R. 6394.

The majority of the provisions of H.R. 6394 relate not to our court but to the Trade Agreements Act and to the Customs Court. The Committee has had the benefit of testimony from the distinguished and admired Chief Judge of the Customs Court, the Honorable Edward D. Re. I should like, Mr. Chairman, the privilege of associating myself with that testimony and of being recorded as in full concurrence therewith.

Sections 401(a)(1), 504, 505, 513(b) and (c), 514, 601, 605(b)(2), and 702 of the bill change the name of our court and otherwise continue the substance of present statutory provisions relating to our court. Far from any objection to

to a change of name, we consider the change both advisable and appropriate, in view of the changed name of the Customs Court.

Concerning substance, Section 401(b)(1) changes our review from "appeals on questions of law only" to review of "the final determinations" of the International Trade Commission, and Section 602 applies the Administrative Procedure Act to that review. Sections 401(c)(1) and 607(a), (b) transfer to our court review of certain broker's license decisions of the Secretary of the Treasury. Section 402(a), though new, confirms the court's long practice of exercising both legal and equity powers. Section 403(a) and (b)(1) and (d), also new, conform to the Federal Rules and confirm the court's present practice. Section 403(b)(2) strikes out an unnecessary requirement for a statement of errors. Section 403(e)(1) revises and establishes a clear precedence of cases. Section 404(a) applies the Federal Rules of Evidence. All of these Sections, Mr. Chairman, constitute welcome amendments to the statutory provisions governing our court. We foresee no difficulty in carrying out our responsibilities for the administration of justice under them. On the contrary, we view these sections as well designed to aid us in performing our varied functions.

I have saved for last, Mr. Chairman, our appreciation of Section 405 of the bill, which authorizes our court to conduct an annual judicial conference. The Section corresponds with those authorizing judicial conferences for the circuit courts of appeal. From the first in 1974, our conferences conducted under the court's auspices have grown,

attendance in 1978 and 1979 totalling 1,000 lawyers. The international trade segment of our conference, we are told, is the largest gathering in the world of lawyers interested in international trade. Our conferences have been conducted at no expense to the taxpayer and we foresee no more than the most minimal, if any, request for conference-supporting funds in FY 1982, the first budget after the Section takes effect. The conferences have to date been a most effective contribution to improvement of the administration of justice in the fields of international trade, patents and trademarks, and we expect to continue that contribution under the much-appreciated authorization provided by the bill.

In sum, Mr. Chairman, we have no objections to any provision of H.R. 6394. Indeed we appreciate the effort of the Committee in drafting and considering all of its many elements and welcome the bill as a major contribution to the administration of justice in the field of international trade.

We would be glad to entertain any question, Mr. Chairman, that you or the Committee may wish to ask.

SUPPLEMENTAL QUESTIONS FOR CHIEF JUDGE MARKEY

1. At the first hearing, the Subcommittee received testimony on the issue of authorizing the award of interest on judgments for or against the United States in customs litigation. Would you comment on the desirability of such?

Matter of legislative policy. No impact on the court. The rate of interest and the question of present judgment interest is under consideration by the Congress (S.1477 Title II).

2. Proposed section 1582 provides that the United States may commence a civil action to recover upon a bond. Assuming such a case was brought against a surety, should this legislation provide the surety with the right to file a cross-claim or institute a third party action against the bond principal?

Yes. Common practice. If made exclusive, would eliminate forum shopping and contribute to uniformity.

3. The Association of the Customs Bar has recommended that the Court of International Trade have jurisdiction over civil actions arising under 19 U.S.C. 1305 which governs the importation of obscene materials. The latest Supreme Court pronouncements on the subject require obscenity to be determined on the basis of the standards of the local community. In light of that Supreme Court holding, would it not be impossible for the Court of International Trade to impose one national rule?

Not impossible. National standard would be appropriate for importations. Local standards deal with distributions, exportation, etc. If enacted, all exclusions under 1305 should be included. No problem with jury trials.

4. If the Subcommittee decided to amend proposed Section 1582 to permit trial by jury in the Court of International Trade, should that right be limited only to civil penalty actions or should it run to civil penalty actions, recoveries upon a bond and recoveries of customs duties?

Should not be limited. Transfer of international trade-related cases should be as complete as possible.

5. Proposed section 1593 would permit the United States to assert a counterclaim "which arises out of an import transaction that is the subject matter of a civil action pending before the court." Do you believe that the draft language is overboard? Should it be limited to "the" import transaction pending before the court?

Matter of legislative policy. Limitation to "the import transaction pending" appears effective compromise and would provide experience.

6. Proposed section 2636(A)(2) would allow an importer to commence an action within 180 days after the expiration of the two-year period within which the notice of denial of a protest was to be mailed by the Customs Service.
- A. Do you believe this is an unnecessarily heavy burden for an importer to bear?
- B. Have there been numerous instances where the Customs Service has neglected to mail a notice of denial within the required two-year period?
- C. Will enactment of this provision provide the Customs Service with an opportunity to effectively shift the burden of tracking denied protests to the importer?

(A) No.

(B) Unknown. Customs Bar says yes.

(C) Must assume Government agency acts properly.

7. Proposed section 2643(B) limits the remand power of the Court of International Trade to civil actions commenced pursuant to section 515 or section 516 of the Tariff Act of 1930. Is this limitation sufficient under the circumstances or should the power be broadened to be co-extensive with that of the federal district courts?

Should be coextensive.

8. Several witnesses have recommended that H.R. 6394 include provisions for the establishment of a small claims procedure. Would you comment on the desirability and feasibility of such a procedure?
- A. Would the establishment of this procedure relegate a small claims litigant to a position where he would receive second class justice?
 - B. Should not all potential litigants be entitled to a day in court where they can obtain a full and fair hearing on the merits of their case?
 - C. If a small claims procedure is to be established, should it be available only with the consent of both parties?
 - D. If a small claims procedure is to be established, should such a case be heard off the record? Should the parties have a right of appeal? Should the case be of no precedential value?

(A) Unaware of any true small claims. Constitutional requirement for uniform treatment of imports is the issue. If there be a small claims litigant in this field he should and would receive the same first class justice. Costs can be reduced by court rule.

(B) Certainly

(C) No. See (A)

(D) No off the record procedures are appropriate.
 Appeal on the record would be appropriate.
 Denial of precedential value would defeat
 constitutional requirement for uniformity.

9. Would you kindly comment on the proposal by the American Importers Association that the bill be amended to provide the importer with the opportunity to institute judicial review of penalty cases in the Court of International Trade at any time after the administrative process is complete and before collection action is commenced by the government?

Yes. Government can be expected to initiate collection action promptly. Administrative remedies, up to collection, will have been exhausted.

10. Section 2637 requires that all liquidated damages must be paid at the time the action is commenced, but situations will undoubtedly arise in which an importer simply cannot pay the duties and they are not fully covered by a surety, precluding him from bringing an action to contest the validity of the assessment. I understand there may be some question regarding the constitutionality of an absolute denial of access to the court. Would you favor or oppose adding a provision to this bill to allow an importer, in special circumstances, to come in to court without the payment of duties? In the alternative, does the irreparable harm exception in section 1581(j)(2) sufficiently address this issue?

Query: Should importers be encouraged to import if unable to pay duties above those covered by surety? Unaware of any constitutional right to import anything. Historic requirement for prepayment of duties has worked and should not be abandoned. Irreparable harm exception in §1581(j)(2) will cover egregious situations and is sufficient innovation in this direction at this time.

Mr. VOLKMER. Thank you very much.

We will now hear briefly from Mr. Berg and Mr. Lubbers, Administrative Conference of the United States; Mr. Leonard C. Meeker, Consumers Union; and Mr. Allerton Tompkins, National Customs Brokers & Forwarders Association of America.

I am very sorry, but we are going to have about 6 or 7 minutes for me to be able to get to you. Then I can't be back until 4:30.

Unless you're willing to stay and want to be back at 4:30, there is, we're going to adjourn the meeting. Does anyone desire to come back at 4:30?

TESTIMONY OF RICHARD K. BERG AND JEFFREY S. LUBBERS, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES; LEONARD C. MEEKER AND DANIEL WAKE, CONSUMERS UNION; AND ALLERTON DE C. TOMPKINS, NATIONAL CUSTOMS BROKERS & FORWARDERS ASSOCIATION OF AMERICA, INC.

Mr. TOMPKINS. I am here on behalf of the Customs Brokers & Forwarders Association.

I have had a very extensive practice in small claims. A small claims procedure, which we advocated in 1977, has subsequently been approved in modified form by other organizations.

I should like to comment on that and be very glad to stay if the members of the panel would be willing.

Mr. VOLKMER. I don't mind.

Well, Mr. Butler, I don't mind coming back as soon as the votes are over. These gentlemen have been here.

Mr. BUTLER. George Bush says, "Let everybody come."

Mr. BERG. I would leave that up to the committee, sir, because we are here at the request of the committee and have filed our statement on the record. If that is satisfactory to the committee, frankly, I don't really have anything to embellish it.

Mr. VOLKMER. That is fine.

Mr. MEEKER. I would be glad to join Mr. Tompkins for a brief session afterwards when you are able to come back.

Mr. VOLKMER. Has everyone submitted prepared statements?

You all have?

Then they will be made a part of the record.

Now, we have a couple of minutes.

Are you Mr. Lubbers?

All right. You are Mr. Berg?

Mr. BERG. Yes, sir.

Mr. VOLKMER. Does anyone have any questions for Mr. Berg or Mr. Lubbers?

You're not going to be here at 4:30?

Mr. BERG. I would prefer not to be.

Mr. VOLKMER. If you have any questions at this time, we have 2 or 3 minutes.

Mr. BERG. We would be glad to respond to any written questions.

Mr. VOLKMER. We have a little time for a few questions.

Frank, do you have anything?

Mr. POLK. No.

Mr. GORDON. Mr. Berg, has the Administrative Conference at all taken a look at the small claims issue?

Mr. BERG. No, sir; we have not.

Mr. VOLKMER. What about the trial-by-jury issue?

Mr. BERG. Our recommendation, sir, calls for exclusive jurisdiction of these penalty actions in the Customs Court, but with the possibility of a jury trial. However, the transfer provision which is in the present bill would seem—we wouldn't have any significant objections to that.

There is a problem of possible right to a jury trial. We have nothing in our recommendation which would—

Mr. VOLKMER. What about the transfer provision, what if that was eliminated?

Mr. BERG. Then I suppose we could have provision for a jury trial in the Customs Court.

Mr. VOLKMER. Right.

Do you have any discussion of that in your statement?

Mr. BERG. Not really, sir.

Mr. VOLKMER. Does the Conference have any feeling on that issue?

Mr. BERG. Our recommendation did not specifically address the jury trial issue. The report of our consultant envisioned that Congress could authorize jury trial in the Customs Court.

Mr. VOLKMER. Fine. Then it does.

Mr. GORDON. Mr. Berg, proposed section 101(b) provides for the selection of the chief judge in the Court of International Trade. Should such a selection process be in keeping with that above a Federal court with nationwide jurisdiction such as the Court of Claims and Court of Customs and Patent Appeals, or with the seniority system governing the Federal district courts?

Mr. BERG. We favor Presidential appointment of the chief judge with advice and consent, consistent with the practice in those other courts you mentioned.

Mr. GORDON. One other question. Proposed section 2643(b) currently limits the remand power of the Court of International Trade to actions commenced pursuant to section 515 or 516 of the Tariff Act of 1980.

Is this limitation sufficient under the circumstances, or should the power be co-extensive with that of the Federal district courts?

Mr. BERG. I'm afraid you have got me on that one.

Mr. GORDON. If you don't have an official comment, we would be glad to submit the question in writing and allow the Conference to submit a written answer.

Mr. LUBBERS. We do favor the remand provision, at least for those cases.

Mr. GORDON. Right. The question is: Should it be amended to go beyond those instances?

Mr. LUBBER. We have not addressed that issue.

Mr. VOLKMER. We will return at 4:30 then.

[The prepared statement of Mr. Berg and Mr. Lubbers follows:]

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OFFICE OF
THE CHAIRMAN

HEARINGS BEFORE THE
SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW

ON H.R. 6394

THE CUSTOMS COURTS ACT OF 1980

February 28, 1980

STATEMENT
OF

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Executive Secretary
Administrative Conference
of the United States

and

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Mr. Chairman and Members of the Committee:

I am pleased to be here today to testify on H.R. 6394, the Customs Courts Act of 1980.

I should mention at the outset that the Administrative Conference of the United States is a permanent independent Federal agency. Its statutory mandate is to identify the causes of inefficiency, delay, and unfairness in administrative proceedings affecting private rights, and to recommend improvements to the President, the agencies, the Congress, and the courts.

The Conference has 91 members and takes formal positions only through actions at its semi-annual plenary sessions. The membership as a body has not considered H.R. 6394 as such. But in 1977 the Conference did study and make specific recommendations relating to aspects of Judicial Review of Customs Service Actions (Recommendation 77-2). We undertook this study after members of the customs bar alerted us to many procedural difficulties associated with seeking judicial review of actions of the Customs Service.

Congress has already taken some significant actions to implement our Recommendation. The passage in the 95th Congress of the Customs Procedural Reform and Simplification Act of 1978 (P.L. 95-410) effected a long-needed reform, which we advocated, of the customs civil penalty process. And the 96th Congress has seen the passage last Session of the Trade Agreements Act of 1979 (P.L. 96-39) which, among other things, followed our Recommendation in expanding the opportunity for affected persons to seek administrative review of Customs Service actions. In addition, the Senate has passed S. 1654, the companion measure to this bill, and we testified in favor of its passage. We are pleased to see that the Subcommittee is moving

expeditiously to consider this similar legislation.

Generally, H.R. 6394 would enact the last significant elements of the reforms urged by our Recommendation 77-2, a copy of which we have attached as an appendix to this Statement. Copies of the report supporting this Recommendation have been made available to the Committee [see Gerhart, Judicial Review of Customs Service Actions, 9 Law & Pol'y Int'l Bus 1101 (1978)]. Our Recommendation addresses the adequacy of judicial review only of actions of the Customs Service, while H.R. 6394 addresses judicial review of all actions arising directly from import transactions under the major trade acts, including actions of several other agencies. Thus, there are matters covered by H.R. 6394 that we have not studied and upon which we can take no position.

Composition of the Court. Title I of the bill would remove both the political limitation on appointees to the Customs Court 1/ and the provision permitting the President to designate the Chief Judge "from time to time". These proposals implement paragraph A(3) of Recommendation 77-2 and we support them. The provisions in the existing law are appropriate perhaps for multi-member administrative agencies where members serve for a limited term of years, but are not consonant with the Article III judicial role of the Court. Our Recommendation, however, differs from Section 101 in one respect because our Recommendation (but not Section 101) provides that the designation of the Chief Judge be subject to the advice and consent of the Senate, as is true with respect to the Chief Judge of the Court

1/ Although the bill would change the name of the U.S. Customs Court to The U.S. Court of International Trade, for convenience I will refer to the Court in this Statement as the Customs Court.

of Claims and the Court of Customs and Patent Appeals.

Jurisdiction of the Court. Title II of the bill significantly expands the exclusive jurisdiction of the Customs Court. It is largely consistent with paragraph A(1) of Recommendation 77-2, although it takes a somewhat different approach from our Recommendation which focused exclusively on actions of the Customs Service.

Proposed section 1581 provides that the Customs Court have exclusive jurisdiction essentially over all import-related civil actions against the United States, its agencies and officers, arising under the four major trade Acts (of 1930, 1962, 1974 and 1979). Enactment of the 1979 Trade Agreements Act has paved the way for this in its title X, which added a new section 516A [to be 19 U.S.C. § 1516a] that placed the review of enumerated actions arising in countervailing duties and antidumping proceedings in the Customs Court. H.R. 6394 seems to have been drafted to assure that all significant import-related judicial review actions will now be heard by the newly constituted Court. 2/

Section 1582 covers civil actions commenced by the United States. In paragraph E of Recommendation 77-2, we proposed a complete reform of section 592 of the Tariff Act of 1930 to provide for a more rational system of civil money penalties against violators, instead of the then-existing system which permitted the Customs Service to seek forfeiture of the imported merchandise or its face value, for any violation. This was largely accomplished in the 95th Congress with the passage of H.R. 8149,

2/ A possible omission, however, might be suits challenging the exclusion of merchandise by the Customs Service under a law that is neither a "customs law" nor one of the enumerated Acts (e.g., switchblade knives, 15 U.S.C. § 1241). We have no information on the frequency of such cases. In our comments on S. 2857, 95th Cong., a predecessor to this bill, we suggested that all final actions of the Customs Service be explicitly made reviewable in the Customs Court except (1) actions pertaining to the exclusion of merchandise under a law that is not a customs law, taken by the Customs Service on the request or at the direction of a court or another Federal agency, and (2) as otherwise provided by law.

(P.L. 95-410), the Customs Procedural Reform Act, which we supported. The amended section 592 (19 U.S.C. § 1592) still, however, provides for district-court jurisdiction of penalty cases. The Conference, as part of its Recommendation, urged that exclusive jurisdiction of penalty actions be in the Customs Court. This was urged on the theory that the Court's ability to hold hearings outside New York could be improved and that a jury-trial provision could be added if necessary. Although the bill does not adopt this approach, its proposal to allow the transfer of cases to the Customs Court, upon the initiative of the defendant, seems a reasonable and workable alternative.

The proposed provision permitting transfer of misfiled cases, section 1584, seems worthwhile. The Administrative Conference has made a similar recommendation with respect to transfer of cases under the Federal pollution laws, see ACUS Recommendation 76-4(B)(3).

[1 C.F.R. § 305.76-4]

The provisions in section 1585 granting the Customs Court those general powers conferred by statutes upon district courts is consistent with our Recommendation, paragraph A(2).

Standing to Seek Administrative and Judicial Review

Section 301 amends 28 U.S.C. §§ 2631-2646. Proposed new section 2631 articulates the test for standing to sue for litigants in the Customs Court. Subsection (a) provides that where the action is filed to contest the denial of a protest under section 515 of the Tariff Act of 1930, the action may be instituted by the person who has

filed the protest under section 514. Subsection (b) provides similarly that actions to contest a denial of a petition under section 516 of the Tariff Act may be filed by the petitioner.

Thus, standing to seek judicial review, for review of protests and petitions covered by these sections depends on standing to seek administrative review. Paragraph B of our Recommendation 77-2 supported an expansion of standing in both areas. With respect to administrative review, we recommended that Congress amend section 516 to permit any adversely affected person to contest value, rate or classification decisions pertaining to imports, and it also recommended that a new provision be added (either to section 514 or separately) giving any adversely affected person the right to seek administrative review of actions of the Customs Service pertaining to the exclusion of merchandise.

The 1979 Trade Agreements Act did revise sections 514 and 516 in significant degree (although the modifications did not broaden administrative standing as much as we recommended), and we think that H.R. 6394 satisfactorily reflects these revisions in its section 2631, relating to standing to seek judicial review.

Burden of Proof

Proposed section 2639 is consistent with the Conference recommendation that the presumption of correctness should continue except in penalty cases.

We strongly support section 2643(b) which addresses a problem analyzed by our study. Under the current situation, a plaintiff challenging a protest denial in the Customs Court has a dual burden of proof: He must not only overcome a statutory presumption that the

Customs action was correct, but must then also prove what specific action would have been correct. Curiously, where the plaintiff can only prove the incorrectness of the administrative action, the Court has been unwilling to modify the action or remand the case to the Customs Service, and the admittedly incorrect action remains uncorrected. This portion of the bill provides a reform that is overdue.

Expedited Cases. Section 2646 adopts our Recommendation (paragraph (D)(1)) to grant precedence on the Court's docket to cases involving the exclusion of merchandise. As our study pointed out, imports may be perishable or seasonal merchandise or the importer may need the merchandise to fulfill production or marketing commitments. In such instances even temporary exclusion may have a permanent and irreparable effect on the importer. Administrative review of exclusion decisions can be had rapidly via protest procedures. It is important that judicial review of such cases also be as speedy as possible. Proposed section 2602, which we also support, applies this provision to the Court of Customs and Patent Appeals.

In closing, I would like to commend the Chairman, the Subcommittee and its staff for their interest in the reform of procedures for judicial review under the customs laws.

Thank you Mr. Chairman.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

APPENDIX

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OFFICE OF
 THE CHAIRMAN

RECOMMENDATION 77-2: JUDICIAL
REVIEW OF CUSTOMS SERVICE ACTIONS
 (Adopted September 15-16, 1977)

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A. Jurisdiction and Powers of the Customs Court

The Customs Court has exclusive jurisdiction to review decisions of the Customs Service (1) denying protests of importers relating to certain enumerated matters and (2) rejecting petitions of United States manufacturers, producers or wholesalers to challenge certain actions taken with respect to merchandise imported by others. Actions of the Customs Service suspending or revoking customs brokers licenses are reviewable, by statute, in the courts of appeals.^{1/} There are other actions of the Customs Service that are administratively final but for which no specific statutory provision for review has been made. These include decisions made by the Service to suspend or discontinue permits for immediate delivery of merchandise as well as decisions to exclude certain types of merchandise from entry. Such actions are now reviewable, if at all, in the district courts pursuant to their general or special jurisdiction.

Moreover, the Customs Court does not have power at present to "compel agency action unlawfully withheld or unreasonably delayed," as can district courts under the APA, 5 U.S.C. §706(1). The Customs Service sometimes fails to act on significant matters for such extended periods that its inaction may amount to agency action, as defined by 5 U.S.C. §551(13) to include "failure to act." An example is the failure or refusal of the Service to complete the final assessment of duties payable on an importation. Finally, the Customs Court has no power at present to provide relief until after the protest or petition process has run its course even though the Customs Service has taken action with such immediate and drastic impact on a person that a district court considering comparable action of another agency would treat it as final for purposes of review. The recommendation would provide for review by the Customs Court of the final actions and failures to act just described.

Decisions to exclude merchandise may be made either by the Customs Service or another agency, such as the Food and Drug Administration. All exclusion decisions pursuant to a customs law (i.e., a law applicable only to imported merchandise, usually codified in Title 19 of the United States Code), whether made by the Customs Service or some other agency, are now reviewable in the Customs Court. This review would be unaffected by the recommendation. Exclusion decisions under a law that is not a customs law are never reviewed in the Customs Court. When such an exclusion decision is made by an agency other than the Customs Service, the Customs Court does not, and under the recommendation would not, review the decision. However, when such an exclusion decision is made by the Customs Service, the recommendation would give the Customs Court exclusive jurisdiction to review it.

The Customs Court has sometimes been said not to have "equity powers." What is meant by this is not clear, but the recommendation would give the Customs Court all powers, injunctive and other, of the district courts.

^{1/} The Conference has not studied the advisability of a change in the reviewing forum for such action. Nor does the Conference intend that the current method of reviewing personnel actions of the Customs Service or its determinations under the Freedom of Information Act or like statutes be disturbed.

The Customs Court is unique among Article III courts in being subject to a requirement that not more than five of its nine judges be appointed from the same political party and in having a chief judge selected from time to time by the President. These requirements, appropriate perhaps for multi-member administrative agencies, are not consonant with the Article III judicial rôle of the Customs Court, especially as that rôle would be expanded by these recommendations.

1. Jurisdiction Without a Protest or Petition

Congress should amend 28 U.S.C. §1582 to broaden the jurisdiction of the Customs Court by giving the court exclusive jurisdiction of any civil action brought to challenge final agency action (as defined in the Administrative Procedure Act) of the Customs Service except (1) action specifically subject to review in another court and (2) action pertaining to the exclusion of merchandise, under a law that is not a customs law, and taken by the Customs Service on the request or at the direction of a court or another federal agency.

2. Remedial Powers

Congress should amend 28 U.S.C. §1581 to confer upon the Customs Court in respect of actions properly pending before it the remedial powers of a United States district court.

3. Political Affiliation of Court Appointees and Selection of Chief Judge

Congress should amend 28 U.S.C. §251 to delete the requirement that not more than five of the nine judges of the Customs Court be appointed from the same political party and to provide that the chief judge is appointed by the President with the advice and consent of the Senate, as in the case of the Court of Claims and the Court of Customs and Patent Appeals.

B. Standing to Seek Administrative and Judicial Review

Under Section 516 of the Tariff Act of 1930, 19 U.S.C. §1516, an "American manufacturer, producer, or wholesaler" may ask for and receive information on the duty imposed on imported merchandise of a kind manufactured, produced or dealt in by him and, thereafter, contest the appraised value of, classification of, or the rate of duty assessed upon, that merchandise by petition to the Customs Service. As stated under heading A, a decision concerning such a petition may be reviewed in the Customs Court. The recommendation is that Congress consider broadening the category of persons entitled to seek this sort of administrative relief and, thereafter, review in the Customs Court to include all persons adversely affected by an incorrect determination by the Customs Service. The Conference believes that the category of persons eligible to challenge such determinations by the Customs Service should thus conform with modern administrative practice, unless Congress determines that overriding considerations of economic policy make this undesirable.

Only the importer of excluded merchandise may now protest within the Customs Service the exclusion of merchandise and have denial of that protest reviewed by the Customs Court. The recommendation contemplates a broadening of the standing provision to enable any adversely affected person to seek administrative and judicial review of action either to exclude or to admit merchandise (unless the action is taken under a law that is not a customs law upon the request or at the direction of a court or another agency).

Under A(1) final actions of the Customs Service other than the denial of protests or petitions relating to classification, appraisal, duty and admission of merchandise, such as the suspension of immediate delivery permits, would be subject to review in the Customs Court. The recommendation contemplates conferring upon any adversely affected person who has exhausted his administrative remedies standing to seek review of such actions. The recommendation does not specify what procedures must be exhausted.

1. Decisions Concerning Duties

Congress should consider amending Section 516 of the Tariff Act of 1930, 19 U.S.C. §516, to allow any person adversely affected by an incorrect determination of the appraised value of, classification of, or rate of duty assessed upon, imported merchandise to obtain from the Customs Service information concerning such appraisal, classification or rate and to petition for a change. Denials of such petitions should be reviewable in the Customs Court.

2. Exclusion Cases

Congress should consider enacting a new provision giving any person adversely affected by an action of the Customs Service, concerning merchandise that is, or should be, excluded from entry or delivery, a means of seeking administrative review of such action, with subsequent review in the Customs Court. Such a procedure should not be available to challenge action pertaining to the exclusion of merchandise, under a law that is not a customs law, and taken by the Customs Service on the request or at the direction of a court or another federal agency.

3. Other Actions

If Congress broadens the jurisdiction of the Customs Court as recommended in A(1), it should also consider providing that actions within the broadened jurisdiction may be brought by any adversely affected person who has exhausted his administrative remedies

C. Burden of Proof in the Customs Court

The Customs Court operates under a statute that establishes a presumption that a Customs Service decision under review is correct and places upon a party seeking review the burden of proving the decision incorrect. Trial in the Customs Court is had on a record made in the court although 28 U.S.C. §2632(f) provides that, upon the service of a summons, the Customs Service is to transmit certain documents underlying the Customs Service decision to the court "as part of the official record of the civil action." The Customs Court and the Court of Customs and Patent Appeals have inferred from the statute a further requirement, that in order to prevail the party seeking review must prove, in addition to the incorrectness of the agency's decision, what the correct decision should be. The recommendation would do away with that unorthodox further requirement and make Customs Court review of Customs Service actions conform in this respect with the review of actions of other agencies by other courts. The mode of review would continue to be a de novo trial (in the sense indicated above), which is considered appropriate because of the high degree of informality of most Customs Service procedures.

1. Elimination of the Plaintiff's Double Burden

Congress should amend 28 U.S.C. §2635(a) to revise the Customs Court's standard of review in the following way: The presumption of correctness of Customs Service decisions and the imposition upon a party challenging a decision of the burden of proving otherwise would be retained, but an additional requirement read into the statute by the Customs Court and the Court of Customs and Patent Appeals would be eliminated. The additional requirement is that the challenging party prove not only that the Customs Service was wrong but also what a correct decision would be or risk suffering affirmance of the incorrect adverse decision.

Specifically, the amended statute should provide that, if the Customs Court determines that action taken by the Customs Service is erroneous, the court should modify or set aside such action; if the court is able to determine what action is correct, it should so determine and order that the correct action be taken; if the court, after exhausting its processes and procedures, cannot determine what action is correct, it should remand the case to the Customs Service with instructions to take action consistent with the decision of the court; any redetermination made by the Customs Service pursuant to a remand should be subject to a new protest or petition; a decision by the Customs Court to remand a case should be appealable.

D. Review of Decisions to Exclude Merchandise

Exclusion of merchandise is a severe remedy. The recommendation would attempt to ensure expedited review of exclusion decisions and would delete the extraordinary authority of the Customs Service to detain and seize imported merchandise that allegedly infringes a United States trademark or copyright in the absence of the same sort of court order that is required before action may be taken against allegedly infringing domestic merchandise.

1. Expedited Review

Congress should amend the statutes giving preference to certain types of cases in the Customs Court, 28 U.S.C. §2633, and the Court of Customs and Patent Appeals, 28 U.S.C. §2602, to ensure a similar preference for cases properly before either court involving the exclusion of merchandise from entry or delivery.

2. The Customs Service's Authority Under the Trademark and Copyright Statutes

Congress should amend the statutes under which the Customs Service is authorized to detain and seize merchandise that allegedly infringes a United States trademark, 19 U.S.C. §1526, or copyright, 17 U.S.C. §603, to provide that the Customs Service may take no such action until after the owner of the trademark or copyright has obtained an order in a United States district court enjoining the importation. Alternatively, Congress should amend the trademark statute, as it has the copyright statute, to authorize the Customs Service to establish by regulation such a condition precedent to its acting to detain and seize allegedly infringing merchandise, and the Customs Service should promulgate such a regulation. In either event, the Customs Service should then adopt express procedures that would enable the owner of a trademark or copyright to identify imported merchandise that may infringe his mark or copyright.

E. Imposition of Civil Penalties

The penalty for violations of Section 592 of the Tariff Act of 1930, 19 U.S.C. §1592, and some other import statutes is forfeiture of imported merchandise or its value. These penalty provisions are unsatisfactory. The statutory forfeiture penalty is likely to be disproportionate to the gravity of the alleged offense. Although the Customs Service is usually prepared to mitigate the penalty, the statutes pose the following dilemma: If the alleged violator does not wish to accept the proffered mitigation because he believes he did not violate the statute or because he believes that he is entitled to a greater degree of mitigation, he is subject to suit in the district court for the full forfeiture value. Moreover, he will lose the benefit of any mitigation if the government can prove a violation, however insignificant, on his part. The recommendation would rationalize penalty procedures.

1. The Rationalization of Section 592

Section 592 of the Tariff Act of 1930, 19 U.S.C. §1592, prohibiting fraudulent or false statements or practices respecting imports, should be revised to make it fairer and more rational in its operation.

a) Section 592 should be amended to provide for civil money penalties against the person violating the statute rather than for forfeiture of the merchandise or the full value thereof. Congress should establish maximum penalties based upon the revenue deficiency, if any, resulting from the violation and upon the degree of culpability of the violator. In any case in which the violation does not result in a revenue deficiency, the maximum penalties should be based upon a percentage of the value of the imported merchandise and upon the degree of culpability of the violator. If the violator is an importer, he should be given the option of surrendering his merchandise in lieu of payment of any penalty assessed.

b) The Customs Service should continue to have the authority to mitigate civil penalties. If an assessment is contested, an action by the government to enforce the penalty should be in the Customs Court. In such an action, the government should have the burden of proving the act or omission constituting a violation and, if so alleged, the intentional nature thereof. The Customs Court should be authorized to determine de novo the amount of the penalty.

c) In order to ensure that those subject to possible penalties under Section 592 know what is expected of them under the laws administered and enforced by the Customs Service, the Service should, to the maximum extent feasible, adopt and publish standards that will guide its determinations under such laws.

d) The authority of the Customs Service to seize and hold merchandise under Section 592, other than prohibited or restricted merchandise, should be limited to instances where such seizure and holding are necessary to protect its ability to collect any revenue deficiency or penalty, and the Customs Service should be required to release the merchandise to the owner upon his provision of security for payment of such revenue deficiency or penalty. Where no such release is effected by the owner, the Customs Service should be required

to release the merchandise not later than 60 days after seizure unless the government has initiated an action in the Customs Court within that period and obtained an extension for good cause from the court. In instances where the Customs Court permits the Service to hold merchandise for sale by the Service to satisfy any revenue deficiency or penalty determined by the judgment of the court, the net proceeds of such sale, after allowance for the judgment and costs of the sale, should be paid to the owner.

2. Other Statutes

Each of the other penalty provisions enforced by the Customs Service should be reviewed and, if appropriate, revised in a manner consistent with the foregoing recommendations for the revision of Section 592.

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OFFICE OF
THE CHAIRMAN

Answers

to

Supplementary Questions

Re: H.R. 6394, the
Customs Courts Act
of 1980

Preface

As we indicated in our testimony, our views on H.R. 6394 are informed primarily by our study of judicial review of actions of the Customs Service, which resulted in ACUS Recommendation 77-2. This study [see Gerhart, *Judicial Review of Customs Service Actions*, 9 *Law & Pol'y Int'l Bus.* 1101 (1978)], addresses the adequacy of judicial review only of actions of the Customs Service, while H.R. 6394 addresses judicial review of several other agencies as well. Consequently, a number of your questions pertain to issues not formally studied by the Administrative Conference. Where possible, we have given you the informal views of the Office of the Chairman, but these do not necessarily represent the views of the Conference membership.

Answers

1. AT THE FIRST HEARING, THE SUBCOMMITTEE RECEIVED TESTIMONY ON THE ISSUE OF AUTHORIZING THE AWARD OF INTEREST ON JUDGMENTS FOR OR AGAINST THE UNITED STATES IN CUSTOMS LITIGATION. WOULD YOU COMMENT ON THE DESIRABILITY OF SUCH?

1. This is a matter of substantive policy and we have no comment on it.

2. PROPOSED SECTION 1582 PROVIDES THAT THE UNITED STATES MAY COMMENCE A CIVIL ACTION TO RECOVER UPON A BOND. ASSUMING SUCH A CASE WAS BROUGHT AGAINST A SURETY, SHOULD THIS LEGISLATION PROVIDE THE SURETY WITH THE RIGHT TO FILE A CROSS-CLAIM OR INSTITUTE A THIRD PARTY ACTION AGAINST THE BOND PRINCIPAL?

A. IF THE SUBCOMMITTEE INCLUDES A CROSS-CLAIM PROVISION, WOULD IT HAVE TO GRANT THE COURT OF INTERNATIONAL TRADE ORIGINAL JURISDICTION TO HEAR THE ACTION OR CAN THE COURT HEAR THE CASE ON THE BASIS OF PENDENT JURISDICTION?

2. One premise of our Recommendation, and of H.R. 6394, is that, to the extent feasible, all litigation related to imports should be heard in the specialized Customs Court (or, as renamed, the Court of International Trade). Therefore, if the United States brings an action against a surety in that Court, surely the Court should be empowered to handle any resulting third party claims. We know of no reason to bar such third party claims. We defer to the Department of Justice on the question of whether a specific grant of original jurisdiction to hear such cases is necessary.

3. PROPOSED SECTION 1531(d) PROVIDES THE COURT OF INTERNATIONAL TRADE WITH THE AUTHORITY TO REVIEW THE ACTIONS OF THE I.T.C. ON RENDERING ADVICE TO THE PRESIDENT FOR THE SOLE PURPOSE OF DETERMINING "THE PROCEDURAL REGULARITY" OF THOSE ACTIONS.

A. DOES THE CUSTOMS COURT OR ANY OTHER FEDERAL COURT CURRENTLY HAVE THE AUTHORITY TO HEAR THIS TYPE OF CASE?

B. ASSUMING THE COURT OF INTERNATIONAL TRADE HEARS A CASE INVOLVING THIS SECTION, WHAT RELIEF SHOULD THE COURT PROVIDE IF IT DETERMINES THAT THE ACTIONS OF THE I.T.C. WERE PROCEDURALLY IRREGULAR? SHOULD IT ORDER THE I.T.C. TO REVIEW THE MATTER AGAIN AND ISSUE A SECOND ADVISORY OPINION TO THE PRESIDENT?

3. We are not aware of any statute which is similar in form to proposed section 1581(d). Somewhat analogous situations have arisen, however. For example, the reviewability of Civil

Aeronautics Board recommendations to the President with respect to foreign route awards was the subject of much dispute. See Pan American World Airways v. C.A.B., 392 F.2d 483, 490-93 (D.C. Cir. 1968). Also, the Administrative Procedure Act provides that agency action is reviewable at the instance of a person adversely affected or aggrieved "except to the extent that *** agency action is committed to agency discretion by law." One can read section 1581(d) as providing in essence that the substance of the I.T.C.'s advice is committed to agency discretion, but that the agency is bound to follow prescribed procedures.

If the Court of International Trade should determine that there was a procedural irregularity sufficient to constitute prejudicial error, 5 U.S.C. § 706, it would presumably order the I.T.C. to withdraw its advisory action and reopen the proceeding. We are not sufficiently familiar with the substance of the statutes involved to judge the effectiveness of such a remedy.

4. PROPOSED SECTION 1581(J)(2) CONTAINS A LIMITED EXCEPTION WHICH WOULD ALLOW A PARTY TO GAIN DIRECT ACCESS TO THE COURT OF INTERNATIONAL TRADE FOR THE REVIEW OF A RULING ISSUED BY THE SECRETARY OF THE TREASURY, IF THE PARTY WOULD BE IRREPARABLY HARMED BECAUSE HE WOULD BE UNABLE TO OBTAIN JUDICIAL REVIEW UNDER PROPOSED SECTIONS 1581(A), 1581(B), OR 1581(C)? DO YOU BELIEVE THAT THE PROPOSED LANGUAGE ACCOMPLISHES ITS INTENDED PURPOSE? IN THE ALTERNATIVE, WOULD YOU FAVOR THE SENATE LANGUAGE FOUND IN SECTION 1581(I)(2) OF S. 1654?

4. Proposed section 1581(j)(2) permits a party to seek judicial review of Treasury rulings if he can show that he would be irreparably harmed without an opportunity for judicial review. The alternative language in S.1654, section 1581(i)(2), would require the plaintiff to demonstrate also that "without a substantial doubt," it would be "commercially impractical to obtain judicial review" using the traditional protest procedure. The Senate bill also specifies that the standard of review in such cases be the "arbitrary-or-capricious" standard.

It does appear to us that the present language of proposed section 1581(j)(2) is unclear. Evidently, it is intended to provide a remedy in the circumstance where the remedies under section 1581(a), (b) and (c) are unavailable because the goods in question are not in this country but are merely proposed to be imported. It would be more accurate, therefore, to require the person to demonstrate that he would be irreparably harmed and that the opportunity to obtain judicial review under subsection (a), (b) or (c) is inadequate. Cf. 5 U.S.C. § 703. Whether it is desirable to narrow the "irreparable harm" standard with the "commercially impractical" language of the Senate bill seems to us essentially a policy judgment, and we express no opinion.

5. PRESENTLY, PROPOSED SECTION 1582 REQUIRES THE COURT OF INTERNATIONAL TRADE TO TRANSFER CIVIL ACTIONS COMMENCED BY THE UNITED STATES TO A FEDERAL DISTRICT COURT IF ONE OF THE PARTIES REQUESTS A TRIAL BY JURY. IS THERE A NEED FOR SUCH A PROVISION OR SHOULD THE COURT OF INTERNATIONAL TRADE BE AUTHORIZED TO CONDUCT THE JURY TRIAL?

A. IF THE SUBCOMMITTEE DECIDED TO AMEND PROPOSED SECTION 1582 TO PERMIT TRIAL BY JURY IN THE COURT OF INTERNATIONAL TRADE, SHOULD THAT RIGHT BE LIMITED ONLY TO CIVIL PENALTY ACTIONS OR SHOULD IT RUN TO CIVIL PENALTY ACTIONS, RECOVERIES UPON A BOND AND RECOVERIES OF CUSTOMS DUTIES?

5. The Conference recommended that actions by the Government to enforce civil penalties for violations of section 592 (and related sections) of the Tariff Act of 1930, be brought in the Customs Court. Our study assumed that Congress could, if necessary, empower the Customs Court to empanel juries. However, as we testified, we believe the proposal in H.R. 6394 to provide for transfer of cases to the district court for jury trial, on the initiative of the defendant, seems reasonable and workable.

With respect to actions involving recovery of customs duties and recovery upon a bond, it may be that the Seventh Amendment provides a right of jury trial, see Damsky v. Zavatt, 289 F.2d 46 (2d Cir. 1961); United States v. Anderson, 584 F.2d 369 (10th Cir. 1978). However, we defer to the Justice Department on this question of constitutional law.

6. THE ASSOCIATION OF THE CUSTOMS BAR HAS RECOMMENDED THAT THE COURT OF INTERNATIONAL TRADE HAVE JURISDICTION OVER CIVIL ACTIONS ARISING UNDER 19 U.S.C. 1305 WHICH GOVERNS THE IMPORTATION OF OBSCENE MATERIALS. THE LATEST SUPREME COURT PRONOUNCEMENTS ON THE SUBJECT REQUIRE OBSCENITY TO BE DETERMINED ON THE BASIS OF THE STANDARDS OF THE LOCAL COMMUNITY. IN LIGHT OF THAT SUPREME COURT HOLDING, WOULD IT NOT BE IMPOSSIBLE FOR THE COURT OF INTERNATIONAL TRADE TO IMPOSE ONE NATIONAL RULE?

6. We have no comment on this issue.

7. IT IS THE INTENTION OF THE BILL THAT EXCLUSIVE JURISDICTION OF THE COURT OF INTERNATIONAL TRADE NOT BE INVOKED IN MATTERS INVOLVING IMPORTS AND THE TOXIC SUBSTANCES CONTROL ACT. YET, THE A.B.A. INDICATED A CONCERN OVER THE BREADTH OF PROPOSED SECTION 1581(i). DO YOU BELIEVE THAT THIS PROBLEM NEEDS TO BE CURED BY AMENDMENT OR CAN IT BE HANDLED THROUGH CLEAR LANGUAGE IN THE LEGISLATIVE HISTORY?

7. We agree that exclusive jurisdiction of the Court ought not apply to matters involving statutes like the Toxic Substances Control Act (TSCA) where the responsibility of the Customs Service is only ministerial. The residual jurisdictional provision, section 1581(i), should be as clear as is possible on this question. A minor adjustment that might help would be to substitute "arises under" for "involves" in clauses A and B of 1581(i)(2).

However, we wish to suggest a more comprehensive revision of subsection (i), divided into two parts--one for actions of the Customs Service and one for actions of other agencies. The provision would read:

"(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a) through (h) of this section and subject to the exceptions set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action against the United States, its agencies, or its officers, which--

"(1) arises directly from an import transaction; and

"(2) involves a final action of the Customs Service except:

"(A) an action pertaining to the exclusion of merchandise under a law that is not a Customs law, taken by the Customs Service on the request or at the direction of a court or another Federal agency, or

"(B) as otherwise provided by law; or

"(3) with respect to actions of agencies other than the Customs Service:

"(A) arises under the Tariff Act of 1930, the Trade Expansion Act of 1962, the Trade Act of 1974, or the Trade Agreements Act of 1979; or

"B) arises under a provision of--

"(i) the Constitution of the United States;

"(ii) a treaty of the United States;

"(iii) an executive agreement executed by the President; or

"(iv) an Executive order of the President, which directly and substantially involves international trade."

Under this approach, the TSCA example would be excluded from the Court of International Trade since TSCA is not a customs law and the Customs Service excludes merchandise upon the direction of the EPA. Actions so excluded could then be brought in the district court. We might add that "customs law" is a term of art, that is fairly well understood to include those laws codified in Title 19 of the U.S. Code or those applicable to imported but not domestically produced merchandise (see Gerhart, p. 1123, fn. 75), but it might be well for the bill to define the term to include the four Acts enumerated in the present subsection. The purpose of the phrase "as otherwise provided by law" would be to make clear that Customs Service actions for which there is already a special statutory review procedure, such as disputes under the Freedom of Information Act, 5 U.S.C. § 552(a)(4), would be unaffected.

8. PROPOSED SECTION 1583 WOULD PERMIT THE UNITED STATES TO ASSERT A COUNTERCLAIM "WHICH ARISES OUT OF AN IMPORT TRANSACTION THAT IS THE SUBJECT MATTER OF A CIVIL ACTION PENDING BEFORE THE COURT." DO YOU BELIEVE THAT THE DRAFT LANGUAGE IS OVERBROAD? SHOULD IT BE LIMITED TO "THE" IMPORT TRANSACTION PENDING BEFORE THE COURT?

8. This seems a reasonable suggestion.

9. THE ASSOCIATION OF THE CUSTOMS BAR HAS RECOMMENDED THE INCLUSION OF THE ESTATE, HEIRS OR SUCCESSORS OF A PERSON AS HAVING STANDING UNDER PROPOSED SECTION 2631(A). IS THE CASE LAW CLOUDED IN THIS AREA SO AS TO CURRENTLY DENY THESE PEOPLE STANDING IN THE CUSTOMS COURT? WOULD THE CONFERENCE FAVOR THIS RECOMMENDATION? IN THE ALTERNATIVE, COULD THIS CONCERN BE ADDRESSED THROUGH CLEAR LANGUAGE IN THE LEGISLATIVE HISTORY?

9. We believe that "person" would ordinarily be interpreted to include legal successors in interest provided, of course, that the successor is adversely affected by the administrative action complained of. If there is doubt, it would be preferable to deal with the subject specifically in the bill. We note that S.1654 has such a provision, not only in section 2631(a), but also in section 2631(b) and (c). However, it might be wise to indicate in the legislative history that the language is being added out of caution and is not intended to suggest that wherever such phraseology is omitted, review may be sought only by the individual referred to.

10. PROPOSED SECTION 2643(B) LIMITS THE REMAND POWER OF THE COURT OF INTERNATIONAL TRADE TO CIVIL ACTIONS COMMENCED PURSUANT TO SECTION 515 OR SECTION 516 OF THE TARIFF ACT OF 1930. IS THIS LIMITATION SUFFICIENT UNDER THE CIRCUMSTANCES OR SHOULD THE POWER BE BROADENED TO BE CO-EXTENSIVE WITH THAT OF THE FEDERAL DISTRICT COURTS?

10. The Conference's primary focus with respect to remand authority was that it be available in proceedings commenced pursuant to sections 515 and 516, where it is currently unavailable. Since H.R. 6394 would give the Court exclusive jurisdiction over other types of cases as well, it would seem logical to permit the Court to remand other actions as well. While we have not studied this question, we do not see any reason why the Court should have a more limited power of remand than a district court.

The guiding principle should be that where a reviewing court is persuaded that an error was made at the administrative level,

but that a new administrative decision is necessary or would be helpful to the final disposition of the matter, the court should be authorized to remand.

11. THE SUBCOMMITTEE HAS RECEIVED TESTIMONY FROM WITNESSES REQUESTING THAT A SMALL CLAIMS PROCEDURE BE ADDED AS A PART OF H.R. 6394. WOULD YOU COMMENT ON THE DESIRABILITY AND FEASIBILITY OF SUCH A PROCEDURE?

A. WOULD THE ESTABLISHMENT OF THIS PROCEDURE RELEGATE A SMALL CLAIMS LITIGANT TO A POSITION WHERE HE WOULD RECEIVE SECOND CLASS JUSTICE?

B. SHOULD NOT ALL POTENTIAL LITIGANTS BE ENTITLED TO A DAY IN COURT WHERE THEY CAN OBTAIN A FULL AND FAIR HEARING ON THE MERITS OF THEIR CASE?

- C. IF A SMALL CLAIMS PROCEDURE IS TO BE ESTABLISHED, SHOULD IT BE AVAILABLE ONLY WITH THE CONSENT OF BOTH PARTIES?
- D. SIMILARLY, SHOULD SUCH A CASE BE HEARD ON THE RECORD? SHOULD IT BE ACCORDED PRECEDENTIAL EFFECT? IF INCLUDED IN THE BILL, SHOULD THE SMALL CLAIMS PROCEDURE INCLUDE A RIGHT OF APPEAL TO THE U.S. COURT OF CUSTOMS AND PATENTS APPEALS?

11. We have not studied the need for or the feasibility of a small claims procedure. The matter certainly deserves consideration, but not, we hope, at the cost of delay in the disposition of the basic bill. Certainly, the ABA's proposal that the Court be given the authority (if it needs it) to develop low-cost procedures, seems reasonable.

12. SUBSECTION (D)(1) OF SECTION 1581 PROVIDES FOR COURT OF INTERNATIONAL TRADE REVIEW OF THE PROCEDURES FOLLOWED BY THE INTERNATIONAL TRADE COMMISSION IN ADVISING THE PRESIDENT REGARDING CERTAIN ACTIONS TO PROTECT DOMESTIC INDUSTRIES AGAINST INJURY FROM IMPORTS, BUT SUCH REVIEW IS POSSIBLE ONLY IF THE INTERNATIONAL TRADE COMMISSION HAS PROVIDED AFFIRMATIVE ADVICE AND ONLY AFTER THE DECISION OF THE PRESIDENT HAS BEEN MADE FINAL. WHY SHOULD WE NOT AUTHORIZE PROCEDURAL REVIEW BY THE COURT OF INTERNATIONAL TRADE, ON AN ACCELERATED BASIS IF NECESSARY, BEFORE THE PRESIDENT ACTS?

- A. WHY SHOULD WE REQUIRE THE ADVICE TO HAVE BEEN AFFIRMATIVE AS A PREREQUISITE TO REVIEW? COULD NOT NEGATIVE ADVICE BASED ON DEFECTIVE PROCEDURE BE JUST AS HARMFUL?

12. We have not studied these issues and are unable to comment on the questions posed.

13. SUBSECTION (E) OF SECTION 1581 PROVIDES THAT THE COURT OF INTERNATIONAL TRADE REVIEW OF THE PROCEDURES FOLLOWED BY THE OFFICE OF THE U.S. TRADE REPRESENTATIVE IN MAKING RECOMMENDATIONS TO THE PRESIDENT REGARDING THE ENFORCEMENT OF U.S. RIGHTS UNDER ANY TRADE AGREEMENTS OR RESPONSES TO CERTAIN FOREIGN TRADE PRACTICES MAY ONLY BE HAD AFTER THE DECISION OF THE PRESIDENT HAS BEEN FINAL. WHAT IS THE PURPOSE OF A PROCEDURAL REVIEW AT SUCH A LATE DATE? WHY NOT AUTHORIZE IT BEFORE THE PRESIDENTIAL ORDER BECOMES FINAL, SO THAT IT MAY PREVENT AN ERRONEOUS DETERMINATION BEFORE IT IS MADE BY THE PRESIDENT?

13. We have not studied these issues and are unable to comment on the questions posed.

14. WOULD YOU KINDLY COMMENT ON THE PROPOSAL BY THE AMERICAN IMPORTERS ASSOCIATION THAT THE BILL BE AMENDED TO PROVIDE THE IMPORTER WITH THE OPPORTUNITY TO INSTITUTE JUDICIAL REVIEW OF PENALTY CASES IN THE COURT OF INTERNATIONAL TRADE AT ANY TIME AFTER THE ADMINISTRATIVE PROCESS IS COMPLETE AND BEFORE COLLECTION ACTION IS COMMENCED BY THE GOVERNMENT?

14. This poses an issue of "ripeness" for review, i.e., whether importers may challenge penalty assessments through a suit for a declaratory judgment--prior to the Government's collection proceeding. The AIA argues that during the delay pending a collection action, the importer may be required to carry very large contingent liabilities. Under usual administrative law principles, however, agency action threatened but not yet taken may be challenged only where the uncertainty forces the challenger into some kind of dilemma, Abbott Laboratories, Inc. v. Gardner, 387 U.S. 136 (1967). Here, however, the violator need not do anything but await the collection proceeding--and in fact he could presumably take part in continuing settlement negotiations. We also note that the problem of unrealistically high contingent liabilities has been ameliorated somewhat by the modification of the civil penalty provision, 19 U.S.C. § 1592, by Pub. L. No. 95-410. In short, absent further information about hardships caused by the delays in the institution of collection actions, we see no reason for an exception to the general ripeness rules here. The Committee may wish, however, to consider some way of forcing the Customs Service to bring these actions more expeditiously.

15. SECTION 2637 REQUIRES THAT ALL LIQUIDATED DAMAGES MUST BE PAID AT THE TIME THE ACTION IS COMMENCED, BUT SITUATIONS WILL UNDOUBTEDLY ARISE IN WHICH AN IMPORTER SIMPLY CANNOT PAY THE DUTIES AND THEY ARE NOT FULLY COVERED BY A SURETY, PRECLUDING HIM FROM BRINGING AN ACTION TO CONTEST THE VALIDITY OF THE ASSESSMENT. I UNDERSTAND THERE MAY BE SOME QUESTION REGARDING THE CONSTITUTIONALITY OF AN ABSOLUTE DENIAL OF ACCESS TO THE COURT. WOULD YOU FAVOR OR OPPOSE ADDING A PROVISION TO THIS BILL TO ALLOW AN IMPORTER, IN SPECIAL CIRCUMSTANCES, TO COME IN TO COURT WITHOUT THE PAYMENT OF DUTIES? IN THE ALTERNATIVE, DOES THE IRREPARABLE HARM EXCEPTION IN SECTION 1581(J)(2) SUFFICIENTLY ADDRESS THIS ISSUE?

15. We have not studied this issue, and feel unable to comment on the questions posed.

Mr. VOLKMER. All right, Mr. Tompkins and Mr. Meeker. Mr. Tompkins, would you mind addressing the major issue that interests you, which is the small claims procedure.

Mr. TOMPKINS. Actually, there are two issues with which we are primarily interested.

Mr. VOLKMER. All right. We will hear you on both.

Mr. TOMPKINS. Thank you.

May I express first my appreciation on your coming back and hearing us at this late hour. It's a great courtesy.

My name is Allerton deCormis Tompkins. I am a partner of the law firm of Tompkins & Davidson, One Whitehall Street, New York, N.Y. 10004. We specialize in customs law and related matters. I am also the customs counsel to the National Customs Brokers & Forwarders Association of America.

We welcome this opportunity to present our views on the Customs Courts Act of 1980, which we heartily endorse, with the exception of only a few provisions. We also endorse the various suggestions and recommendations of the American Importers Association as submitted to you on February 13. We commend the drafters of this bill for an excellent job covering a most difficult subject.

The objections and recommendations of our association are set forth in a statement which is submitted herewith and which we request be made a part of the record. We believe that these proposals will greatly facilitate and improve the proposed bill.

My other remarks will be limited to emphasizing two points, and possibly I would like to mention a third. First is in title IV section 1546 which vests in the Court of Appeals for International Trade, Patents and Trademarks, the exclusive authority to hear the complaints of an aggrieved customhouse broker whose license had been denied, revoked, or suspended. Our association is not at all in sympathy with any broker who willfully violates a law or the regulations. Our remarks and criticisms are directed toward those brokers who have broken a regulation, and so forth, which is claimed to be unreasonable, or where the penalty may be excessive.

The Customs Service has been most reasonable in the operation of its revocation and suspension authority, and very few brokers have been interested in going further with judicial review.

But there are instances where judicial review is desired. We are greatly concerned that those brokers who are distant from the appellate court that is being created will not have an opportunity to have traditional review without undue expense. Also that the appellate court—here, again, I refer to the Court of Appeals for International Trade, Patents and Trademarks—might be reluctant to send the court out to a far-distant port just to hear one broker. We feel that if there is to be a change—and we approve of giving the new court of appeals jurisdiction—that there should be joint jurisdiction. I have recently heard the suggestion that there be an appeal from revocation and so forth, only to the new Customs Court to be tried in the area where the broker is located. I have not cleared this matter with my principles, but I see no objection to that provision.

I certainly would recommend to my association that they support such a provision, because the Customs Court is ambulatory, and it

frequently has sessions in far-distant ports where two, three, or four different cases are heard. The broker's request for review would merely be another case on the docket. But we urge that the provision as written be not adopted.

On the question of counterclaims by the Government, we find the proposed provisions are very objectionable; and we support the positions taken by others that this provision for counterclaims, and so forth, be deleted entirely from the statute, even if the complaint is confined to the one case before the court for review. It would be extremely difficult for an importer who had sold his goods on the basis of what the Government claimed was due, at a low price and small profit, only to find at a later date that he's not going to make any profits and that the Government wanted more money. I can see no objection to the suggestion that was made a short time ago, that any so-called counterclaim be raised within the 90-day period that a protest is before the Customs Service for review. That would permit the protestant to conclude whether to proceed or not, with that particular matter.

On the last point I would like to touch upon—oh, there is one point in our report that is not covered, if I may. When we were studying this bill, we didn't realize that the proposed section 2636(a)(2) would start the time for filing a protest without any notice to the importer. Our association has in the past consistently opposed such a "no notice" provision. We wholly endorse and support the statement made today by Mr. Vance, objecting to this section.

Lastly, it was our organization which first proposed a small-claims procedure. And I refer to pages 6 and 7 of our statement and the attached letter to Judge Re. We are happy to learn that other associations are now supporting our views. If our proposals, or similar proposals for a small claims procedure are not incorporated in this bill, we urge that another bill be speedily enacted which would provide for such a procedure. Further, I might state that since my semiretirement 10 years ago, and I have been now a customs attorney for over—for 50 years; I was very active, practicing almost all over the United States, particularly east of the Mississippi River, and many of those cases were small claims. And I used to try two or three a day, sometimes more.

A man would come in with a small case involving maybe \$300 or \$400—very upset—and want a review. In those days it was very simple to handle such a case. Just tell the Government attorney and the court, "We want to try a case. We are going to prove such and such. The witnesses are going to be so-and-so." There were not a lot of motions and not a lot of questions about the witnesses, preexamination and preliminary cross-examination, and so forth. The Government would do the same, and you would just try these cases.

Now those small cases still exist; hundreds of them. I know; because the brokers call them to my attention. And I am very active in this association. These brokers are all over the country. We drop these small cases, because I advise them and other attorneys advise them we can't handle these little cases. They are too small. And there is nowhere that these small cases can go to get judicial review; they are denied, really, due process of the law. When Mr. Vance indicated that he hasn't had much experience with these small cases, there is a good rea-

son for it, because when the Customs Court Act of 1970 was passed the procedures that I had followed during my active career were abolished and a new procedure was adopted. Those new procedures which required a lot of motions and a lot of pretrial procedures, necessitated attorneys charging a lot of money. Attorneys wouldn't; my office today will not handle a case that is under \$5,000. You can't afford to do it. It's impossible. You just lose money.

And there is uniformity in the small-claims procedure we recommend. These small-claims cases are limited to just one case. It means that only that case will be decided. If there are to be more cases, OK, you go into court. We will let the Justice Department say whether it might be a precedence-making case and, if so, to go to the regular court session.

I thank you.

Mr. VOLKMER. All right. We have another vote on, believe it or not. I am going to leave in about 7 minutes to go make that vote. So at this time I would like to hear from Mr. Meeker, before we have any questions.

Mr. MEEKER. Thank you, Mr. Chairman. Our statement has been submitted to the committee. We would appreciate having it incorporated in the record.

Mr. VOLKER. Both of your statements will be incorporated into the record.

[Complete statements of Mr. Tompkins and Mr. Meeker follow:]

"A National Association of
International Scope."



**National
Customs Brokers & Forwarders Association of America, Inc.**

ONE WORLD TRADE CENTER • NEW YORK, N.Y. 10048 Suite 1109

Telephone 432-0050

STATEMENT OF
NATIONAL CUSTOMS BROKERS & FORWARDERS ASSOCIATION OF AMERICA, INC.
CONCERNING
H.R. 6394
CUSTOMS COURTS ACT OF 1980

Our Association is a nationwide organization of approximately 400 members located in all of the major ports of the country, as well as 23 affiliated regional and local Associations. Our members include customs brokers licensed by the U.S. Treasury Department as qualified to enter and clear merchandise through Customs, ocean freight forwarders licensed by the Federal Maritime Commission to handle export shipments, international air cargo forwarders licensed by the Civil Aeronautics Board, and IATA air freight sales agents.

We handle through our membership most of the general cargo imported into, as well as exported from, this country. Our Association is the only nationwide organization representing the customs brokerage and international freight forwarding industry.

Our customs broker members are specialists in all facets of the problems relating to the entry and clearance of imported merchandise. They daily handle thousands of import shipments. They are to be found as active members in all of the principal organizations in this country

dealing with imports, and they are the advisers to the importing community in connection with technical and everyday Customs matters. They are the essential link between importers and the Customs Service, as well as the work horse which facilitate the work of that Service without which that Service cannot exercise its function of supervising the importation of foreign merchandise. They frequently are importers of record. If they do not speak in this field on behalf of importers, they are their principal consultants whenever customs problems arise, particularly those matters that take place prior to actual litigation in court.

Our Association supports H.R. 6394. The Bill is desirable and laudable. Several recommendations, which we are convinced would improve that Bill, are summarized below.

REMARKS AND RECOMMENDATIONS

Title IV - Section 1546. Brokers' Licenses.

There is one provision in H.R. 6394 which we regard as highly objectionable, namely, Section 1546 which vests exclusive jurisdiction in the Court of Appeals for International Trade, Patents, and Trademarks to review "(1) any decision of the Secretary of the Treasury to deny or revoke a customs broker's license xxx or (2) any action challenging an order of the Secretary of the Treasury to revoke or suspend a (customs broker's) license xxx". We urge that this provision be modified so that a broker can have the option of bringing such matters for review either before the Court of Appeals for International Trade, Patents, and Trademarks, or, as under the present law, before the local U.S. Court of Appeals where the aggrieved broker resides or has his principal place of business.

Customs brokers are located in every port of the United States where substantial quantities of merchandise are imported. Most of them are individuals or small organizations who work hard to make a modest living with small profits. Those brokers who live and work great distances from Washington, D.C., where the Court of Appeals for International Trade, Patents, and Trademarks is located, such as the West Coast, Alaska and Hawaii, will be needlessly injured if they are compelled to travel to Washington with their attorneys in order to have their complaints reviewed. A personal appearance and an oral hearing are necessities when a broker's livelihood is at stake. We support this provision insofar as it extends jurisdiction to the Court of Appeals for International Trade, Patents, and Trademarks to review such actions by the Secretary of the Treasury, but that court should not be given exclusive jurisdiction.

The proposed statute removes the existing right of an aggrieved customhouse broker to have his complaint heard without undue expense in his own territory. Under the proposed provision an aggrieved broker located far from Washington must appeal to and rely upon the mercies of the Court of Appeals for International Trade, Patents, and Trademarks to let him have the privilege of the existing law under which he can appeal as a matter of right to his local Appeals Court. The heavy travel and living expenses involved in sending the Court of Appeals for International Trade, Patents, and Trademarks to a distant city to hear the arguments of an aggrieved customhouse broker would normally be considered as a prime factor by that Court, and that prime factor would result in a denial of the broker's motion to transfer unless most unusual circumstances were found to exist. The proposed position would remove the

right of appeal to an aggrieved poor broker operating in a distant port except under unusual circumstances -- a denial of due process of law. Only the rich brokers could afford to obtain judicial review as a matter of right.

Title II - Section 1581(j)(2).

This section is poorly phrased and difficult to comprehend. In any event, there should be a clearly worded provision, similar to the provision in Section 1581(i)(2) of S. 1654, which would permit an importer, and only an importer, his agent or attorney (not an American manufacturer, producer, or wholesaler, or association handling a like or similar product), to obtain prompt relief wherever he could establish that he would be faced with irreparable injury by a delay in connection with a judicial review of a final ruling by Customs officials that is claimed to be unwarranted. Such a provision is urgently needed and should be rephrased to clearly accomplish this result.

Section 1582.

To insure uniformity in decisions, it is rather essential that all decisions involving civil actions commenced by the United States which are handed down either by the Court of International Trade, or the appropriate district court, be appealed only to one appeals court, namely, the Court of Appeals for International Trade, Patents, and Trademarks.

Section 1583. Also Section 2643.

The provisions are objectionable. They will subject an importer who brings protest action in the Court of International Trade and, in order to validate his protest, has paid increased duties which he claims are unreasonable, to the possibility of paying substantial amounts of duty at a higher duty rate, or on the basis of a higher dutiable value on all

pending protested entries made years prior to a final decision and where sales prices on the imported goods had been finalized on the basis of the cost of the duties as liquidated years ago by Customs. Section 1583 should be deleted and Section 2643(a) should be modified since the government already has adequate judicial means to enforce its demands and other setoff claims. An importer who wants relief from government imposed duties and dutiable values believed to be unfair and unreasonable should not be subject to greater import barriers as the outcome and reward for efforts to obtain justice.

As presently worded this provision would allow the government to assert a counterclaim arising out of (1) any import transaction pending before the court whether or not pertinent to the particular import transaction then pending review, or (2) an outstanding unrecovered bond or customs duties relating to any import transaction that is pending review whether or not pertinent to the particular transaction then pending review.

Page 13 of the Report issued by the Senate Committee on the Judiciary in connection with filing counter claims under S. 1654 states:

"A counterclaim may not be asserted unless in effect it arises out of the same import transaction pending before the court."

If this is the intent of the lawmakers, and if counterclaims are to be authorized, then the counterclaim should be limited to one which arises out of the same import transaction that is the subject matter of a civil action pending before the court.

In addition, if Section 1583 is to be retained, then it should be amended (following the procedures set forth in Section 1582(b)) so as not to deny to importers their constitutional right to a trial by jury.

Title III - Section 2631(i)(4).

The definition of the term "like product" is poorly phrased because it is predicated in the first instance upon a "product which is like"

("like" is defined as "like"). The term should be defined as a product which resembles another product in quality, characteristic and uses, as well as being directly competitive with the former item. The proposed definition would make such things as cheap compact automobiles and expensive Cadillac automobiles "like products". The primary common meaning of the word "like" is that it must resemble something else in quality. Competition is the prime factor in the commercial world when determining whether or not a product can be successfully marketed, and it is an essential element to consider when one product is claimed to be like, or similar to another.

Section 2639(b).

Court litigation frequently involves the component material of chief value of imported merchandise. The tariff classification of many articles is dependent upon this factor. To avoid any questions as to whether depositions, price lists, etc. may be admitted into evidence in determining this factor, the first sentence of Subsection (b) should be amended to read:

"Where the value of merchandise, or any of its components is in issue xxx".

Section 2643(c)(1).

We heartily endorse a preliminary injunctive relief procedure. It is urgently needed. However, importers and brokers at ports which are far from New York will be injured if they can obtain injunctive relief from a substantial irreparable injury only in the Court of International Trade. Haste is here an important factor, and an early hearing at the local port of entry is of utmost importance. Delays in arranging for a hearing by that Court at a port away from New York will occur. The injured party should not be bound to undergo the expense and hardship of traveling from

a distant city to New York with his attorney and witnesses. The expense to the government of bringing the Court of International Trade to a distant port (Hawaii, Alaska, West Coast, etc.) must also be considered. Such an injured party should have the same option, as set forth in Section 1581(i)(z), of bringing his action either in the Court of International Trade, or in the local district Court. Appeals from either court should go only to the U.S. Court of Appeals for International Trade, Patents, and Trademarks.

Section 2646(1); Title IV - Section 2602.

Subparagraph (1) of each of the above sections should be modified to permit the primary precedence of those civil actions which involve a demand for the redelivery of perishable merchandise, as well as the exclusion of perishable merchandise.

Small Claims Procedures

The proposed law is defective in that it does not cure the complaint of all importers having small claims who cannot afford the delay and expense of contesting in the Court of International Trade adverse decisions by Customs officials. At the present time, the importer who receives an adverse decision on a small claims matter frequently stops importing, particularly if that ruling will price the article out of the market.

Hundreds of such small claims cases are decided administratively every year against importers. For details, see the many decisions that are either summarized or set forth in the weekly Customs Bulletins. Attorneys who specialize in customs law have not been willing to promote the cause of a small claims procedure, and the Court of International Trade apparently will not voluntarily provide in its Rules for procedures which will allow importers to obtain judicial review of complaints

involving small amounts of money. Moreover, some of the small claims procedures we propose require legislation.

The position of the National Customs Brokers & Forwarders Association of America, Inc., is set forth in the attached copy of letter dated April 21, 1977 to Chief Judge Re. We urge that a small claims procedure be included in this Bill.

Conclusion

In conclusion, and except for the above matters, we endorse this Bill to increase the powers and jurisdiction of the Court of International Trade and the Court of Appeals for International Trade, Patents, and Trademarks.

NATIONAL CUSTOMS BROKERS & FORWARDERS
ASSOCIATION OF AMERICA, INC.

National Association of
International Scope.



**National
Customs Brokers & Forwarders Association of America, Inc.**

1000 WHELER BUILDING - NEW YORK, N.Y. 10048 - Suite 1100

Telephone 431-0910

April 21, 1977

Honorable Edward D. Re, Chief Judge
United States Customs Court
One Federal Plaza
New York, New York 10007

Dear Judge Re:

We are informed that some consideration has been given to a suggestion for the creation of a procedure in the United States Customs Court which, by changes in the Court Rules, would permit an importer to have his complaint concerning a small protestable matter reviewed in an informal way by a judge of the court without the procedural requirements of discovery, with no record, and without appeal review.

We find that the present court procedures are very costly. Many protestable disputes do not involve large sums of money. These smaller cases are not litigated even though the importers believe that the U. S. Customs Service has made erroneous decisions. Attorneys who specialize in customs law have little interest in handling these smaller cases, and the time-consuming paperwork and discovery proceedings related to incidental matters are frequently out of all proportion to the amounts involved.

Customs brokers, who must closely follow and be knowledgeable about customs procedures and the expenses pertaining to contesting customs decisions claimed to be erroneous, must be in a position to advise their clients about customs litigation problems. We, therefore, have knowledge as to the reasons why so few small customs disputes are brought before the court for adjudication. In the interests of the importing community, of which we are a primary segment, we are much in favor of having the court provide for a simple inexpensive small claims procedure.

We find that there are few qualified attorneys specializing in customs law who are willing to handle court litigation that involves less than about \$2,500.00. If such specialists are willing to do so, their fees invariably constitute a substantial portion of the amounts involved. Hence, where the amounts involved are less than about \$2,500.00 the importer should be permitted to handle the matter himself without the necessity of engaging an attorney who is admitted to practice before the U. S. Customs Court. We recognize the advisability of having a qualified attorney handle all litigation, including small claims. In many instances their services are essential. However, there are many other instances where the facts are comparatively simple and there are few legal complications; it is this type of small claim matter to which our suggestions are directed.

We would sum up our views as follows:-

1. To avoid statutory changes, the proceedings should be confined to protestable matters authorized by 19 U.S.C. 1514 and 19 U.S.C. 1515, and the summons requirements for taking protests into court.

2. There should be a \$2,500.00*limitation on the duties, charges or drawback involved, and a \$5,000.00*imitation on the value of excluded merchandise.

3. The proceedings should relate to only one shipment and be informal, in chambers, and without a record unless desired or authorized by the court; without discovery proceedings; without setting a precedent; without a published decision; binding upon the importer and the government as to that shipment; without appeal.

4. The importer, whether an individual, or a partnership (which may be represented by a partner), or a corporation (which may be represented by an authorized officer) should be allowed to present his own case to the judge without the necessity of engaging an attorney. By the word "importer" we mean not only the importer of record (who may be a customs broker because such brokers frequently handle shipments on a duty paid basis on behalf of the exporters) but also the ultimate consignee who usually is responsible for and ordered the goods. In any event, the customs broker who handled the entry should be allowed to participate with the consignee in the hearings because he is usually the only person who has knowledge (outside of the government service) of the problem and its ramifications.

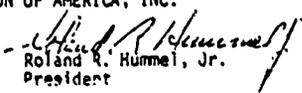
5. When an importer files his summons with the court he should at the same time notify the court that he wants the small claims relief procedures, and he should then set forth his reasons in detail for disputing the government's action with a copy to the U. S. Customs Service and to the Department of Justice. The U. S. Customs Service should, within a short period of time (such as 30 days of notice of the request for small claims relief procedures), file with the court, with the Department of Justice, and with the importer its reasons for its protested action.

6. Before the hearing the Department of Justice should investigate, within a short time limitation (such as 30 days), to determine if there are factual disputes or serious legal ramifications which might cause the hearing judge to conclude that justice would require the services of an attorney. In this event, the importer should be allowed to withdraw from the small claims procedures, and then to proceed with normal litigation with an attorney.

If you feel that the foregoing suggestions warrant further consideration, we shall be glad to discuss the same with you at your convenience.

Respectfully,

NATIONAL CUSTOMS BROKERS & FORWARDERS
ASSOCIATION OF AMERICA, INC.


Roland K. Hummel, Jr.
President

*These amounts should be doubled due to the depreciation of the dollar since 1977.

STATEMENT OF LEONARD C. MEEKER BEFORE THE SUBCOMMITTEE
ON MONOPOLIES AND COMMERCIAL LAW OF THE HOUSE COMMITTEE
ON THE JUDICIARY ON FEBRUARY 28, 1980, CONCERNING THE
CUSTOMS COURT ACT OF 1980.

Mr. Chairman, members of the Committee:

Consumers Union* appreciates this opportunity to present testimony concerning the Customs Court Act of 1980.

Legislation is indeed necessary to clarify questions of jurisdiction and standing to sue in matters of international trade. Consumers Union was made keenly aware of these problems when in recent years it challenged restraints imposed by the Executive Branch on the importation of textiles. In that litigation the Court of Appeals for the District of Columbia Circuit dismissed the action by Consumers Union on the ground that exclusive jurisdiction in the matter lay with the Customs Court. But, under the relevant statutes and the decisions of the Customs Court, Consumers Union could not qualify as a plaintiff and could not invoke the jurisdiction of the Customs Court. Thus Consumers Union was left with no judicial forum in which to secure a determination of its legal claims.

* Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide information, education, and counsel about consumer goods and services and the management of the family income. Consumers Union's income is derived solely from the sale of Consumer Reports, its other publications and films. Expenses of occasional public service efforts may be met, in part, by nonrestrictive, noncommercial grants and fees. In addition to reports on Consumers Union's own product testing, Consumer Reports, with over 2.4 million circulation, regularly carries articles on health, product safety, marketplace economics, and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

We are encouraged that this Subcommittee has undertaken to overhaul the relevant jurisdictional statutes. We remain seriously concerned, however, that the bill now before the Subcommittee leaves consumers still with no remedy when they wish to challenge restrictive Executive Branch action on imports.

The Customs Court Act of 1980 is a complex bill dealing with highly technical subject matter. In deciding to restructure the jurisdiction of the Customs Court, the Subcommittee has assumed a task that can have enormous impact on the law of international trade. Accordingly, the preparation of new legislation on this subject should be undertaken with special care and an emphasis on precision. We think the current bill is inadequate on two critical issues, jurisdiction and standing.

JURISDICTION

The Customs Court is a specialized court relying on the particular expertise of its members. Judges of the Court have often been selected for their specialized experience in customs law questions arising specifically out of the importation of merchandise from abroad. Thus the Court is equipped to resolve questions of classification, appraisement, rates of duty, and the like. But we doubt that this specialized court is the best forum for deciding other kinds of questions -- such as questions of general law on Congressional delegation of authority, proper standards for administrative decision, fair procedure, or the scope of Presidential power under the Constitution. Certainly a Court of International Trade should not be the sole forum for deciding such questions simply because they arise in the context

of importation of commodities from abroad.

Accordingly, we have serious doubt about the provisions of the bill before the Subcommittee that grant to the Court of International Trade exclusive jurisdiction over such matters as the scope of statutory authority, procedural requirements of the A. P. A., or the proper application of the Freedom of Information Act. These matters do not lie within the Court's area of expertise and could be better handled by a federal court of general jurisdiction. We think it is inconsistent and unwise to create a court to handle technical matters and at the same time to transfer to it, in certain classes of cases, exclusive jurisdiction over matters of general law which the federal district courts are better equipped to handle. The present bill, as in sections 1581(d), (e) and (h), gives to the Court of International Trade exclusive jurisdiction over a broad range of such matters. We oppose such a grant of exclusive jurisdiction.

The recent case of Consumers Union v. CITA, 561 F.2d 972 (1977), illustrates the type of problems that would have to be taken to the Court of International Trade under the present bill, assuming they could be taken anywhere. In that case Consumers Union brought suit to obtain a judicial determination of the legality of quotas that were imposed by the Executive Branch on textile imports without disclosing any standards of decision and without following any procedures that would allow public participation. Questions like these are not specific to customs law and the processes of importation; They can and do arise in a great variety of contexts. Such questions are

appropriately determined by the federal district courts, which have a wide experience in evaluating the adequacy of standards adopted and procedures followed. The decisions on such matters ought to be mutually consistent regardless of the context giving rise to a particular case. Such consistency will best be promoted through the exercise of general jurisdiction by the federal courts.

The problem is highlighted by §1581(i), the residual clause giving the Court of International Trade exclusive jurisdiction over any civil suit against the United States that "arises directly from an import transaction" and involves any of the major tariff and trade laws, the Constitution, a treaty, an Executive agreement or an Executive Order. This section would require that many questions of general law be submitted exclusively to the Court of International Trade. This provision would require that questions under the Trade Agreements Act of 1979, for example, go exclusively to the Court of International Trade. Such questions could include challenges to the approval of trade agreements, anti-dumping problems, and even Freedom of Information questions. Should the Court of International Trade have exclusive jurisdiction simply because they arose from an import transaction? We think the answer is a clear NO.

Section 1581(i) would also lead to much uncertainty and litigation regarding the scope of the phrase "arises directly from an import transaction."

Finally, we are left by the bill to wonder whether the federal district courts retain any jurisdiction in matters of international trade

STANDING

Section 2631 of the bill lists the persons entitled to commence an action under the various provisions of the tariff and trade laws. Because of its total failure to provide standing for interested consumer parties, organizations such as Consumers Union are apparently left with no forum in which to challenge actions affecting imports. The Act would thus legitimize the perverse result of Consumers Union v. CITA. We think this is a serious flaw. Consumer organizations ought not be excluded from the possibility of judicial review in matters affecting their interests. The matter should be resolved by making unequivocally clear that the federal district courts possess jurisdiction over civil actions by a litigant such as Consumers Union that wishes to contest an administrative action of a general nature taken by an agency of the Executive Branch. We urge that the bill be amended to confirm explicitly the jurisdiction of the district courts to determine such questions however they arise, including the context of international trade and import transaction cases.

CONCLUSION

Any alteration of the jurisdiction and machinery of the federal courts should be done very carefully. Our objections to the present bill are closely related -- it should be clear that the district courts retain their general jurisdiction in cases that happen to arise out of import transactions, and that consumer groups can invoke that jurisdiction.

Consumers Union continues to stand ready to work with the Subcommittee and its staff with a view to solving these problems and drafting appropriate legislation for the reorganization of the Customs Court.

This concludes my prepared statement. I would be happy to try to respond to any questions you may have.

Thank you.

Mr. MEEKER. I would like to emphasize two points. First, who may contest decisions relating to international trade and customs matters? Consumers Union, on the basis of its own experience, has a considerable concern that the now pending bill before the committee is rather restrictive in that respect. There are provisions for suit by certain classes of interested persons who include importers, manufacturers, and some others described as interested parties; but there is a real concern that consumers, either in an association or individually, may not be able to have access to court in order to challenge some restrictions on imports, or higher duties, which do have an impact on consumers. We think that the provisions of the bill in that respect should be broadened so that anyone who has that kind of interest, be he a manufacturer, an importer, a union, or a member of the public, member of the consuming public, should be entitled to bring legal action, if necessary, to secure judicial determination of a claim.

The other point that I would like to draw particular attention to is the scope of exclusive jurisdiction in the proposed Court of International Trade. Section 1581(i), as the American Bar Association has already pointed out, does give exclusive jurisdiction, apparently, in a very broad range of cases to the Court of International Trade. We doubt that it is appropriate to make that jurisdiction exclusive in that range of cases because, in many instances, issues may come up which are not peculiar to imports, peculiar to customs law. They may be issues having to do with authority of the President, with fair procedure, proper standards to be followed by an administrative agency, issues that may come up in the administration of any statute. And where a plaintiff may want to challenge action by the Executive on one of those grounds, we don't feel that it's appropriate to give the Court of International Trade exclusive jurisdiction of that kind of issue simply because it has arisen in the context of importation. We think that issues of that sort which are not related, really, to the expertise of this court, but which are encountered in many different frameworks, are appropriate for the Federal district courts, and that there should be at least concurrent jurisdiction. So that a plaintiff with that kind of issue could take it to the district court if he chose.

Those are the two points that I would urge that the committee take into consideration. We would be happy to work with the committee and the committee's staff to see whether some amendments might be incorporated which would take care of those two concerns, both as to the standing of plaintiffs and as to concurrent jurisdiction of the courts in cases where that would seem appropriate.

Mr. VOLKMER. I have one question. I have got 2 minutes.

Mr. Tompkins, what if we gave the Customs Court the power to set up a small claims procedure?

Mr. TOMPKINS. I would be all in favor of it. At least we have opened the door.

Mr. VOLKMER. Fine. Staff has questions, I believe.

Mr. GORDON. Mr. Tompkins, the Department of the Treasury has recommended that civil actions commenced by the United States for suspension or revocation of customs brokers' licenses should be commenced in the Court of International Trade as opposed to the Court of Customs and Patent Appeals as is proposed in the legislation. Would you be amenable to such a recommendation?

Mr. TOMPKINS. I have had an opportunity to carefully consider that point today. I'm all in favor of it. It seems to me that it would be highly desirable, provided the court remains ambulatory and continues as they do now to go to different ports to have hearings. I have no objection to that. I don't think my association would object to it, but I can't speak for the association.

Mr. VOLKMER. If the association does take a position on that, would you forward it to us, please?

Mr. TOMPKINS. I shall be happy to.

Mr. GORDON. If such an action does commence in the Court of International Trade should it receive *de novo* review?

Mr. TOMPKINS. I would say so; yes.

Mr. GORDON. Mr. Meeker, in your statement you indicated the Customs Court is not a proper forum for judicial review of questions of congressional delegation of authority, scope of Presidential power, and proper standards for administrative decisions. Do you believe that judges on the Customs Court cannot evaluate these matters in the same manner as the Federal district court judge; and second, similarly, do you believe that the Customs Court would disregard the precedents established by Federal district courts in these areas?

Mr. MEEKER. They would be under no compulsion to be governed by the decisions of Federal district courts. It's not as if those were the decisions of an appellate court which would be essentially binding as precedents upon them. Now, as the appropriateness of those questions to a particular forum, we think that the district courts are a more appropriate forum and should at least be available as a concurrent forum for questions under statutes, questions of a kind which can arise in connection with many statutes where the issues are familiar to district judges, where district judges frequently deal with them.

Mr. GORDON. Thank you.

Mr. VOLKMER. I'll be right back.

Mr. POLK. Mr. Tompkins, I would like to clarify your position on the counterclaim issue. On page 5 of your statement, you refer to the Senate committee report language that indicates a counterclaim must arise out of the same import transaction.

Mr. TOMPKINS. Exactly.

Mr. POLK. If a test case is brought and there are other similar cases suspended, with the report language as a guide, are those suspended cases affected by counterclaims? Can they be brought—

Mr. TOMPKINS. We would very much object to having any suspension cases counterclaimed, because those suspension cases involve old importations where the liquidations had become final long ago, and where the importer has sold his merchandise on the basis of firm prices and firm duties. And to face him at a later date, long after he establishes these things, would be very objectionable. We would oppose such a thing.

Mr. POLK. How would the mechanics of this work? Is it that a case can only be brought up by the importer? Would the Government have filed any counterclaims with regard to the suspended cases? Would there in effect be suspended counterclaims pending while the test case is being litigated?

Mr. TOMPKINS. At the present time, there is nothing really to stop the Customs Service from changing a classification or changing a value

on current or future shipments. This is done; has been done frequently. There the importer is aware of the possibilities of higher duties, and he can set his prices accordingly. But to apply any type of increased duties after the importer has accepted the fact that the Customs Service would not assess higher duties and opposed the duties that were assessed I think would be most unfair, even on the same transactions unless it was so closely tied together that—and it was brought to the importer's attention before he went to court and during the 90-day period when the Customs Service could act upon a protest.

Mr. POLK. I'm wondering, is the language of the bill sufficient to safeguard your position if we write into the House committee report the language that is in the Senate committee report? I'm wondering whether there is any way the Government may, on its own, bring up the suspended cases, knowing that the precedent had been set so that it would win those cases. Is additional language needed?

Mr. TOMPKINS. I don't think additional language other than the word "same" be added. In other words, it would be the same thing as then pending judicial review.

Mr. POLK. That's correct with regard to that case. When that case was disposed of, there was no counterclaim with respect to these other cases. So, under the bill, can the Government then bring up the suspended case on its own motion and, in effect, win its counterclaims on those cases?

Mr. TOMPKINS. That is what bothers me no end. I would very much oppose such a thing. Even on the same shipment, the one that has made the test case, the situation could happen where an entirely different shipment of merchandise was the subject of a section 592 penalty case. There the importer might be subject to criminal liabilities in addition to his civil liabilities. His civil liabilities might amount to \$200,000 or more, millions of dollars, on the same shipment that was before the court. But unless the court is to be given trials by jury, the importer would be denied his day in court for a trial by jury if the counterclaim did involve such a situation.

Mr. POLK. Now, with regard to the counterclaim issue, I take it that your preference would be to retain the practice in current law. That is, no counterclaim at all.

Mr. TOMPKINS. No counterclaims at all.

Mr. POLK. That is your preference.

Mr. TOMPKINS. Absolutely.

Mr. POLK. If there is to be a counterclaim procedure at all, you wish it to be limited to the very transactions involved in the case and no more, is that correct?

Mr. TOMPKINS. No; not really. I want the counterclaim to be raised at a time when the Government still has an opportunity to answer the protest, so that when the importer goes into court, he will know his maximum liabilities.

Mr. POLK. Well, yes. I understand that. But that, I take it, would be your first choice. But in view of your testimony, it seemed to me that when you were citing with some approval the Senate report language, that you were indicating actually your second choice. Is that correct?

Mr. TOMPKINS. Well, when I saw that the Senate had approved of this, and it was so much better than what appears in the present bill, we

would go for that. But we are opposed, as we say, we are opposed to the whole thing. It's very repugnant to us.

Mr. POLK. Thank you.

Mr. GORDON. Mr. Meeker, it is the intention of the bill that exclusive jurisdiction of Court of International Trade not be invoked in matters involving imports and statutes such as the Toxic Substances Control Act. Yet in your testimony you indicated concern over the breadth of proposed section 1581 (i). Do you believe that this problem needs to be cured by an amendment, or can it be handled through the use of strong legislative history?

Mr. MEEKER. No; I think an amendment is definitely required because the language of 1581 (i) is really quite sweeping.

Mr. GORDON. Mr. Meeker, does the Consumers Union have any thoughts on the issue of the small claims procedure?

Mr. MEEKER. That is not an issue that we have addressed, and I don't think that I'm able to state any position on it at this time. In principle, though, it is certainly distressing to hear that the Customs Court today, under its existing procedures, no longer affords a practical forum for small claimants. And that is a situation which certainly ought to be changed. After hearing from Mr. Tompkins and his experience, I would think that this is a matter which should not be allowed to remain in its present posture because, apparently, only importers with very large claims are able to secure judicial determinations of them, and in the case of the small claimants, whatever the customs service says is the last word.

Mr. GORDON. But it seems from Mr. Tompkins' earlier comments that that is a function of the fact that the attorneys choose not to handle cases because of the costs of litigation, as opposed to the legal precedent involved so that justice may be had by a particular client.

Mr. MEEKER. Well, the reason why the situation has developed appears to be that the court itself during the last 10 years has adopted a series of procedures governing the cases which do add greatly to the expense of litigation. So that the procedure described by Mr. Tompkins, when he handled many small claims cases, that procedure is no longer available under the rules of the court as it operates today. The court does not have very much business, and the judges don't do very much.

Mr. GORDON. Mr. Tompkins, at our first hearing the subcommittee received testimony on the issue of authorizing the award of interest on judgments for or against the United States in customs litigation. Would you be kind enough to comment on the desirability of such an authorization?

Mr. TOMPKINS. My association submitted no recommendations. It is my personal view that any interest, whether to be paid by the Government or importer, is very unreasonable and should not occur.

Mr. GORDON. Section 2637 requires that all liquidated damages must be paid at the time an action is commenced. Situations are undoubtedly going to arise in which an importer simply cannot pay the duties, and they are not fully covered by a surety, precluding him from bringing an action to contest the validity of the assessment. I understand that there may be some question regarding the constitutionality of such an absolute denial of access to the court. Would you favor or oppose

adding a provision to this bill to allow an importer in special circumstances to come into court without payment of duties?

Mr. TOMPKINS. Absolutely. It would be highly desirable. There are many instances where the duties can not be paid by reason of a person dying or some other unusual circumstance. As a result, the case, with merit, is never litigated. If that could be worked out, I should be very glad to work with the committee on it.

Mr. GORDON. How frequently do you think this might have to be taken advantage of? Do you have any estimate at all?

Mr. TOMPKINS. I have no idea. I know of a number of cases where the importers have come to me and wanted to know if they really had to pay the duties, because that would work great hardships. And I don't know what ultimately happened. I can't answer that question. I'm sorry.

Mr. GORDON. Thank you.

Mr. VOLKMER. I wish to personally thank both of you for waiting the full afternoon. We do appreciate your coming here and we appreciate your testimony. It's been invaluable. I know it's going to help me later on when we get into the markup. Now, if you would submit the other information which we will request regarding the matters discussed this afternoon, it would be greatly appreciated. If you have any other matters that you think need clarification, feel free to address us on it.

Mr. TOMPKINS. Thank you very much, we appreciate it.

[Information furnished:]

"A National Association of
International Scope"



**National
Customs Brokers & Forwarders Association of America, Inc.**

ONE WORLD TRADE CENTER • NEW YORK, N.Y. 10048 Suite 1109

Telephone 432-0090

March 10, 1980

House Committee on the Judiciary
Subcommittee on Monopolies and Commercial Law
Rayburn House Office Building
Washington, D. C.

Gentlemen:

Re: H.R. 6394

Reference is made to your request to our representative, Allerton deC. Tompkins, at the hearings on February 28, 1980 on H.R. 6394 to obtain an answer to the question of whether our Association would be in favor of a provision in H.R. 6394 which would vest exclusive authority in the new Court of International Trade to review decisions of the Secretary of the Treasury denying, revoking or suspending the license of a customhouse broker, instead of having this authority vest exclusively in the new Court of Appeals for International Trade, Patents and Trademarks, as set forth in Title IV, Section 401 (b)(1), Section 1543 of H.R. 6394. You also indicated that you would like to know if the new Court of International Trade should be given the authority to have jury trials and thus remove the necessity of having litigation involving import related transactions requiring trials by jury handled, as under present practice, in the overcrowded local district courts.

Since the new Court of International Trade (now the United States Customs Court) is set up to hold, and has in the past held, hearings from time to time at various ports in the country, while the new Court of Appeals for International Trade, Patents and Trademarks has not, and does not regularly do so, our primary objection to the present authorization in Section 1543 would be removed. We would approve of an exclusive authorization for a trial de novo in the new Court of International Trade, particularly if that court could have trials by jury wherever it sits. Although we have no sympathy for a broker who willfully breaks the law or regulations, our approval would require authorization to that court, in its discretion, to restrain the Secretary of the Treasury from enforcing its punishment until after there had been a final judicial decision.

We have no objection to an authorization to the new Court of International Trade to conduct trials by jury, and we favor increasing the powers of that Court to handle exclusively all litigation involving import transactions and import related problems.

In answer to a question you posed to Mr. Tompkins he stated that he would be in favor of authorizing the Court of International Trade to set up -- as a matter of discretion -- a small claims procedure because he felt that it would be a step in the right direction. A small claims procedure is urgently needed, and it will require legislation in connection with such things as no appeals, no written decisions, no precedence, etc. The Customs Court has not been willing to promote the matter due to the opposition or lack of interest by the Association of the Customs Bar. That Court, therefore, should not be given discretion to set up such a procedure. If anything is to be done by that Court, we feel that it will require a provision in the Bill which instructs that Court to set up such a procedure.

We appreciate the opportunity to express our views on these matters.

Respectfully,

National Customs Brokers & Forwarders
Association of America, Inc.

By William R. Casey

"A National Association of
International Scope"



National
Customs Brokers & Forwarders Association of America, Inc.

ONE WORLD TRADE CENTER - NEW YORK, N.Y. 10048 Suite 1109

Telephone 432-0090

March 14, 1980

The Honorable Peter W. Rodino, Jr.
Chairman
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Dear Mr. Rodino:

This will acknowledge your letter of March 4th to our Customs Counsel, Mr. Allerton deC. Tompkins, in which you ask us to provide answers to several questions. We appreciate the opportunity of doing so.

In Mr. Tompkins' absence, I am responding to the questions for the association, as follows:

1. AT THE FIRST HEARING, THE SUBCOMMITTEE RECEIVED TESTIMONY ON THE ISSUE OF AUTHORIZING THE AWARD OF INTEREST ON JUDGMENTS FOR OR AGAINST THE UNITED STATES IN CUSTOMS LITIGATION. WOULD YOU COMMENT ON THE DESIRABILITY OF SUCH?

Question #1:

We believe that this would be desirable. In the high interest world of today, it is patently unfair for the importer to be required to deposit additional duties, to be forced to wait several years for litigation and refunds, and then to receive no interest. Of course, the Government should have the same privilege.

2. THE ASSOCIATION OF THE CUSTOMS BAR HAS RECOMMENDED THAT THE COURT OF INTERNATIONAL TRADE HAVE JURISDICTION OVER CIVIL ACTIONS ARISING UNDER 19 U.S.C. 1305 WHICH GOVERNS THE IMPORTATION OF OBSCENE MATERIALS. THE LATEST SUPREME COURT PRONOUNCEMENTS ON THE SUBJECT REQUIRE OBSCENITY TO BE DETERMINED ON THE BASIS OF THE STANDARDS OF THE LOCAL COMMUNITY. IN LIGHT OF THAT SUPREME COURT HOLDING, WOULD IT NOT BE IMPOSSIBLE FOR THE COURT OF INTERNATIONAL TRADE TO IMPOSE ONE NATIONAL RULE?

Question #2:

It would seem to us desirable for the Court of International Trade to have such jurisdiction. However, in the opinion of this layman, it seems impossible for the Court of International Trade to impose one national rule in view of the latest Supreme Court pronouncements.

3. PRESENTLY, PROPOSED SECTION 1582 REQUIRES THE COURT OF INTERNATIONAL TRADE TO TRANSFER CIVIL ACTIONS COMMENCED BY THE UNITED STATES TO A FEDERAL DISTRICT COURT IF ONE OF THE PARTIES REQUESTS A TRIAL BY JURY. IS THERE A NEED FOR SUCH A PROVISION OR SHOULD THE COURT OF INTERNATIONAL TRADE BE AUTHORIZED TO CONDUCT THE JURY TRIAL?

A. IF THE SUBCOMMITTEE DECIDED TO AMEND PROPOSED SECTION 1582 TO PERMIT TRIAL BY JURY IN THE COURT OF INTERNATIONAL TRADE, SHOULD THAT RIGHT BE LIMITED ONLY TO CIVIL PENALTY ACTIONS OR SHOULD IT RUN TO CIVIL PENALTY ACTIONS, RECOVERIES UPON A BOND AND RECOVERIES OF CUSTOMS DUTIES?

Question #3:

In our judgment, the Court of International Trade should be authorized to conduct the jury trial.

Question #3A:

It should run to civil penalty actions, recoveries upon a bond, and recoveries of customs duties.

4. PROPOSED SECTION 1582 PROVIDES THAT THE UNITED STATES MAY COMMENCE A CIVIL ACTION TO RECOVER UPON A BOND. ASSUMING SUCH A CASE WAS BROUGHT AGAINST A SURETY, SHOULD THIS LEGISLATION PROVIDE THE SURETY WITH THE RIGHT TO FILE A CROSS-CLAIM OR INSTITUTE A THIRD PARTY ACTION AGAINST THE BOND PRINCIPAL?

A. IF THE SUBCOMMITTEE INCLUDES A CROSS-CLAIM PROVISION, WOULD IT HAVE TO GRANT THE COURT OF INTERNATIONAL TRADE ORIGINAL JURISDICTION TO HEAR THE ACTION OR CAN THE COURT HEAR THE CASE ON THE BASIS OF PENDENT JURISDICTION?

Question #4:

We believe that the surety should have the right to file a cross-claim or institute a third party action against the bond principal. However, we wonder if the principal's defense would be improper venue since he has a contract with the surety in whatever state is involved.

Question 4A:

Either the Court of International Trade or the Federal District Court could hear the case.

5. PROPOSED SECTION 2643(B) LIMITS THE REMAND POWER OF THE COURT OF INTERNATIONAL TRADE TO CIVIL ACTIONS COMMENCED PURSUANT TO SECTION 515 OR SECTION 516 OF THE TARIFF ACT OF 1930. IS THIS LIMITATION SUFFICIENT UNDER THE CIRCUMSTANCES OR SHOULD THE POWER BE BROADENED TO BE CO-EXTENSIVE WITH THAT OF THE FEDERAL DISTRICT COURTS

Question #5:

We are not sure enough of the proper answer to this question to respond to it.

6. WOULD YOU KINDLY COMMENT ON THE PROPOSAL BY THE AMERICAN IMPORTERS ASSOCIATION THAT THE BILL BE AMENDED TO PROVIDE THE IMPORTER WITH THE OPPORTUNITY TO INSTITUTE JUDICIAL REVIEW OF PENALTY CASES IN THE COURT OF INTERNATIONAL TRADE AT ANY TIME AFTER THE ADMINISTRATIVE PROCESS IS COMPLETE AND BEFORE COLLECTION ACTION IS COMMENCED BY THE GOVERNMENT?

Question #6:

We agree fully with the position of the American Importers Association.

7. SECTION 2637 REQUIRES THAT ALL LIQUIDATED DAMAGES MUST BE PAID AT THE TIME THE ACTION IS COMMENCED, BUT SITUATIONS WILL UNDOUBTEDLY ARISE IN WHICH AN IMPORTER SIMPLY CANNOT PAY THE DUTIES AND THEY ARE NOT FULLY COVERED BY A SURETY, PRECLUDING HIM FROM BRINGING AN ACTION TO CONTEST THE VALIDITY OF THE ASSESSMENT. I UNDERSTAND THERE MAY BE SOME QUESTION REGARDING THE CONSTITUTIONALITY OF AN ABSOLUTE DENIAL OF ACCESS TO THE COURT. WOULD YOU FAVOR OR OPPOSE ADDING A PROVISION TO THIS BILL TO ALLOW AN IMPORTER, IN SPECIAL CIRCUMSTANCES, TO COME IN TO COURT WITHOUT THE PAYMENT OF DUTIES? IN THE ALTERNATIVE, DOES THE IRREPARABLE HARM EXCEPTION IN SECTION 1581(J)(2) SUFFICIENTLY ADDRESS THIS ISSUE?

Question #7:

We would favor adding a provision that would allow an importer, in special circumstances, to come into court without the payment of duties.

We hope that our responses prove helpful to you in your deliberations on these important matters. As you weigh the pros and cons on various provisions, we urge once again [as we did in our testimony] that a small claims procedure be included in your forthcoming legislative measure.

Respectfully,

NATIONAL CUSTOMS BROKERS & FORWARDERS
ASSOCIATION OF AMERICA, INC.

William R. Casey, Jr.
William R. Casey, Jr.
President

SUPPLEMENTAL QUESTIONS FOR

LEONARD MEEKER

ON BEHALF OF

THE CONSUMERS UNION

1. At the first hearing, the Subcommittee received testimony on the issue of authorizing the award of interest on judgments for or against the United States in customs litigation. Would you comment on the desirability of such?
 1. Neither Consumers Union nor the undersigned has considered this issue or developed a view on it.
 2. Do you see any need for the inclusion of the transfer provision in proposed Section 1582 (b) (1)?
 2. Consumers Union believes, as was said in our statement, that a litigant should be able to bring his case in the district court whenever the case involves questions of general law, such as those on Congressional delegation of authority, proper standards for administrative decision, fair procedure and the scope of Presidential power under the Constitution. The undersigned does not believe jurisdiction in the district court should be dependent upon a request for a jury trial. I would have no preference as to the forum in which jury trials are held.
 3. If the Subcommittee decided to amend proposed Section 1582 to permit trial by jury in the Court of International Trade, should that right be limited only to civil penalty actions or should it run to civil penalty actions, recoveries upon a bond and recoveries of customs duties?
3. Neither Consumers Union nor the undersigned has developed any view on this issue.

4. Proposed section 1583 would permit the United States to assert a counterclaim "which arises out of an import transaction that is the subject matter of a civil action pending before the court." Do you believe that the draft language is overbroad? Should it be limited to "the" import transaction pending before the court?

4. Neither Consumers Union nor the undersigned has developed any view on this issue.

5. Proposed section 2643(b) limits the removal power of the Court of International Trade to civil actions commenced pursuant to section 515 or section 516 of the Tariff Act of 1930. Is this limitation sufficient under the circumstances or should the power be broadened to be co-extensive with that of the federal district courts?

5. Neither Consumers Union nor the undersigned has developed any view on this issue.

6. The A.B.A. has recommended the inclusion of a small claims procedure in H.R. 6394. Would you comment on the desirability and feasibility of such a procedure?

A. Would the establishment of this procedure relegate a small claims litigant to a position where he would receive second class justice?

B. Should not all potential litigants be entitled to a day in court where they can obtain a full and

fair hearing on the merits of their case?

- C. If a small claims procedure is to be established, should it be available only with the consent of both parties?
- D. Similarly, should such a case be heard on the record? Should it be accorded precedential effect? If included in the bill, should the small claims procedure include a right of appeal to the U.S. Court of Customs and Patent Appeals?

6. Consumers Union has not adopted any formal position concerning a small claims procedure. The undersigned believes that the inclusion of such a procedure is desirable, since all potential litigants should be entitled to a day in court. I do not believe a small claims procedure would provide only second class justice. The current system seems to provide small claims litigants no justice at all.

A small claims procedure should be available at the option of the small claims litigant and should not require the consent of both parties. The latter formulation would allow the federal government to prevent all suits by importers who cannot afford the expensive Customs Court procedure, thus defeating the purpose of having a small claims procedure. The small claims cases should be heard on the record, should be accorded precedential effect, and should include a right of appeal.

Mr. VOLKMER. Thank both of you very much. That concludes our hearings for today.

[Whereupon, at 5:19 p.m., the hearing was adjourned.]

ADDITIONAL MATERIALSTATEMENT FOR THE RECORD - REPRESENTATIVE CHARLES A. VANIK

H.R. 6394 represents, in many respects, the completion of reforms which were initiated with the Trade Agreements Act of 1979. The Ways and Means Trade Subcommittee has a great interest in this legislation, since it does involve the major U.S. international trade statutes which come within our jurisdiction, e.g., the Trade Agreements Act of 1979, the Trade Act of 1974, and the Tariff Act of 1930. It is clear that the jurisdiction of the U.S. Customs Court must be defined in a manner which allows it to make full use of its expertise and resources in addressing international trade litigation, and for this reason I support the general concepts embodied in H.R. 6394.

This statement addresses various substantive aspects of the legislation which need to be improved, as well as questions of trade policy which need to be resolved. The Trade Staff has been working with the staff of the Judiciary Committee on this bill so that several technical concerns have already been addressed. However, the Trade Subcommittee may still need to closely examine this bill in a separate hearing and mark-up session, since many of the provisions clearly affect the substance of prior trade legislation considered by the Ways and Means Committee. For example, several changes in the jurisdiction of the Court directly affect international trade policy and substantive Subcommittee decisions which were made last year and embodied in the Trade Agreements Act of 1979. Overall, the House version of the Customs Court Act is preferable to the earlier version which passed the Senate, since various technical improvements have made the legislation clearer and more comprehensible.

What follows are comments and suggestions which are intended to further refine the legislation.

Title I

Section 101 of the bill establishes a method for appointing the judges of the Court and designating the chief judge in a manner which is far preferable to that contained in S. 1654.

Title II

Title II of the bill, dealing with the jurisdiction of the Court of International Trade, contains the most important provisions in the bill, since it establishes the jurisdiction and powers of the Court. There are several problems of interpretation with some of the provisions in this title. For example, proposed sections 1581(d) and (e) give the Court exclusive jurisdiction to review certain actions, advice, and findings of the International Trade Commission and the United States Trade Representative, "solely for the purpose of determining the procedural regularity of such actions."

Without further explanatory language, it is unclear what specific remedies can be declared by the Court under these circumstances. Perhaps a more fundamental policy question is whether it is desirable that some of these actions be reviewable at all, since they constitute advice or recommendations of an independent agency to the President. The Trade Subcommittee may wish to carefully examine the need to provide judicial review under each one of the enumerated provisions of the Trade Act of 1974 and the Tariff Act of 1930. This is particularly important since neither the House nor Senate committee with jurisdiction over these statutes has formally considered the impact of these changes.

Setting aside this policy question for a moment, there seems to be an inconsistency between proposed section 1581(d)(1) and 1581(d)(2). Basically, 1581(d)(1) grants jurisdiction to the Court to review certain actions of the International Trade Commission only after the President's decision is final and has been published in the Federal Register. 1581(d)(2), however, states that if no advice, findings, recommendations or determinations have been provided to the President by the International Trade Commission, then the Court shall have jurisdiction. In other words, read literally, section 1581(d)(2) grants jurisdiction at a point much earlier in time (i.e., before anything has been provided to the President) than is specified in (d)(1). Moreover, some of the provisions of law cited in subsection (d)(1) are inappropriate for inclusion here, e.g., the recommendations to the President are made by the United States Trade Representative and not the International Trade Commission (section 304 of the Trade Act of 1974); time limits are vague for an International Trade Commission determination (section 338 of the Tariff Act of 1930).

Subsection (e), which gives the Court exclusive jurisdiction to review determinations of the Secretary of Labor or Secretary of Commerce in the area of adjustment assistance, significantly expands existing law by permitting judicial review of the certification (and not just the failure to certify) of workers, communities, and firms. In addition to changing the jurisdiction from the U.S. Court of Appeals to the Court of International Trade, this subsection raises problems of which parties have "standing" to bring suit, e.g., in contesting the certification of eligibility for adjustment assistance.

Proposed section 1581 then continues with a specific list of areas where the Court has jurisdiction pursuant to a designated statute. Then section 1581(i) provides that in addition to this specific list, the Court of International Trade shall have exclusive jurisdiction of any civil action against the U.S which "arises directly from an import transaction" and involves: (1) the Tariff Act of 1930, the Trade Expansion Act of 1932, the Trade Act of 1974, or the Trade Agreements Act of 1979, or (2) a provision of the Constitution, a treaty, or Executive agreement, or Executive order "which directly and substantially involves international trade." This broad grant of residual jurisdiction to the Court seems to supersede the prior specific list, i.e., section 1581(a)-(h), notwithstanding the phrase in subsection (i): "in addition to the jurisdiction conferred...by subsections (a) through (h)...". Indeed, there is a question as to what force and effect the prior limitations in subsections (a) through (h) will have in light of this language. Apparently the purpose of this subsection is to eliminate any confusion which currently exists as to the demarcation between the jurisdiction of the U.S. district courts and the Court of International Trade. My fear is that the wording of this subsection is so broad and ambiguous (e.g., when does a civil action "involve" the enumerated statutes?) as to continue the blurred jurisdictional division between this Court and the district courts.

Subsection (j) lists certain limitations on the jurisdiction of the Court. There is no apparent reason why actions arising under section 305 of the Tariff Act of 1930 (dealing with importation of immoral articles) is excluded from the Court's jurisdiction.

Proposed section 1582 gives the Court original jurisdiction of inter alia, actions by the U.S. to review a civil penalty under section 592 of the Tariff Act of 1930. The Trade Subcommittee held extensive hearings on the Customs Procedural Reform and Simplification Act of 1978, which kept jurisdiction of 592 cases in the district court. While the provisions for transfer to the district court upon request appear to provide a safeguard for a jury trial, I would like to have the Trade Subcommittee examine this further.

The remainder of the bill covers the Court procedures to be followed, the Court of Appeals for International Trade, Patents, and Trademarks, and technical amendments--subject areas primarily within the expertise of the Judiciary Committee. However, proposed section 2636(d) substantially shortens the time within which a party may challenge certain determinations made during an antidumping or countervailing duty investigation from the 30 days provided in the Trade Agreements Act of 1979 to 5 days. Considering the recent passage of the Trade Agreements Act and the lack of any controversy concerning the judicial review provisions of that Act, I believe the Trade Subcommittee would wish to examine closely the rationale for such a drastic change. I do note that proposed section 2643 of Title 28, "Relief," eliminates the old double burden of proof that has to be met by a plaintiff under existing law, and this is a definite improvement.

Moreover, the expansion of the authority of the Court of International Trade to issue preliminary or permanent injunctive relief,

contained in proposed section 2643, is a needed grant of full equity powers, consistent with the Court's status as an Article III Court.

I also wish to comment on the effective date provisions of this bill. Section 701(a), which is unchanged from the Senate-passed version, generally provides that the amendments made by this bill will be effective on the date on which the provisions of Title VII of the Tariff Act of 1930, as added by Title I of the Trade Agreements Act take effect. At the time the Senate was considering this legislation, Title VII had not yet taken effect, and there was some doubt as to whether the preconditions necessary to its taking effect would be met. Thus, the Senate bill included this provision solely to ensure that this measure would not become effective if Title VII of the Tariff Act were not in effect. Retention of this effective date provision in the House bill is no longer needed since Title VII took effect on January 1, 1980. In fact, section 701(a) as presently drafted would have a retroactive effect. It is not clear how enactment of this provision would affect pending litigation in district courts on matters which will fall within the exclusive jurisdiction of the Customs Court upon enactment of this legislation. I therefore suggest that the appropriate effective date of this legislation would be the date of its enactment.

Finally, I suggest that the title of the Act be changed to the "International Trade Courts Act of 1980," since the designation of "Customs Courts" is eliminated with this legislation.

CHAIRMAN



UNITED STATES INTERNATIONAL TRADE COMMISSION

WASHINGTON, D.C. 20438

February 25, 1980

The Honorable Peter W. Rodino, Jr.
Chairman
Committee on the Judiciary
2137 Rayburn House Office Building
Washington, D.C. 20515

Attention: Lee M. Gordon, Esq.

Dear Mr. Chairman:

In accordance with our letter of February 8, 1980, enclosed please find a memorandum of views of the U.S. International Trade Commission on H.R. 6394, the Customs Courts Act of 1980. We believe that this memorandum adequately expresses the position of the Commission on this bill. However, if after reviewing our submission, you believe that oral testimony would be helpful, an appropriate representative of the Commission would be pleased to appear before the Committee's Subcommittee on Monopolies and Commercial Law.

Thank you for your attention to our views.

Sincerely yours,

A handwritten signature in cursive script that reads "Catherine Bedell".

Catherine Bedell
Chairman

Attachments

MEMORANDUM OF VIEWS OF THE UNITED STATES INTERNATIONAL TRADE COMMISSION
ON H.R. 6394 - CUSTOMS COURTS ACT OF 1980 TO THE
COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON
MONOPOLIES AND COMMERCIAL LAW

The U.S. International Trade Commission is an independent agency of the United States created to provide expert advice on and to investigate matters related to tariffs and trade. The Commission when full consists of six commissioners appointed by the President and confirmed by the Senate and a staff of approximately 400. There is currently one vacancy. The Commission is independent of the Executive Branch. In addition to general functions of advice, the Commission conducts investigations under section 332, section 337, and the antidumping and countervailing duty provisions of title VII of the Tariff Act of 1930, the Agricultural Adjustment Act, and the Trade Act of 1974. A number of these functions have been revised substantially by the Trade Agreements Act of 1979, Public Law 96-39, enacted July 26, 1979, but the Commission has in most cases either retained essentially the functions it previously held, or those functions have been expanded. The Commission, through its staff, provided technical advice and assistance to the Congress in preparing the Trade Agreements Act of 1979, and we, of course, would like the judicial review of Commission actions provided for in H.R. 6394 to be made consistent with the Trade Agreements Act.

H.R. 6394, which consists of seven titles, has an impact upon the Commission because several Commission determinations are, by virtue of pre-existing law or by virtue of the Trade Agreements Act of 1979, subject to review in the United States Customs Court (which the bill would rename the United States Court of International Trade) or the United States Court of Customs and Patent Appeals (which the bill would rename the United States Court of Appeals for International Trade, Patents, and Trademarks), the courts that are the subjects of the bill. In particular, under the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, Commission determinations of material injury, threat of material injury, or material retardation of a domestic industry under the antidumping and countervailing duty laws will be subject to review at various stages in the United States Customs Court under Section 516A of the Tariff Act of 1930, a new provision added to the Tariff Act by the Trade Agreements Act of 1979. In addition, Commission determinations pursuant to section 337 of the Tariff Act of 1930, which treats with certain types of unfair trade practices, are reviewable in the United States Court of Customs and Patent Appeals.

We have a number of technical comments concerning the statute, which we have prepared in an attachment to this statement. In addition to these technical comments, we would like to bring the following matters to the Committee's attention:

1. Section 2635(b)(2) (in section 301, page 19, of the bill) would allow the Court of International Trade to disclose confidential or privileged material "under such terms and conditions as the court may order,"

notwithstanding the provision in the bill that confidential or privileged status be preserved in litigation. We believe that this language is potentially inconsistent with the Tariff Act of 1930 as amended by the Trade Agreements act of 1979.

Under the access-to-information provisions of the countervailing duty and antidumping laws as amended by the Trade Agreements Act of 1979, confidential information is given an absolute exemption from public disclosure. (Section 777(b)(1) of the Tariff Act of 1930 as amended by the Trade Agreements Act of 1979). The protection of this information is continued in court proceedings for the disclosure of the information, since any orderable disclosure is limited by statute. Section 777(c)(2). The confidential record is required to be submitted to the court, but nothing in the amendments enacted by the Trade Agreements Act of 1979 permits the court to disclose information to the parties themselves. Therefore the overall effect of the Trade Agreements Act is to maintain the confidentiality of information obtained by the Commerce Department and the United States International Trade Commission in proceedings under the countervailing duty and antidumping laws with the exception that this information may be disclosed under "protective orders," that is, orders which allow the release of the information to attorneys, but bar the attorneys from releasing the information to their clients.

The statutory scheme for protecting the confidentiality of sensitive business information would be destroyed if the Court of International Trade were to be permitted in the course of proceedings challenging agency

determinations to reveal the information to the parties themselves. The purpose of withholding the information from the parties was that the agencies would be better able to encourage private persons to submit information.

We suggest that the phrase on lines 13, 14 and 15 of page 19 of the bill be amended by striking the words, "and may make such material available under such terms and conditions as the court may order." and substituting, "and may make such information available under a protective order consistent with section 777 of the Tariff Act of 1930." The language we propose is based upon the language of section 777(c) (2), allowing the United States Customs Court (or Court of International Trade) to issue interlocutory orders requiring the agencies to make confidential information available in the course of administrative proceedings. Therefore, the effect of the language would be to disallow broader disclosure of information on appeal than would be allowed on an interlocutory basis.

2. Under section 1581(a) of the judicial code (in section 201, page 4, of the bill), entitled "Civil Actions Against the United States," the Court of International Trade would have exclusive jurisdiction of civil actions relating to a number of matters involving essentially the technical aspects of the importation process. Appeal to the Court of International Trade from determinations of the Commission in antidumping and countervailing duty investigations is reserved for subsection (c) of section 1581. Nevertheless, subsection (a) may be read to include appellate jurisdiction concerning "the legality of all orders and findings entering into" the underlying administrative decision. We believe this language in the statute should be

deleted, notwithstanding its historical place in the statute, because of changes wrought by the Trade Agreements Act.

Prior to the Trade Agreements Act of 1979, the exclusive means of obtaining review of antidumping and countervailing duty determinations was by making protest to customs entries, which were subjected or not subjected -- as the case might have been -- to a special duty assessed by the Secretary of the Treasury based upon underlying Treasury Department and U.S. International Trade Commission determinations under the Antidumping Act or the countervailing duty law. The judicial code provided with respect to antidumping and countervailing duty proceedings that the protest process triggered judicial review of the underlying administrative determinations of antidumping or countervailing duty as well as the actual amount of duty in question by virtue of the phrase "including the legality of all orders and findings entering into the same."

The Trade Agreements Act changed the administrative process necessary to get standing for judicial review. Under section 1001 of the Trade Agreements Act, a new section 516A was inserted in the Tariff Act of 1930 to provide for direct judicial review in countervailing duty and antidumping duty proceedings, without the necessity of first protesting the liquidation of the customs entry in question. This channel of review is intended to be exclusive and comprehensive. The Senate report on the Trade Agreements Acts contains the following statement:

Unfortunately, the procedures contained in section 516 as amended were not particularly well-suited for suits not involving traditional classification and valuation questions. In addition, the amendments to section 516 made by the Trade Act of 1974 left unclear such questions as the scope and standard of review.

The bill seeks to remedy these problems and others by restoring section 516, with some amendments, to its traditional role (section 1001(b) of this Act) and by creating a new section 516A which concerns only challenges to determinations relating to countervailing and antidumping duties. S.Rep. 96-249 (96th Cong., 2d Sess.) at 249.

Under the bill as presently framed, the old phrase, "including the legality of all orders and findings entering into the same," remains in section 1581(a). Section 1581(c) includes section 516A actions. We are concerned that there would be an opportunity for collateral attack upon Commerce Department and U.S. International Trade Commission determinations under the bill. The main attack could be made through the intended statutory channel of direct appeal to the United States Customs Court (or, under the bill, the United States Court of International Trade). However, when entries are made and duties assessed so as to include (or not to include, as appropriate) an antidumping or countervailing duty, then but for the amendment we propose, the protest against the duty itself might also allow a collateral challenge to the legality of the underlying Commerce Department and U.S. International Trade Commission findings. That was not the intention of the Congress as we understand it in the Trade Agreements Act and, in fact, would subject these determinations to multiple review in the new U.S. Court of International Trade.

3. Section 2636(f) of the judicial code (in section 301, page 22, of the bill), entitled "Time for commencement of action," provides for time limits upon institution of actions in the U.S. Court of International Trade. Many of these time limits simply reflect or implement provisions of the law as amended by the Trade Agreements Act of 1979, but subsection (f) creates a time

limit that is not included in the Trade Agreements Act and, we believe, may have some unfortunate aspects.

The underlying administrative action to which appeals affected by section 2636(f) relate are determinations by the Department of Commerce and the U.S. International Trade Commission denying requests for sensitive domestic business information obtained in the course of antidumping and countervailing duty investigations. The United States Customs Court may, under a new provision of the Trade Agreements Act, issue an order directing the agencies to make all or a portion of the requested information, particularly domestic cost and price data, available under a "protective order," but the order "shall not have the effect of stopping or suspending the" underlying administrative investigation. This data may not be made public under the new law, but it may be released under a protective order restricting the persons who may see the data.

The bill provides in section 2636(f) of the amended judicial code that actions pursuant to the section permitting these appeals are "barred" unless the actions are commenced within ten days of a denial of a request for confidential information. No time limit is placed upon the agencies involved in their determination of whether to grant or deny a request for information from a party, so the proposed provision has no effect of compelling the agencies to proceed expeditiously in granting or denying the request. Rather, the primary effect of the provision is to force persons whose requests are denied to go almost immediately to the United States Customs Court for an enforcing order. In fact, this procedure may urge parties to burden the court

unnecessarily out of caution; it may also cause parties that are not aware of the time bar in the judicial code (the bar is not reflected in the Trade Agreements Act) inadvertently to waive their rights to appeal from agency actions. Indeed, for the Congress not to place a time limit upon the agencies which must initially act upon such requests, but to place a limit upon the private parties once the agency has acted upon the request, may be interpreted as unfair.

4. The Commission approves the provision of section 602 of the bill (page 42) that would clarify standards of review in actions to review section 337 determinations in the United States Court of Customs and Patent Appeals. Section 337 authorizes the Commission to investigate and order to cease certain unfair trade practices in the import trade of the United States. Under the new law, the standards applicable under the Administrative Procedure Act to adjudicative actions of agencies will apply to all Commission determinations under section 337, except determinations of general public interest factors enumerated in the section, which may not be overturned except for abuse of discretion. No de novo court trial or court determination of the weight of the evidence would be authorized. A corresponding change in the judicial code is necessary, which we have proposed in our attached technical comments.

We appreciate the opportunity to be of assistance to the Committee, and will be happy to provide any additional help we can in connection with this important legislation.

TECHNICAL COMMENTS OF THE U.S. INTERNATIONAL TRADE COMMISSION
 CONCERNING H.R. 6394, "Customs Court Act of 1980"

1. Page 4, line 1:

Change the title from "Civil Actions against the United States" to "Civil Actions against the United States and agencies thereof."

Reason for Change. Actions arising under section 516A of the Tariff Act of 1930 may conceivably name as a defendant the United States International Trade Commission, an independent agency of the United States not a part of the Executive Branch.

2. Page 31, line 1:

Insert in proposed Title V a new section amending section 1543 of title 28 as follows: (deleted matter shown in brackets, added matter underlined):

Section 1543. United States International Trade Commission decisions.

The Court of Appeals for International Trade, Patents, and Trademarks shall have jurisdiction to review [by appeal on questions of law only, the findings] the determinations of the United States International Trade Commission as to the unfair practices in import trade, made under section 337 of Title 19, United States Code.

Reason for Change. Conforming change to take account of changes made in section 337 by section 602 of the bill.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

WILLIAM E. FOLEY
DIRECTORJOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

March 19, 1980

WILLIAM JAMES WELLER
LEGISLATIVE AFFAIRS
OFFICER

Honorable Peter W. Rodino, Jr.
Chairman, Committee on the Judiciary
U.S. House of Representatives
2137 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for requesting the views of the Judicial Conference of the United States on the Customs Court Act of 1980. During the Conference's Proceedings on March 5-6, 1980, it reviewed a report on the bill from its Committee on Court Administration, and that committee's unanimous recommendation that the bill be approved. The Conference unanimously accepted the committee's recommendation, and authorized this office to inform you of its full support for the bill.

I should also advise you that the Court Administration Committee's recommendation to the Conference, in addition to advocating approval of the bill in general, also recommended approval of whatever technical or ministerial suggestions the United States Customs Court itself might file directly with your committee.

Sincerely,



William James Weller
Legislative Affairs Officer



GENERAL COUNSEL OF THE
UNITED STATES DEPARTMENT OF COMMERCE
Washington, D.C. 20230

18 APR 1980

Peter W. Rodino
Chairman
Subcommittee on Monopolies and Commercial Law
Committee on the Judiciary
United States House of Representatives
Washington, D.C.

Dear Mr. Chairman:

There is currently pending before your committee H.R. 6394, the Customs Courts Act of 1980. By virtue of our responsibilities of administering the antidumping and countervailing duty laws, the Department of Commerce has great interest in this bill and, with the changes suggested below, would support its enactment.

Most important to the Department is that the bill be amended to make clear that any determination, decision, or action of the Department in the course of an antidumping or countervailing duty proceeding can be judicially reviewed only as allowed by section 516A of the Tariff Act of 1930. This section, which was enacted as part of the Trade Agreements Act of 1979, allows judicial review of certain listed preliminary determinations made in the course of an antidumping or countervailing duty proceeding. Any determinations, decisions, or actions not listed in the statute are judicially reviewable only in connection with a final determination. Section 516A allows far more extensive and expeditious review of determinations made in the course of an antidumping or countervailing duty proceeding than previously existed. The section strikes a careful balance between litigants' rights to challenge certain preliminary determinations and the Department's need to complete the investigatory or review process without excessive interference. Since this section just became effective on January 1, 1980, it is necessary to give it time to be tested by experience before judging whether changes are necessary.

Section 1581(i) in section 201(a) of H.R. 6394 could be construed as expanding opportunities to judicially challenge preliminary determinations, decisions, and actions of the Department in the course of an antidumping or countervailing duty proceeding beyond that allowed by section 516A. We doubt that this construction was intended and, in any event, it is undesirable for the reasons explained above. To clarify the language, we would suggest that the following language be added at line 6, p. 5 of H.R. 6394:

Determinations, decisions, and actions by the administering authority or the U.S. International Trade Commission in the course of an antidumping or countervailing duty proceeding under Title VII or section 303 of the Tariff Act of 1930 shall be reviewable only pursuant to section 516A of the Tariff Act of 1930.

I should add that the language in the companion Senate bill S. 1654, at line 8, p. 7, although apparently intended to accomplish the same result as our suggested language, does not. Literally read, it merely states that the only way to judicially challenge those preliminary determinations which are listed in section 516A is according to the procedure of section 516A. Any preliminary determination, decision, or action not listed could arguably be challenged in court without waiting for the final determination.

We are additionally concerned with the injunctive relief provisions of H.R. 6394 found at line 11, p. 28. It should be made clear that no injunctive relief can be sought unless the plaintiff has exhausted his administrative remedies. Moreover, we would suggest striking the sentence beginning on line 14, p. 28, which reads:

In ruling on such a motion, the court shall consider whether the person making the request will be irreparably harmed if such injunction is not granted, and the effect of granting such injunction on the public interest.

This sentence, which we urge be deleted, lists two of the four criteria traditionally recognized by the courts in granting injunctions. It omits the considerations that the plaintiff must show that he is likely to prevail on the merits and that the harm to him of not obtaining the injunction outweighs the harm to the other party if the injunction is granted. The deletion we propose would allow the Court of International Trade to rely on the case law in considering whether to grant an injunction.

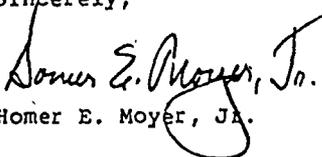
To conform the injunctive provisions of the Tariff Act of 1930 to this proposed change in H.R. 6394 would require repealing section 516A(c)(2) of the Tariff Act of 1930, deleting the words "under paragraph (2) of this subsection" in section 516A(c)(1), and renumbering section 516A(c)(3) to be (c)(2).

Our third proposed change is that line 17, p. 12 be amended to allow intervention in court actions under section 516A of the Tariff Act of 1930 only by interested parties as defined in section 771(9) of the Tariff Act of 1930. This change would bring H.R. 6394 closer to the provisions of existing law.

Finally, we suggest that "or the administering authority or his delegate" be added at line 20, p. 24 of H.R. 6394. This change would make clear that, in any court challenge, decisions of the administering authority, as well as the Secretary of the Treasury, are presumed to be correct.

We have been advised by the Office of Management and Budget that there would be no objection to the submission of this report to you from the standpoint of the Administration's program.

Sincerely,

A handwritten signature in cursive script that reads "Homer E. Moyer, Jr." The signature is written in dark ink and is positioned above the typed name.

Homer E. Moyer, Jr.

WAYNE JARVIS, LTD.

CUSTOMS AND
INTERNATIONAL TRADE LAW

55 EAST MONROE STREET

SUITE 1614

CHICAGO, ILLINOIS 60603

(312) 332-2430

February 19, 1980

Leo M. Gordon, Esq.
 Subcommittee on Monopolies
 and Commercial Law
 Committee on the Judiciary
 2136 Rayburn House Office Building
 Washington, D. C. 20515

Re: H. R. 6934
"Customs Courts Act of 1980"

Dear Leo:

This will supplement our various telephone conversations concerning the above proposed legislation.^{1/}

During our initial discussion you indicated that the exclusion of sureties from Section 2631(a),^{2/} of "Persons entitled to commence a civil action," resulted from a typographical omission. Accordingly, I will not comment further on any objections St. Paul Fire and Marine Insurance Company may have to the Section as it is presently drafted.

Our analysis indicates that, from the surety's perspective, there is only one substantive difference between S. 1654 and H. R. 6934. Section 1581 of S. 1654 provides, inter alia:

"(i)(1) The Court of International Trade shall not have jurisdiction—

* * *

"(C) of any civil action with respect to any effort by the United States to recover a civil fine or penalty or to enforce

^{1/} Unless otherwise noted, citations refer to the House Bill.

^{2/} By contrast, S. 1654 provides:

"§2631. Persons entitled to commence a civil action

"(a) A civil action contesting the denial, in whole or in part, of a protest under section 515 of the Tariff Act of 1930 may be commenced in the Court of International Trade by the person who filed the protest under section 514 of the Tariff Act of 1930, or by his estate, heirs, or successors or by a surety of such person in the transaction which is the subject of the protest." (Emphasis added)

a forfeiture, to recover upon a bond, or to recover customs duties, other than as specified in section 1582 of this title."^{3/}
(Emphasis added)

For reasons we have previously discussed, it is presently our belief that it would be preferable for the Court of International Trade ("the Court") to have jurisdiction over actions to recover upon a bond. However, without certain modifications and/or additions, the existing draft of the House Bill will create jurisdictional and procedural difficulties outweighing the advantages of leaving the District Courts.

The introductory language of existing Customs bond forms clearly explains that the principal (which may either be an importer or a customhouse broker) and the surety "are held and firmly bound unto the United States of America . . . jointly and severally." In practice, there is frequently no difference between actions to recover upon a bond and actions to collect Customs duties. Because the obligors are jointly and severally liable, an action instituted in the District Court by the United States will name both parties as defendants.^{4/} While the importer of record has both a statutory and contractual obligation to pay Customs assessments, the surety's obligation is merely contractual. The failure to name either a surety or the principal in a collection suit would be subject to a defense of failure to join an indispensable party.^{5/}

Once the suit has been instituted in the District Court, an initial procedural step is for the surety to file a cross-claim^{6/} against the importer and possibly a counter-claim^{7/} against the United States seeking declaratory and/or injunctive relief.

^{3/} The transfer provisions of Section 1582 are not applicable to actions to recover upon a bond or to recover customs duties.

^{4/} Unless the bond principal is insolvent.

^{5/} F.R.C.P. 12(b)

^{6/} F.R.C.P. 13

^{7/} Ibid.

Section 1583^{8/} merely empowers the Court to render judgment upon:

" . . . (2) any counterclaim of the United States to recover upon a bond or customs duties relating to such transaction." (Emphasis added)

As presently drafted, the Bill does not contemplate litigation between private parties before the Court, nor does it provide for the entry of judgments in favor of one private party against another.

This deficiency would prevent the Court from fully adjudicating the rights of all interested parties in, inter alia, the following circumstances:

(1) The Government institutes an action against an importer and a surety, jointly and severally, to collect dumping duties. The importer desires to, but cannot, institute a third-party proceeding against the foreign exporter, alleging fraud and breach of contract. The surety also desires to, but cannot, file a cross-claim against the bond principal, seeking exoneration and/or reimbursement.

(2) The Government institutes an action against the surety on a term bond of a licensed customhouse broker. Utilizing the bond as security, the broker obtained release of numerous merchandise from Customs custody on behalf of various actual importers. The broker is bankrupt. The surety desires to, but cannot, institute third-party proceedings against the importers, predicated upon theories of agency and unjust enrichment and seeking exoneration for the sums demanded by the Government.

In each of the foregoing cases,^{9/} the Defendants would be required to institute separate suits in a United States District Court or State Court. Such proceedings would obviously involve most of the factual and legal issues of the original suit.

^{8/} Entitled "Counterclaims".

^{9/} These examples are predicated upon actual cases being handled by our firm.

Arguably, the present language of Section 2633^{10/} is broad enough to empower the Court to provide by rule for counterclaims, cross-claims and third-party actions.

"(b) The Court of International Trade shall prescribe rules governing the summons, pleadings, and other papers, for their amendment, service, and filing, for consolidations, severances, suspensions of cases, and for other procedural matters." (Emphasis added)

Section 2643 of the Bill describes the "Relief" the Court will be able to fashion. We believe that (at the very least) it should be extensively redrafted. For example, Subsections (a), (b), and (c)(1) are all probably unnecessary in light of the broad powers granted the Court under Section 1585.^{11/} Secondly, the exhaustion language contained in Subsection (c)(1) also appears unnecessary in light of the language contained in Section 2637,^{12/} and more specifically in Subsection (c).^{13/} Section 2643 could possibly be revised as follows:

"§2643. Relief

"(a) Except as provided in paragraph (b) of this section, the Court of International Trade may order any form of relief that is appropriate in a civil action, including, but not limited to, money judgments, declaratory judgments, orders of remand, injunctions, and writs of mandamus and prohibition.

"(b) In ruling on a motion for a preliminary or permanent injunction, the Court shall consider whether the person making the request will be irreparably harmed if such an injunction is not granted, and the effect of granting such injunction on the public interest.

^{10/} Entitled "Procedure and fees".

^{11/} Entitled "Powers in law and equity".

^{12/} Entitled "Exhaustion of administrative remedies".

^{13/} It is also curious that the Congress must empower the Court to take actions "on its motion" (e.g., Sections 2644(b) (entitled "Decisions") and 2645 (entitled "Retrial or rehearing")).

"(c) The Court of International Trade may not grant an injunction or issue a writ of mandamus in any civil action commenced to review any determination of the Secretary of Labor or the Secretary of Commerce certifying or refusing to certify workers, communities, or firms as eligible for adjustment assistance under the Trade Act of 1974."

The Court should be utilized, as intended, to accommodate a vast body of cases the District Courts are presently ill-equipped to handle because of crowded dockets and lack of expertise. If Congress believes that the Court should "possess all the powers in law and equity of, or as conferred by statute upon, a District Court of the United States," then it should preserve that desire by guarding against needless specificity in detailing the Court's powers.

After you have reviewed this comment, I will be available to explore the matter in greater detail. Pending those discussions, I believe it would be appropriate to withhold final decision on whether I will testify on behalf of St. Paul during the Subcommittee Hearings on February 28th.

Cordially,

WAYNE JARVIS, LTD.

Wayne Jarvis

WJ:sf

*follows
Dy Lux 394*

WAYNE JARVIS, LTD.

CUSTOMS AND
INTERNATIONAL TRADE LAW

55 EAST MONROE STREET

SUITE 1614

CHICAGO, ILLINOIS 60603

(312) 339-2430

April 9, 1980

Leo M. Gordon, Esq.
 Subcommittee on Monopolies
 and Commercial Law
 Committee on the Judiciary
 2136 Rayburn House Office Building
 Washington, D. C. 20515

Re: H. R. 6934
"Customs Courts Act of 1980"

Dear Leo:

This will supplement our various discussions concerning the application of the proposed provisions of Sections 1582(a)(2) and (3) to prospective litigation in the Court of International Trade ("the Court").

My letter of February 19, 1980, discussed this subject and specifically indicated that to fully adjudicate the rights of all interested parties involved in actions arising under Sections 1582(a)(2) and (3), it would occasionally be necessary for the Court to entertain counterclaims (by or against the United States), cross-claims and third-party actions.

You have requested our opinion whether such actions would be considered substantive or procedural. If procedural, we have agreed that they can be provided for by rule under Section 2633(b).^{1/} If considered substantive, a separate jurisdictional grant would be required to fill a void in the Court's historical development.

Cross-Claims and Third Party Practice

Rules which authorize the filing of counterclaims, etc. are procedural and do not affect or enlarge substantive rights. 3 Moore's Federal Practice ¶13.02 at 13-57; Rule 13(d), Federal Rules of Civil Procedure; see also Hanna v. Plumer, 380 U.S. 460 (1965).

^{1/} "(b) The Court of International Trade shall prescribe rules governing the summons, pleadings, and other papers, for their amendment, service, and filing, for consolidations, severances, suspensions of cases, and for other procedural matters." (Emphasis added)

However, while courts may promulgate procedural rules which authorize how actions may be asserted, they may not enact rules which enlarge substantive rights not previously granted. Ultimately, the question is one of jurisdiction.

Since the Customs Court has historically been a "plaintiff's court," it has never had the opportunity to construe its jurisdictional limits in the context of counterclaims, cross-claims or third-party actions. Admittedly, such actions were not previously provided for by statute. However, in another context, the Court of Customs and Patent Appeals has definitely stated that under no circumstances may the Customs Court enlarge its jurisdiction by its own rules. United States v. Torch Mfg. Co., 62 CCPA 41, 43, CAD 1143 (1975). In 1956, Congress declared the Customs Court to be an Article III court. See also Michelin Tire Corp. v. United States, CRD 79-6 (Feb. 26, 1979), Cust. Bull. No. 13, Vol. 13. It is well-settled that the jurisdiction of Article III courts below the level of the Supreme Court is limited and entirely dependent upon implementation by Congress. United States v. Boe, 64 CCPA 11 n. 9, CAD 1177 (1976).

In the context of actions under Sections 1582(a)(2) and (3), the defendants will always be private parties. The Bill does not contain provisions empowering one private party to institute an independent action against another. This deficiency cannot be remedied by rule and such actions must be considered substantive.

Counterclaims Against the United States

The ability of a private party to assert a counterclaim against the United States presents a more difficult legal question. At the outset, it should be observed that a private party has the right to institute an independent action against the United States under Section 1581(i), which could assert matter identical to that raised by a counterclaim arising under Sections 1582(a)(2) or (3).

With respect to the possible assertion of counterclaims against the United States, the question of jurisdiction is also intimately related to the doctrine of sovereign immunity.

The general rule is that without specific statutory consent, no suit can be brought against the United States. United States v. Shaw, 309 U.S. 495, 500-01 (1940). It is permissible for any waiver of sovereign immunity to require or authorize suits to be brought only in designated forums. Shaw, supra, at 501. The general rule applies whether the action is in the form of an original action, counterclaim or cross-suit (Shaw, supra, at 503; United States v.

United States Fidelity & Guaranty Co., 309 U.S. 506 (1940)), as long as lack of consent is apparent from the statutes enacted by Congress.^{2/}

The courts, however, have carved out an exception to the general rule, to the extent the action against the United States does not seek affirmative relief, but only seeks a "set-off" (a liquidated demand asserted to diminish or extinguish the plaintiff's demand, which arises out of a different transaction and emerges from a contract) or "recoupment" (a demand arising out of the same transaction as the plaintiff's claim).^{3/}

Set-offs asserted against the United States may only be proved if the counterplaintiff complies with the requirements of Section 2406 of Title 28 of the United States Code.^{4/} Even then, set-offs as well as matters of recoupment will only diminish or extinguish the government's claim and not exceed it. In light of Shaw, supra, and U.S. Fidelity & Guaranty Co., supra, the law appears to be that:

"Without specific statutory consent, no suit may be brought against the United States. No officer by his action can confer jurisdiction. Even when suits are authorized they must be brought only in designated courts. The United States by the in-stitution of a civil action or proceeding subjects itself to: (1) a compulsory counterclaim asserting matter of recoupment, which arises out of the

2/ In United States v. Yellow Cab, 340 U.S. 543 (1951), the Court held that the Federal Tort Claims Act constituted a consent to suit against the government by means of a third-party action. The FTCA made the government liable as if it were a private party according to the laws of the state where the injury occurred and local law in this case authorized contribution from joint tortfeasors.

3/ With respect to litigation in the district courts, counterclaims under Rule 13 of the Federal Rules of Civil Procedure include matters in the nature of set-off and recoupment. Rule 13(a) and (b).

4/ "In an action by the United States against an individual, evidence supporting the defendant's claim for a credit shall not be admitted unless he first proves that such claim has been disallowed, in whole or in part, by the General Accounting Office, or that he has, at the time of the trial, obtained possession of vouchers not previously procurable and has been prevented from presenting such claim to the General Accounting Office by absence from the United States or unavoidable accident." 28 U.S.C. §2406.

transaction or occurrence that is the subject matter of the sovereign's suit, and is used to defeat or diminish recovery by the sovereign, but the institution of suit does not warrant an affirmative judgment against the United States; and (2) a set-off, which is a permissive counterclaim, to the extent that it is authorized under § 2406 in the court where the set-off is pleaded." 3 Moore's Federal Practice ¶13.28 at 13-716, 717.

Accordingly, the theory that when the United States institutes suit it consents by implication to the full and complete adjudication of all related matters does not appear to be widely accepted by the Federal judiciary. See United States v. Finn, 239 F.2d 679 (9th Cir. 1956); United States v. Gregory Park, 373 F.Supp. 317 (D.N.J. 1974); In re Oxford Marketing Ltd., 444 F.Supp. 399 (N.D. Ill. 1978), contra. United States v. Martin, 267 F.2d 764 (10th Cir. 1959).

To the extent the above principles can be applied to prospective litigation in the Court, and assuming the Court promulgates appropriate rules, it appears that private litigants would only be able to assert counterclaims against the United States in the nature of recoupment or set-off.

Although counterclaims against the United States may arguably be procedural in nature, in light of the foregoing limitations on relief, we believe that a substantive provision should also be included in the Bill to fully ensure this right to private litigants.

Recommendations

I. Section 1582 - Civil Actions Commenced By the United States.

If, as we discussed, the Court is granted the power to impanel juries, the jurisdictional grant contained in Section 1582(a) should be changed from original to exclusive jurisdiction. Sections 1582(b) and (c) should be stricken.

II. Section 1583 - Counterclaim and Cross-Claim.

We proposed that Section 1583 be amended to read as follows:

"The Court of International Trade shall have exclusive jurisdiction to render judgment upon any counterclaim or cross-claim asserted by any

party, provided such claim arises out of (1) an import transaction that is the subject matter of a civil action pending before the court, or (2) an action to recover upon a bond or customs duties relating to such transaction.

III. A separate section should be included in the Bill granting the Court the power to entertain third-party actions. The following proposed language has been modeled after the provisions of Rule 14 of the Federal Rules of Civil Procedure:

"Third-Party Practice

"At any time after commencement of an action under Section 1582(a)(2) or (3) of this title, a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the claim of the United States against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise, he must obtain leave on motion upon notice to all parties to the action. In addition to asserting his defenses to the third-party plaintiff's claim, the person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Section 1583 of this title. The third-party defendant may assert against the United States any defenses which the third-party plaintiff has to the claim of the United States. The third-party defendant may also assert any claim against the United States arising out of the transaction or occurrence that is the subject matter of the claim of the United States against the third-party plaintiff. The United States may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the claim of the United States against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses, in addition to any counterclaims and cross-claims

as provided in Section 1583 of this title. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this section against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant."

If it is decided that the particularities of third-party practice should be prescribed by rule, we suggest that Section 1583 be revised to read as follows:

"The Court of International Trade shall have exclusive jurisdiction to render judgment upon any counterclaim, cross-claim or third-party action asserted by any party, provided such claim arises out of (1) an import transaction that is the subject matter of a civil action pending before the court, or (2) an action to recover upon a bond or customs duties relating to such importation."
(Emphasis added)

IV. Section 2643 - Relief.

As stated in my letter of February 19th, I believe this section should be revised as follows:

"§ 2643. Relief.

"(a) Except as provided in paragraph (b) of this section, the Court of International Trade may order any form of relief that is appropriate in a civil action, including, but not limited to, money judgments, declaratory judgments, orders of remand, injunctions, and writs of mandamus and prohibition.

"(b) In ruling on a motion for a preliminary or permanent injunction, the Court shall consider whether the person making the request will be irreparably harmed if such an injunction is not granted, and the effect of granting such injunction on the public interest.

"(c) The Court of International Trade may not grant an injunction or issue a writ of mandamus

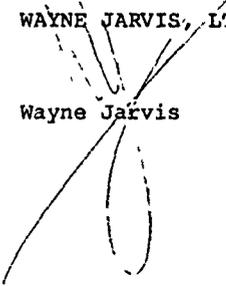
in any civil action commenced to review any determination of the Secretary of Labor or the Secretary of Commerce certifying or refusing to certify workers, communities, or firms as eligible for adjustment assistance under the Trade Act of 1974."

We appreciate this additional opportunity to comment on the Bill and are available at your convenience to discuss this matter in greater detail.

Cordially,

WAYNE JARVIS, LTD.

Wayne Jarvis

A handwritten signature in dark ink, appearing to be 'Wayne Jarvis', is written over the typed name. The signature is stylized with a large, sweeping loop at the end.

WJ:sf

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Statement by Donald W. Paley, Esq. Chairman, Committee on Customs Law, New York County Lawyers Association, on H.R. 6394, 96 Cong. 2nd Sess., introduced by Representative Rodino ("Customs Courts Act of 1980") to improve the Federal judicial machinery by clarifying and revising certain provisions on Title 28, United States Code, relating to the judiciary and judicial review of international trade matters.¹

RECOMMENDATION

It is recommended that the bill be approved, but with provisions deleted pertaining to counterclaim by the United States, for the reason set forth below.

STATEMENT

The New York County Lawyers Association is composed of over 10,000 attorneys practicing in and near the borough of Manhattan. The Committee on Customs Law is composed of private

1. This statement is issued by the Committee pursuant to the by-laws of the Association which permits such dissemination. It has not been submitted to the Board of Directors for approval and therefore does not necessarily represent the views of the Board.

practitioners, government attorneys in the Customs field, and staff attorneys with the United States Customs Court. The Committee participated in the drafting process of a companion bill, S.1654, and filed a report on that bill as originally introduced, with the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary on September 10, 1979.

We endorse the general principles and most of the provisions of H.R. 6394, with the exception of the counterclaim provisions contained in proposed new Section 1583 of Title 28 (pg. 9, line 11). Together with the Association of the Customs Bar, we strenuously opposed before the Senate the novel, dangerous, and inapposite transplantation into Customs jurisprudence of the Government counterclaim concept. There has been no provision for a counterclaim by the Government in actions brought by importers since the present system of Customs litigation was established by the creation of the Board of General Appraisers (now the Customs Court) in 1890. In such litigation the importer bears the burden of proving not only that the Government's classification or appraisement is erroneous but that its claim is correct. Injecting the concept of defending counterclaims (which may be extraneous to the original claim) would place an additional and unwarranted burden on the importer and effectively reduce - or even eliminate - the availability of judicial review.

To those with a working knowledge of Customs litigation procedures, it is apparent that the proposed provisions granting the United States the right to counterclaim (and to receive an affirmative money judgment in the amount of its counterclaim, as covered in proposed

new Section 2643 of Title 28 at pg. 27, line 17 of the bill) would have a tremendously chilling effect on the initiation of Customs litigation by importers.

Proposed new Section 1583 would allow the United States to assert and receive a judgment upon "any counterclaim asserted by the United States which arises out of an import transaction that is the subject matter of a civil action pending before the Court", and in addition, allows the United States to counterclaim "to recover upon a bond or Customs duties relating to such transaction."

As the Subcommittee is undoubtedly aware, Customs litigation is normally conducted upon the basis of multiple entries (in the hundreds or thousands) pending before the Court on various summonses filed by the importers against denied protests. Each summons, upon its filing before the Customs Court, becomes "a civil action pending before the Court" and each entry covered by such summons also becomes "an import transaction that is the subject of a civil action pending before the Court."

The normal conduct of litigation wherein multiple summonses and multiple entries (covered by such summonses) are involved contemplates the selection of a test case (usually covering one or several entries) by the filing of a complaint and an answer pertaining to that merchandise only. Thereafter, action on all other cases covering identical or similar merchandise, subject to the same legal and factual disputes as the test-case merchandise, is usually "suspended" by order of the Court, pending the outcome of the test case.

Consider this situation: An importer has filed 100 separate civil actions before the Court (by summons) covering 500 entries in

total. The importer files his complaint in Civil Action No. 1, covering one summons embracing five entries. The importer, let us say, is claiming the merchandise to be properly dutiable at a rate of 5% rather than 10% as assessed. Under the proposed bill, the Government, in its answer, could assert a counterclaim that the proper rate of duty should be 20%, and also that the appraised value of \$1.00 per unit is too low and the merchandise should be valued at \$2.00 per unit. Such counterclaim need not be limited to the five entries covered by the test case complaint, but under proposed Section 1583 could include the other 495 entries covered by the other 99 summonses in the files of the Court. At this stage the Government would have thus created a massive contingent duty liability for the test-case importer/plaintiff.

The counterclaim weapon is unnecessary because the present system adequately protects the revenue. Under the present system, in addition to defending the classification (or value), the Government is entitled to claim alternatively that the merchandise before the Court should be assessed at a higher rate (or value). A decision by the Customs Court that a higher rate of duty or valuation properly applies (other than that determined upon liquidation by Customs) becomes, in effect, a declaratory judgment under which the Government is authorized to apply the higher rate of duty or increased value to unliquidate entries pending before the Customs Service, or to future entries of such merchandise. Normally this is done by the publication of a notice in the Federal Register or Customs Bulletin, in the interest of fairness and of adequate notification to the importing community of a change in administrative practice flowing from the Court decision.

However, Section 1583 appears to go even much further than the situation discussed above in that it would allow the Government to introduce completely different issues relating to the classification or value of entirely different merchandise by way of counterclaim, thereby unnecessarily complicating the record and obscuring the issue which the importer set out to litigate. For example, even though the importer's action may have been brought to determine whether Customs was erroneously over-assessing his importations of electrical equipment, the Government would be able to counterclaim that wearing apparel imported by the same plaintiff on a different importation, the subject matter of a completely different civil action, should have been assessed at a higher rate than it was assessed (e.g.: because it was ornamented), or should have been appraised at a value higher than that at which it was appraised (e.g.: because a commission paid by the importer is dutiable). This would serve only to encumber and complicate the record and substantially delay the determination of the issue for which the importer instituted his action.

In short, we are concerned that proposed Section 1583 would, in effect, mandate an aggressive stance by Government attorneys by granting a potent and unnecessary weapon, the use of which would coerce many importers into forced abandonment of otherwise meritorious cases, and discourage other importers from pressing otherwise valid claims before the Customs Court. The mischief which could be wrought by the too-broad counterclaim provisions of proposed Section 1583 far outweighs any potential benefits to be gained from this section.

Furthermore, we are familiar with the views of the Association of the Customs Bar in opposing the counterclaim provision, expressed in its presentation to the Subcommittee on February 28, 1980 and are fully supportive of those views.

ALTERNATIVELY, THE PROVISIONS ALLOWING
THE GOVERNMENT TO COUNTERCLAIM SHOULD
BE LIMITED TO THOSE ENTRIES ON WHICH
A COMPLAINT HAS BEEN FILED

We are unalterably opposed to the counterclaim provision in its entirety. If the Subcommittee is persuaded that the counterclaim provisions should be retained, we urge that the language of Section 1583 be limited to permit the Government to counterclaim only on those entries under active litigation by the importer, i.e., those entries covered by the importers's complaint.

The Senate's intention to limit the scope of the new counterclaim procedures is quite evident in its discussion of proposed Section 1583 of the Senate bill. (See Senate Report No. 96-466, 96 Cong., 1st Sess. on S.1654, pg. 13). Normally, a counterclaim is asserted in the answer (see Rule 13 of the Federal Rules of Civil Procedure) which follows the complaint. We therefore urge that if the counterclaim provisions are to be retained at all, proposed Section 1583 be redrafted to read as follows (new language underscored):

"The Court of International Trade shall
have exclusive jurisdiction to render
judgment upon (1) any counterclaim
asserted by the United States which
arises out of an import transaction that

is the subject matter of a civil action pending before the Court in which a complaint has been filed, or (2) any counterclaim of the United States to recover upon a bond or customs duties relating to such transaction."

Under the provision as so amended, importers would at least have some measure of assurance that in initiating litigation in the Customs Court, they are not exposing themselves to huge "back-door" duty liabilities on every entry previously made or to be made, which may ultimately be pending before the Customs Court for disposition.

DISSENTING VIEW

A member of the Committee who is on the staff of the Department of Justice in the New York Field Office for Customs Litigation advises that he dissents from the views stated herein and endorses the principle that the United States should have the same right of counterclaim in the Customs Court it now enjoys in other Courts.

Respectfully submitted,

Donald W. Paley
Donald W. Paley
Committee Chairman

96TH CONGRESS - SECOND SESSION

HEARINGS BEFORE
SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ON

H.R. 6394
THE CUSTOMS COURTS ACT OF 1980

STATEMENT

on behalf of

THE CUSTOMS LAW COMMITTEE

of the

LOS ANGELES COUNTY BAR ASSOCIATION

March 5, 1980

SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW
HOUSE COMMITTEE ON THE JUDICIARYHEARINGS ON H. R. 6394
THE CUSTOMS COURTS ACT OF 1980

Mr. Chairman and members of the Subcommittee:

This statement is respectfully submitted on behalf of the Customs Law Committee of the Los Angeles County Bar Association. The Committee is composed of attorneys engaged in the general practice of law with particular emphasis on international, commercial, and trade matters including taxation and regulation by State, County, City and Federal Agencies, and Federal District Courts litigation; house counsel for companies engaged in international trade; and attorneys engaged primarily in Customs law practice before the Customs Courts, the United States Customs Service, and other Federal Agencies, Boards and Commissions.

Our Committee has reviewed the draft of the Customs Courts Act of 1980 and is particularly concerned about the impact of the proposed legislation on parties litigant whose causes of action arise at points distant from the Headquarters of the Customs Court and proposed Court of International Trade, and counsel resident at locations distant from New York. We urge the Subcommittee to consider the desirability of holding hearings at Los Angeles, which ranks second only to New York Seaport in the amount of Customs duties collected per annum, and at other principal ports of entry at which Customs litigation arises, to afford parties litigant and counsel at locations distant from New York an opportunity to give testimony with respect to the proposed legislation. This procedure was followed by the House Committee on Ways and Means Subcommittee on

International Trade with respect to H.R. 8149, the Customs Procedural Reform and Simplification Act of 1978, Public Law 95-410. As in the case of P.L. 95-410, we believe testimony provided at other ports would supply the Members of the Subcommittee with valuable background information necessary to insure that the proposed legislation will afford to parties litigant throughout the United States equal access to judicial review in international trade matters.

We support enactment of legislation to enlarge the powers of the Customs Court and to improve the machinery for judicial review in international trade matters, but urge consideration of the concerns expressed herein, and modification of the provisions which we believe would adversely affect the rights of parties litigant, particularly at locations distant from New York.

Our objections and suggestions are respectfully submitted, referring to the provisions of proposed Title 28 in the order in which they appear in H.R. 6394:

Sec. 201, 28 U.S.C. 1582. Civil Actions commenced by the United States

Our Committee concurs with the statement filed on behalf of the American Bar Association (pages 10-11) questioning the granting of exclusive jurisdiction to the Court of International Trade over civil actions commenced by the United States for the recovery of penalties, customs duties, and under bonds, as provided in proposed Sec. 1582. We see no reason for burdening the Court of International Trade with all collection suits initiated at all ports in the United States under Customs bonds or for the recovery of customs duties, nor for interpleading the importer in a suit by the United States against the surety on a

bond. Such suits do not require the special expertise of the Customs Court or the Court of International Trade. Also executions on judgments can be more effectively handled by the District Courts and their Marshals.

Comprehensive consideration has only recently been given by the Congress and the Committees on the Judiciary to the subject of judicial review of penalty cases arising under Sec. 592 of the Tariff Act of 1930, 19 U.S.C. 1592. In enactment of the Customs Procedural Reform and Simplification Act of 1978, Public Law 95-410, the question of jurisdiction in the Customs Court or the District Courts was extensively considered, and the decision made to leave the jurisdiction in the District Courts. We agree that there should be a provision for transfer of penalty cases to the Court of International Trade when the issues raised require its particular expertise. However, we believe there should be an opportunity to test the operation of the well considered provisions of Sec. 592(e) as amended by P.L. 95-410 before changing the law again to require that all such suits shall be brought in the Court of International Trade, whether or not the particular issues raised require the special expertise of the Court of International Trade. At ports of entry other than New York, the convenience of filing pleadings locally, dealing with local counsel and obtaining hearings on motions as well as trials can be handled more economically in the District Courts.

The requirement of Sec. 1582(a) that suits filed by the United States to collect civil penalties under Sec. 592 of the Tariff Act of 1930 be filed in the Court of International Trade rather than the District Courts would greatly inconvenience the government as well as the importer. Most penalties under Sec. 592 are resolved through administrative procedures which are often extensive and time consuming.

Referral of penalties to the United States Attorney for initiation of an action under Sec. 592 occurs when efforts for settlement administratively have failed, usually at a date close to the expiration of the statutory period. Such cases usually involve voluminous documentation, including not only the entry documents covering many entry transactions, but also penalty notices, petitions of the importer, reports of Customs agents and the Penalties officers, and the decision of Customs Headquarters addressed to the District Director. When these documents are transmitted by the District Director to the United States Attorney, consultation with the local Customs officials is usually essential to the preparation of the action.

Efforts toward settlement without trial, before and after the filing of such suits, can also be handled much more expeditiously between counsel located in the same geographical area.

We therefore urge that jurisdiction be retained primarily in the District Courts with provision for transfer to the Court of International Trade only when the issues require its special expertise.

We also concur in the views expressed in the statement of the American Bar Association (page 11) that jurisdiction should at least be concurrent in the District Courts and in the Court of International Trade; that the right to transfer to the District Court should not be limited solely to cases in which a jury trial is desired; and that a motion to transfer to the District Court when a jury trial is desired, as provided in 19 U.S.C 1582(b)(1) should be granted as a matter of right.

Sec. 201, 28 U.S.C. 1583 - Counterclaims

Our Committee opposes enactment of the provision for counterclaims by the United States in proposed 28 U.S.C. 1583. We concur with the statement of Andrew P. Vance on behalf of the Association of the Customs Bar regarding this section, and wish to add the following comments.

The administrative decisions of the Customs Service regarding the classification or value of imported articles are usually the result of considerable deliberation. Frequently, an importer has requested a ruling and has submitted legal arguments in support of his position. This may be done before liquidation of an entry by Request for Internal Advice in accordance with the provisions of 19 CFR Part 177, or by Application for Further Review filed with a protest after liquidation of an entry, pursuant to 19 U.S.C. 1514 and 1515. The Customs Service considers the arguments and makes a decision based on its interpretation of the law. If the decision is adverse to the importer, he files a civil action after denial of his protest filed upon liquidation of the entry. This commences the procedure for seeking judicial review, which should not be inhibited by the threat of an even higher assessment.

Permitting the assertion of counterclaims by the United States in the Court of International Trade is inconsistent with time limitations against the government fixed in Secs. 501 and 514 of the Tariff Act of 1930, 19 U.S.C. 1501 and 1514 (copies attached).

CUSTOMS DUTIES

19 § 1501

§ 1501. Voluntary reliquidations by appropriate customs officer; notice

A liquidation made in accordance with section 1500 of this title or any reliquidation thereof made in accordance with this section may be reliquidated in any respect by the appropriate customs officer on his own initiative, notwithstanding the filing of a protest, within ninety days from the date on which notice of the original liquidation is given to the importer, his consignee or agent. Notice of such reliquidation shall be given in the manner prescribed with respect to original liquidations under section 1500(e) of this title.

As amended June 2, 1970, Pub.L. 91-271, Title II, § 205, 84 Stat. 283.

CUSTOMS DUTIES

19 § 1514

§ 1514. Protest against decision of appropriate customs officer—Finality of decisions; return of papers

(a) Except as provided in section 1501 of this title (relating to voluntary reliquidations), section 1516 of this title (relating to petitions by American manufacturers, producers, and wholesalers), section 1520 of this title (relating to refunds and errors), and section 1521 of this title (relating to reliquidations on account of fraud), decisions of the appropriate customs officer, including the legality of all orders and findings entering into the same, as to—

- (1) the appraised value of merchandise;
- (2) the classification and rate and amount of duties chargeable;
- (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
- (4) the exclusion of merchandise from entry or delivery under any provision of the customs laws;
- (5) the liquidation or reliquidation of an entry, or any modification thereof;
- (6) the refusal to pay a claim for drawback; and
- (7) the refusal to reliquidate an entry under section 1520(c) of this title,

shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Customs Court in accordance with section 2632 of Title 28 within the time prescribed by section 2631 of that title. When a judgment or order of the United States Customs Court has become final, the papers transmitted shall be returned, together with a copy of the judgment or order to the appropriate customs officer, who shall take action accordingly.

Under 19 U.S.C. 1514, decisions of the appropriate Customs officer which may be protested by the importer become final and conclusive upon the United States and any officer thereof after the expiration of 90 days. Under 19 U.S.C. 1501, the appropriate Customs officer may, on his own initiative, voluntarily reliquidate an entry in any respect, only within the 90-day period after liquidation. Assertion of a counterclaim thereafter, when an importer's claim has reached the Court of International Trade, should accordingly not entitle the United States to a more favorable position than 19 U.S.C. 1501 permits.

When the case comes before the Court, the final administrative decision of the Customs Service is clothed with the presumption of correctness by 28 U.S.C. Sec. 2635(a), Sec. 2639(a) of the proposed statute. The burden of proof which the importer bears is two-fold: (1) to overcome the presumption of correctness; and (2) to prove that his claim is correct. Thus, the Government can obtain a favorable decision from the Customs Court without presenting any evidence or testimony, if the importer fails to meet his onerous statutory burden.

Allowing the Government the right to counterclaim in the Customs Court for a higher value or rate of duty will impose awesome risks on the importer so onerous as to effectively preclude a decision to seek judicial review. Few importers would be willing to contest administrative decisions believed to be incorrect, if faced with these potential risks.

Under present law, if the Court sustains an alternative claim of the Government with respect to the merchandise protested, the higher assessment is applied only to unliquidated entries. However, under proposed Sec. 1583, increased duties would be applied as well to the entry transaction the subject of the litigation. Since imported products are usually sold shortly after importation, long before the litigation is initiated, an importer cannot adjust his prices to recapture additional duty liability incurred because of a counterclaim. In fact, additional duties imposed as a result of a counterclaim could put an importer out of business.

The proposal to permit a Government counterclaim arising out of an import transaction that is the subject of a civil action pending before the Court is much too broad and should be deleted.

After an importer has paid the duties assessed by the Customs Service, as a condition precedent to filing an action in the Customs Court, he should be permitted to seek judicial review of the assessment made, without subjecting himself to a liability more severe than already imposed by the Customs Service in the administrative proceedings.

The Government's right to modify its position after it has made the assessment complained of should be no broader than allowed to the importer. Proposed 28 U.S.C. 2638 provides that the Court will consider new grounds asserted by an importer in support of a civil action only if

they apply to the same merchandise the subject of the protest and are related to the same administrative decision listed in Sec. 514 of the Tariff Act of 1930 that was contested in the protest.

Counterclaims, if permitted at all, should be similarly limited, and prospective in effect, as under present law.

Sec. 301, 28 U.S.C. 2635. Filing of Official Documents

Sec. 2635 enumerates the documents to be forwarded to the Court of International Trade by the appropriate customs officer, upon service of the summons on the Secretary of the Treasury in any civil action contesting the denial of a protest under Sec. 515 of the Tariff Act of 1930 or the denial of a petition under section 516 of that Act. The provisions of proposed Sec. 2635(a)(1) of Title 28, copy attached, are substantially the same as Sec. 2632(f) of Title 28 as amended by the Customs Courts Act of 1970, P.L. 91-271 (copy attached), except that there has been added to proposed Sec. 2635 (a)(1) a new document, "(1), a copy of any bond relating to the entry."

JUDICIARY—PROCEDURE 28 § 2632

(f) Upon service of the summons on the Secretary of the Treasury or his designee in any action brought under subsection (a)(1) or (a)(2), the appropriate customs officer shall forthwith transmit the following items, if they exist, to the United States Customs Court as part of the official record of the civil action: (1) consumption or other entry; (2) commercial invoice; (3) special Customs invoice; (4) copy of protest; (5) copy of denial of protest in whole or in part; (6) importer's exhibits; (7) official samples; (8) any official laboratory reports; and (9) the summary sheet. If any of the aforesaid items do not exist in the particular case, an affirmative statement to that effect shall be transmitted as part of the official record.

As amended June 2, 1970, Pub.L. 91-271, Title I, § 113, 84 Stat. 279;
Jan. 3, 1975, Pub.L. 93-618, Title III, § 321(f)(3), 88 Stat. 2048.

3 "§ 2635. Filing of official documents

4 "(a)(1) Upon service of the summons on the Secretary of
5 the Treasury in any civil action contesting the denial of a
6 protest under section 515 of the Tariff Act of 1930 or the
7 denial of a petition under section 516 of such Act, the appro-
8 priate customs officer shall forthwith transmit to the clerk of
9 the Court of International Trade, as prescribed by its rules,
10 and as a part of the official record—

11 "(A) the consumption or other entry and the entry
12 summary;

13 "(B) the commercial invoice;

14 "(C) the special customs invoice;

15 "(D) a copy of the protest or petition;

16 "(E) a copy of the denial, in whole or in part, of
17 the protest or petition;

18 "(F) the importer's exhibits;

19 "(G) the official and other representative samples;

20 "(H) any official laboratory reports; and

21 "(I) a copy of any bond relating to the entry.

22 "(2) If any of the items listed in paragraph (1) of this
23 subsection do not exist in a particular civil action, an affirma-
24 tive statement to that effect shall be transmitted to the clerk
25 of the court.

We question the need for transmitting to the Court a copy of the bond. Bonds usually cover all entries made by an importer during a period of one year at one port (The Term Bond), or at all ports in the United States (The General Term Bond). Most firms importing commercially, file with the Customs Service a term bond of a general nature to cover all importations made during a one-year period. Importers with a lesser volume of transactions may utilize the bond of the custom house broker, allowing the merchandise to be entered in the broker's name under his bond. Few importers supply Customs with Single Entry Bonds.

The only actions in which a copy of the Bond should be required are civil actions commenced by the United States under proposed Sec. 1582(a)(2) to recover upon a bond relating to the importation of merchandise, and possibly a civil action commenced by the United States under proposed Sec. 1582(a)(3) to recover customs duties. Although we believe these collection actions should be left in the District Courts, since they do not require the particular expertise of the Customs Court, these comments are offered in the event jurisdiction over these actions is given to the Court of International Trade.

It is suggested that Sec. 2635(a)(1) (I) be amended to specify that a copy of the bond should be transmitted to the Court only when the civil action in which the summons is served was commenced by the United States under Sec. 1582(a)(2) or (3). The following language is suggested:

Sec. 2635(a)(1)

(I) a copy of any bond relating to the entry, in civil actions initiated by the United States under Sec. 1582 (a)(2) or (3); and

We question the inclusion of proposed Sec. 2635(a)(1)(F) and (G), requiring the appropriate customs officer to send to the Court as part of the official record,

"(F) the importer's exhibits;

(G) the official and other representative samples;"

Although these provisions are now contained in Sec. 2632(f) ["(6) importer's exhibits; and (7) official samples;"], the Court, with its enlarged jurisdiction, would soon be burdened with storage of merchandise samples and exhibits. Since there is often a lapse of at least a year or two between the filing of an action with the Court and the trial of the case, receipt and retention of samples and exhibits could well become burdensome to the Court. In addition, a very low percentage of the cases filed in the Customs Court ever come to trial.

We suggest that in lieu of forwarding the samples and exhibits, the appropriate Customs officials should be required to report to the Court the fact that there are samples and/or exhibits, but that such samples or exhibits should be retained at the port of entry until the time of trial. At that time, samples and exhibits can be produced and offered in evidence, after identification and authentication by witnesses for the respective parties. This procedure (except for notification to the Court) was followed prior to enactment of Public Law 91-271, the Customs Courts Act of 1970.

It is suggested that Sec. 2635(a)(1)(F) and (G) be amended to read as follows:

"(F) a report identifying the importer's exhibits received and retained in the custody of the appropriate Customs Officials at the port of entry;

(G) a report identifying the official and other representative samples retained in the custody of the appropriate Customs officials at the port of entry;"

In addition, there should be added to Sec. 2625(a)(1) a provision requiring the appropriate customs officials to transmit to the Court such other documents as may be appropriate to the subject of the litigation. For example, in cases involving claims for duty-free entry under Item 800.00 or duty-free allowance of the value of fabricated components of U.S. origin under Item 807.00 of the Tariff Schedules of the United States, the affidavit of the importer on Customs Form 3311 and declaration of the foreign shipper or assembler, required by the Customs Regulations, should be included in the documents required to be transmitted to the Court. In cases involving drawback, other documents peculiar to those transactions may be material to litigation. In cases involving alleged failure to comply with the terms of Temporary Importation Bonds, the bond should be forwarded.

It is therefore suggested that Sec. 2635(a)(1) be further amended by adding a new paragraph (J) reading as follows:

(J) any other documents required to be filed with the entry papers which are relevant and material to the protested decision.

Sec. 301, 28 U.S.C. 2637(a) - Exhaustion of Administrative Remedies

This section provides for the filing of an action only if all liquidated duties, charges or exactions have been paid and would permit filing of an action by a surety company upon payment of duties up to the amount of the surety bond, and for a refund of such duties as may be ordered refunded to the surety company, up to the amount of its bond.

Provision should be made for refund to the surety only of that portion of the duties ordered refunded which the surety in fact paid. The claims made in a protest may request a refund of a portion of the duties initially deposited at the time of entry by the actual importer and as to such duties, they should be ordered refunded to the importer of record and not to the surety company, whose interest is usually related only to the amount of increased duties payable at the time of liquidation. For example, in the case of merchandise claimed to be free as American Goods Returned or fabricated components assembled abroad entitled to duty-free allowance, the entire amount of duty or a substantial portion thereof, deposited at the time of entry, may be recovered as a result of an action filed in the Court of International Trade. The proposed provision should not award to the surety company duties deposited by the importer.

Sec. 301, 28 U.S.C. §2643. Relief -- Entry of Money Judgments for or Against the United States

For the reasons set out in our discussion of counter claims, the provision for entry of money judgments for the United States should be deleted.

In addition, we question the advisability of burdening the Customs Court or the Court of International Trade with entry of a money judgment against the United States, requiring a determination of the exact amount of duty refundable. This would require access to accounting data not normally in the hands of the Customs Court. For this reason, under present law, the Customs Court renders a judgment directing the Customs officials at the port of entry to reliquidate the entry in accordance with the judgment order of the Court. A determination is then made by the accounting officials at the Customs District or Region of the amount actually deposited, which is not always reflected on the entry documents.

In the case of warehouse entries, for example, the duty is paid on withdrawal of the merchandise from warehouse. It is not customary nor does 28 U.S.C. 2632 nor proposed 28 U.S.C. 2635(a)(1) provide for the Customs officials at the port of entry to forward to the Court the Warehouse Withdrawal forms which reflect the duty actually paid as the merchandise was withdrawn from warehouse. The warehouse entry itself merely reflects the estimated duties calculated by the customs house broker at the time the warehouse entry was filed, and not the duties actually paid as the merchandise was withdrawn, at the rate of duty in effect at that time.

Requiring the Court of International Trade to issue a money judgment would accordingly burden the Court with accounting data which is often voluminous and not available to the Court. Such data is available to the Customs District or Region where the controversy arose. Procedurally, the Customs officials at the port of entry recompute the duty based on

the judgment order of the Court and authorize the refund to be made. The refund is then issued by a U. S. Disbursing Officer whose office is usually in a different city.

The procedure now followed also permits the Customs officials at the port of entry to properly allocate the amount to be refunded to the entry transactions involved. Issuance of a money judgment by the Court would leave uncompleted the accounting computations required at the port of entry to properly balance the customs accounts. The documents forwarded to the Court by the field officers are also original documents required to be returned to Customs District or Region for reassociation with its files. These documents are often needed for other purposes, such as claims for drawback on other merchandise covered by the same entry.

In addition, when refunds are handled by the Customs Service at the port of entry, it is the practice of the Service to offset refunds against unpaid increased duties payable by the same importer. Issuance of money judgments by the Court would deprive the Customs Service of the financial control of accounts now exercised at the Customs District or Region.

Small Claims Division

The need for a Small Claims Division of the United States Customs Court or Court of International Trade is seriously questioned.

It has been proposed that a Small Claims Division be provided for claims of returning tourists and other matters of a unique nature unrelated to the issues regularly coming before the Court. The incidence of such claims is believed to be very small. Since the duty-free exemption for returning tourists was increased by the Customs Procedural Reform and Simplification Act of 1978 (Public Law 95-410) to \$300, with duty assessed at 10% on the next \$600, there is relatively little reason to anticipate duty disputes between returning tourists and the U.S. Customs Service.

Litigation in the Customs Court arises principally from objections of the importer or domestic interests to duty assessments on commercial shipments. Most imported merchandise is imported in repeated shipments by many importers. It is difficult to conceive of an issue arising on commercial shipments which could properly be handled as a small claim without precedential value, without violation of the Constitutional provision in Article I, Sec. 8 that all Customs duties shall be uniformly assessed throughout the United States. If decisions of the proposed Small Claims Division were not precedential, unequal treatment of importers bringing in identical merchandise in different Districts would be certain to result.

It is apparent that the proposals before the Committee to establish a Small Claims Division within the Court would create a dilemma which does not appear to be resolvable. If, as has been suggested, a Small Claims Division is established to render decisions on limited evidentiary records, without precedential effect, the Constitutional mandate that Customs duties shall be uniformly assessed would be violated, in the sense that a successful importer claimant would be granted a favorable decision on classification or appraisement that would not be extended to the general trading public. On the other hand, were decisions of the Court in its Small Claims Division published with precedential effect, the potential for prejudice to other importers confronted with the same issues of classification or appraisement could be enormous. Consider the possibility of an issue presented in the Small Claims Division inadequately and informally on a minimal record, establishing on the basis of stare decisis the law of the case. Other importers with much more at stake desiring to fully present the issues to the Court in full-blown litigation would certainly be disadvantaged by an adverse decision of the Small Claims Division having precedential effect.

Affording a hearing to parties in small claims at all ports throughout the United States would also be very costly. While small claims were routinely handled by the Customs Court prior to 1970, when the Court held regular sessions at ports of entry throughout the United States, such hearings are now scheduled at ports outside of New York infrequently, only when cases are noticed for trial. Scheduling of Court sessions throughout the country for the handling of small claims requiring the attendance of

a Judge and counsel for the Government would involve excessive expense. Unless hearings were provided in every Customs District, a Small Claims Division would not benefit importers outside of New York.

Establishment of a Small Claims Division for cases involving duty assessments of up to \$5,000 could include many of the cases filed under 19 U.S.C. 1515. Customs duties now average well under 10% ad valorem, and substantial additional reductions are being made under the recent round of multilateral trade negotiations. A duty assessment of \$5,000 could represent duty at the rate of 5%, for example, on merchandise valued at \$100,000, but would qualify for handling as a small claim on the basis of the amount of duty assessed, notwithstanding that the same claim may be asserted by the same and other importers in later shipments.

Identical claims are usually the subject of thousands of other protests filed with the United States Customs Service and actions filed in the United States Customs Court on other importations of the same kind of merchandise. For example, 50,000 plywood cases were suspended under the plywood test case. This has been the usual nature of the litigation coming before the Customs Court.

Small claims can be and are presently handled in the Customs Court. Such claims have been handled, traditionally, by suspension under a test case initiated on behalf of an importer with a substantial financial interest in an issue. When the legal principle has been established in the test case litigation, small claims can be processed under summary procedures authorized by the rules of the Court. Since protests involving

small claims can be suspended in the field under a test case pending before the Court for up to two years and can be suspended in the files of the Court until the test case litigation is concluded, it is doubtful that the incidence of claims not covered by such test cases warrants establishment of a Small Claims Division.

In addition, small claims can be and have been brought before the Court. See Andrew Akin v. United States, 76 Cust. Ct. 15, C.D. 4629; affirmed in 64 CCPA 68, C.A.D. 1185 (1977) involving a controversy over assessment of the duty of \$1.20 on hiking boots purchased in Canada by a U. S. citizen of the Indian race, for his personal use.

Small claims in the Customs Court differ materially from small claims in the Tax Court or in local jurisdictions. Each taxpayer by the nature of tax returns and the factual basis of disputes with the Internal Revenue Service has a unique case. Most other small claims courts involve two private parties, each appearing without counsel. In the Court of International Trade, however, it is assumed the government would always be represented by counsel.

Although proceedings before the Customs Court have become more formal and legalistic, involving considerable expense, provision can be made by rule of the Court to permit trials without interrogatories and without discovery, upon application of the parties, so that costs could be substantially reduced. Since the Customs Court has, by rule, provided for the suspension and subsequent submission of cases, including small claims, on Submissions on Agreed Statements of Fact, other appropriate

summary procedures can and should be provided by rule of the Court for the handling of small claims, without the need for a special provision in the law establishing a Small Claims Division.

Proposed Amendment of 19 U.S.C. 1514 to Eliminate the Requirement of Only One Protest per Category of Merchandise

It is urged that, in the comprehensive re-enactment of the legislation relating to the United States Customs Court, Sec. 514 of the Tariff Act of 1930, 19 U.S.C. 1514, should be amended to restore the orderly litigation of issues which can be most expeditiously and efficiently handled as separate actions.

Prior to 1970, separate actions were provided for valuation issues (initiated under 19 U.S.C. 501) and classification issues (initiated under 19 U.S.C. 1514). Prior to 1970, the separate litigation of different issues involving merchandise imported on the same entry was encouraged, to permit the assignment of different issues to Divisions of the Court according to subject matter. This system permitted an importer to recover overpayments of duty as various issues were resolved, without requiring the resolution of all issues involving other merchandise covered by the same entry. While some issues may be vigorously contested and may require extensive evidence, other issues relating to the same merchandise may be resolved or submitted on agreed statements of the facts. Requiring the importer to resolve all issues in one action permits the Government to delay the refunding of some of the duties assessed in excess of the amounts legally payable on one class of merchandise or one issue, while the parties litigate other unrelated issues involving the same or other merchandise covered by the same entry.

While there is no doubt that multiple issues can be determined by the Court in one law suit, the cost of litigation has escalated to such a degree as to discourage litigation of cases in which the issues are so diverse as to greatly extend the time of trial and the scope of the evidence required. The result has been the waiver, abandonment or dismissal of many claims.

The provision of 19 U.S.C. 1514 restricting protests to only one for each category of merchandise covered by an entry has adversely affected the rights of parties to litigate different issues.

For example, the issue of import surcharge assessed under Item 948.00, Tariff Schedules of the United States, pursuant to Presidential Proclamation 4074 of August 15, 1971, applied to all merchandise entered between August 15 and December 17, 1971. In addition, various other classification and valuation issues arose regarding merchandise imported during that period. When the entries involving surcharge were liquidated, counsel for importers initially included the claim against imposition and assessment of the surcharge with such other substantive claims as were appropriate with respect to value or classification or other assessments on the same merchandise covered by the same entry. Field Officers of the Customs Service may review or suspend protests in the field for two years under 19 U.S.C. 1515. That period was subsequently extended to five years in the case of protests against imposition of the import surcharge, by Public Law 93-618. Other issues raised with respect to the same merchandise were not always suspensible in the field. Accordingly, the Customs officials at New York and Los Angeles, among other ports, from

time to time requested that the import surcharge claims be made the subject of separate protests, on which administrative review would be withheld in the field to await a decision in the test case then being litigated. This procedure permitted the retention of the surcharge claims in the field offices, without deluging the files of the Customs Court with thousands of law suits required to be filed within 180 days after denial by the Field Officers of the administrative claims under 19 U.S.C. 1515. It was believed that this procedure would permit resolution of the substantive issues other than the surcharge, separately, permitting the importer to recover other excess assessments without awaiting resolution of the highly contested surcharge issue.

The import surcharge assessments have been sustained in two test cases. United States v. Yoshida International, Inc., 526 F. 2d 560, 63 CCPA 15, C.A.D. 1160 (1975). Alcan Sales, Div. of Aluminum Corporation v. United States, 76 Cust. Ct. 41, C.D. 4633 (1976), affirmed in 534 F. 2d 920, 63 CCPA 83, C.A.D. 1170 (1976). While the litigation in the Customs Courts was concluded with holdings that the assessments were properly made, based on the Trading with the Enemy Act, there is now pending before the Circuit Court of Appeals in the 9th Circuit, a test case challenging the Government's right to retain the import surcharge assessments under the Trading with the Enemy Act, now that the emergency in effect at the time the assessments were imposed has passed.

Since 19 U.S.C. 1514 states that only one protest may be filed per category of merchandise (treating the limitation as a restriction based

on merchandise rather than issue), other claims which were the subject of separate protests have been dismissed on the technical ground that only one protest is permitted under the law. Minox Corporation D/o Berkey Photo, Inc. v. United States, 77 Cust. Ct. 110, C.D. 4680 (1976). Ataka America, Inc. v. United States, 79 Cust. Ct. 135, C.D. 4724 (1977). Webcor Electronics v. United States, 79 Cust. Ct. 137, C.D. 4725 (1977). Sanyo Electric, Inc. v. United States, 81 Cust. Ct. 114, C.D. 4775 (1978).

While the importers have contended that the Customs Service should have numbered the several claims filed within the 90 day protest period as one protest, as was done at some ports, the unduly restrictive language of 19 U.S.C. Sec. 1514 has deprived parties plaintiff of their day in Court, as reflected in the decisions cited above.

It is therefore suggested that 19 U.S.C. 1514 be amended to eliminate the unduly restrictive language and to permit the separate litigation of claims involving separate issues, even when the same category of merchandise may be involved. Legislation designed to afford parties litigant the fundamental right of judicial review should not be couched in terms which in fact deprive the parties litigant of the access to the Courts which the legislation was intended and designed to grant.

There is no incentive to importers to file numerous law suits on their importations. Costs of litigation alone militate against such a policy. However, importers should be allowed to file separate suits to contest separate assessments, when deemed appropriate in the judgment

of their counsel. This would expedite the presentation of legal and factual issues to the Court, with quicker resolution of controversies between those engaged in international trade and the Customs Service, and permit the recovery of overpayments of duty based on separate assessments, as in the case of import surcharge and other value or classification questions involving the same merchandise.

It is therefore suggested that Sec. 514 of the Tariff Act of 1930 as amended by Public Law 91-271, 19 U.S.C. 1514, be amended by deleting from par. (b)(1) the second sentence reading:

...Only one protest may be filed for each entry of merchandise, except that where the entry covers merchandise of different categories, a separate protest may be filed for each category

This would remove a limitation which has been an inequitable bar to the reasonable and expeditious judicial review to which all parties are entitled.

The Committee on Customs Law of the Los Angeles County Bar Association greatly appreciates the privilege and opportunity of commenting on the proposed Customs Courts Act of 1980 and hopes that its comments and suggestions may assist the Members of the Subcommittee in their deliberations.

If hearings are scheduled at Los Angeles, we would appreciate an opportunity to comment further.

Respectfully submitted,



Peter de Krasel
Chairman, Customs Law Committee

Los Angeles County Bar Association

96TH CONGRESS
2D SESSION

H. R. 6394

To improve the Federal judicial machinery by clarifying and revising certain provisions of title 28, United States Code, relating to the judiciary and judicial review of international trade matters, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 31, 1980

Mr. RODINO introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To improve the Federal judicial machinery by clarifying and revising certain provisions of title 28, United States Code, relating to the judiciary and judicial review of international trade matters, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be cited as the "Customs Courts Act of
4 1980".

1 TITLE I—COMPOSITION OF THE COURT OF IN-
2 TERNATIONAL TRADE AND ASSIGNMENT OF
3 JUDGES TO OTHER COURTS

4 COMPOSITION OF COURT

5 SEC. 101. Section 251 of title 28, United States Code,
6 is amended to read as follows:

7 **“§ 251. Appointment and number of judges; offices**

8 “(a) The President shall appoint, by and with the advice
9 and consent of the Senate, nine judges who shall constitute a
10 court of record to be known as the United States Court of
11 International Trade. The court is a court established under
12 article III of the Constitution of the United States.

13 “(b) The President shall designate one of the judges of
14 the Court of International Trade who is less than seventy
15 years of age to serve as chief judge. The chief judge shall
16 continue to serve as chief judge until he reaches the age of
17 seventy years and another judge is designated as chief judge
18 by the President. After the designation of another judge to
19 serve as chief judge, the former chief judge may continue to
20 serve as a judge of the court.

21 “(c) The offices of the Court of International Trade shall
22 be located at New York, New York.”.

23 ASSIGNMENT OF JUDGES

24 SEC. 102. (a) Section 293(b) of title 28, United States
25 Code, is amended by striking out “Customs Court” and all

1 that follows through “need arises.” and inserting in lieu
2 thereof “Court of International Trade to perform judicial
3 duties in any circuit, either in a court of appeals or district
4 court, upon presentation of a certificate of necessity by the
5 chief judge or circuit justice of the circuit in which the need
6 arises.”.

7 (b) Section 293(d) of title 28, United States Code, is
8 amended to read as follows:

9 “(d) The chief judge of the Court of International Trade
10 may, upon presentation to him of a certificate of necessity by
11 the chief judge of the Court of Appeals for International
12 Trade, Patents, and Trademarks or the chief judge of the
13 Court of Claims, designate and assign temporarily any judge
14 of the Court of International Trade to serve as a judge of the
15 Court of Appeals for International Trade, Patents, and
16 Trademarks or the Court of Claims.”.

17 . TITLE II—JURISDICTION OF THE COURT OF

18 INTERNATIONAL TRADE

19 JURISDICTION OF THE COURT

20 SEC. 201. (a) Chapter 95 of title 28, United States
21 Code, is amended to read as follows:

22 **“CHAPTER 95—COURT OF INTERNATIONAL TRADE**

“Sec.

“1581. Civil actions against the United States.

“1582. Civil actions commenced by the United States.

“1583. Counterclaims.

“1584. Cure of defects.

“1585. Powers in law and equity.

1 **“§ 1581. Civil actions against the United States**

2 “(a) The Court of International Trade shall have exclu-
3 sive jurisdiction of any civil action commenced by any person
4 whose protest under section 515 of the Tariff Act of 1930
5 has been denied, in whole or in part, by the appropriate cus-
6 toms officer, where the administrative decision, including the
7 legality of all orders and findings entering into such decision,
8 involves—

9 “(1) the appraised value of merchandise;

10 “(2) the classification and rate and amount of
11 duties chargeable;

12 “(3) all charges or exactions of whatever charac-
13 ter within the jurisdiction of the Secretary of the
14 Treasury;

15 “(4) the exclusion of merchandise from entry or
16 delivery or a demand for redelivery to customs custody
17 (including a notice of constructive seizure) under any
18 provision of the customs laws, except a determination
19 appealable under section 337 of the Tariff Act of 1930;

20 “(5) the liquidation or reliquidation of an entry, or
21 any modification thereof;

22 “(6) the refusal to pay a claim for drawback; or

23 “(7) the refusal to reliquidate an entry under sec-
24 tion 520(c) of the Tariff Act of 1930.

1 “(b) The Court of International Trade shall have exclu-
2 sive jurisdiction of any civil action commenced under section
3 516 of the Tariff Act of 1930.

4 “(c) The Court of International Trade shall have exclu-
5 sive jurisdiction of any civil action commenced under section
6 516A of the Tariff Act of 1930.

7 “(d)(1) After the decision of the President has become
8 final and has been published in the Federal Register, the
9 Court of International Trade shall have exclusive jurisdiction
10 of any civil action commenced to review the advice, findings,
11 recommendations, and determinations of the International
12 Trade Commission under sections 131, 201, 202, 203, 304,
13 406, and 503 of the Trade Act of 1974, sections 336 and
14 338 of the Tariff Act of 1930, and section 22 of the Agricul-
15 tural Adjustment Act, solely for the purpose of determining
16 the procedural regularity of such actions.

17 “(2) If no advice, findings, recommendations, or deter-
18 minations have been provided to the President by the Inter-
19 national Trade Commission, the Court of International Trade
20 shall have exclusive jurisdiction to review the advice, find-
21 ings, recommendations, and determinations of the Commis-
22 sion under the sections specified in paragraph (1) of this sub-
23 section, solely for the purposes of determining the procedural
24 regularity of such actions.

1 “(e) After the decision of the President has become final
2 and has been published in the Federal Register, the Court of
3 International Trade shall have exclusive jurisdiction to
4 review any action of the Office of the United States Trade
5 Representative under section 302(b)(1) or 304 of the Trade
6 Act of 1974, solely for the purposes of determining the pro-
7 cedural regularity of such action.

8 “(f) The Court of International Trade shall have exclu-
9 sive jurisdiction of any civil action commenced to review any
10 determination of the Secretary of Labor or the Secretary of
11 Commerce certifying or refusing to certify workers, commu-
12 nities, or firms as eligible for adjustment assistance under the
13 Trade Act of 1974.

14 “(g) The Court of International Trade shall have exclu-
15 sive jurisdiction of any civil action commenced to review a
16 final determination of the Secretary of the Treasury under
17 section 305(b)(1) of the Trade Agreements Act of 1979.

18 “(h) The Court of International Trade shall have exclu-
19 sive jurisdiction of any civil action involving an application
20 for an order directing the administering authority or the In-
21 ternational Trade Commission to make confidential informa-
22 tion available under section 777(c)(2) of the Tariff Act of
23 1930.

24 “(i) In addition to the jurisdiction conferred upon the
25 Court of International Trade by subsections (a) through (h) of

1 this section and subject to the exceptions set forth in subsec-
2 tion (j) of this section, the Court of International Trade shall
3 have exclusive jurisdiction of any civil action against the
4 United States, its agencies, or its officers, which—

5 “(1) arises directly from an import transaction;

6 and

7 “(2)(A) involves the Tariff Act of 1930, the Trade
8 Expansion Act of 1962, the Trade Act of 1974, or the
9 Trade Agreements Act of 1979; or

10 “(B) involves a provision of—

11 “(i) the Constitution of the United States;

12 “(ii) a treaty of the United States;

13 “(iii) an executive agreement executed by the
14 President; or

15 “(iv) an Executive order of the President,
16 which directly and substantially involves international
17 trade.

18 “(j) The Court of International Trade shall not have
19 jurisdiction—

20 “(1) of any civil action arising under section 305
21 of the Tariff Act of 1930; or

22 “(2) to review any ruling or refusal to issue or
23 change a ruling relating to classification, valuation,
24 rate of duty, marking, restricted merchandise, entry re-
25 quirements, drawbacks, vessel repairs, and similar mat-

1 ters issued by the Secretary of the Treasury other than
2 in connection with a civil action commenced under sub-
3 section (a), (b), or (c) of this section, except that this
4 exclusion shall not apply if a person demonstrates that
5 he would be irreparably harmed without an opportunity
6 to obtain judicial review under subsection (a), (b), or (c)
7 of this section.

8 **“§ 1582. Civil actions commenced by the United States**

9 “(a) The Court of International Trade shall have origi-
10 nal jurisdiction of any civil action which arises from an
11 import transaction and which is commenced by the United
12 States—

13 “(1) to recover a civil penalty under section 592,
14 704(i)(2), or 734(i)(2) of the Tariff Act of 1930;

15 “(2) to recover upon a bond relating to the impor-
16 tation of merchandise required by the laws of the
17 United States or by the Secretary of the Treasury; or

18 “(3) to recover customs duties.

19 “(b)(1) Any party to a civil action described in subsec-
20 tion (a) of this section who desires to have such action tried
21 before a jury may, within thirty days after the date such
22 action is commenced, file a motion with the Court of Interna-
23 tional Trade requesting a transfer of such action to the dis-
24 trict court of the United States for the district in which such
25 action arose.

1 “(2) The Court of International Trade shall promptly
2 order the action transferred to the appropriate district court if
3 the Court of International Trade determines that the moving
4 party is entitled to a trial by jury in such action.

5 “(c) Within ten days after the issuance of an order of
6 transfer under subsection (b)(2) of this section, the clerk of
7 the Court of International Trade shall transmit the summons,
8 pleadings, and other papers to the clerk of the appropriate
9 district court. The action shall proceed in the district court as
10 if it had been commenced in such court in the first instance.

11 **“§ 1583. Counterclaims**

12 “‘The Court of International Trade shall have exclusive
13 jurisdiction to render judgment upon (1) any counterclaim as-
14 serted by the United States which arises out of an import
15 transaction that is the subject matter of a civil action pending
16 before the court, or (2) any counterclaim of the United States
17 to recover upon a bond or customs duties relating to such
18 transaction.

19 **“§ 1584. Cure of defects**

20 “(a) If a civil action within the exclusive jurisdiction of
21 the Court of International Trade is commenced in a district
22 court of the United States, the district court shall, in the
23 interest of justice, transfer such civil action to the Court of
24 International Trade, where such action shall proceed as if it

1 had been commenced in the Court of International Trade in
2 the first instance.

3 “(b) If a civil action within the exclusive jurisdiction of a
4 district court, a court of appeals, or the Court of Appeals for
5 International Trade, Patents, and Trademarks is commenced
6 in the Court of International Trade, the Court of Interna-
7 tional Trade shall, in the interest of justice, transfer such civil
8 action to the appropriate district court or court of appeals or
9 to the Court of Appeals for International Trade, Patents, and
10 Trademarks, where such action shall proceed as if it had
11 been commenced in such court in the first instance.

12 **“§ 1585. Powers in law and equity**

13 “The Court of International Trade shall possess all the
14 powers in law and equity of, or as conferred by statute upon,
15 a district court of the United States.”.

16 (b) The item relating to chapter 95 in the table of chap-
17 ters for part IV of title 28, United States Code, is amended
18 by striking out “Customs Court” and inserting “Court of In-
19 ternational Trade” in lieu thereof.

20 **TITLE III—COURT OF INTERNATIONAL TRADE**

21 **PROCEDURE**

22 **COURT PROCEDURE**

23 **SEC. 301.** (a) Chapter 169 of title 28, United States
24 Code, is amended to read as follows:

1 **“CHAPTER 169—COURT OF INTERNATIONAL TRADE**
2 **PROCEDURE**

“Sec.

“2631. Persons entitled to commence a civil action.

“2632. Commencement of a civil action.

“2633. Procedure and fees.

“2634. Notice.

“2635. Filing of official documents.

“2636. Time for commencement of action.

“2637. Exhaustion of administrative remedies.

“2638. New grounds in support of a civil action.

“2639. Burden of proof; evidence of value.

“2640. Scope and standard of review.

“2641. Witnesses; inspection of documents.

“2642. Analysis of imported merchandise.

“2643. Relief.

“2644. Decisions.

“2645. Retrial or rehearing.

“2646. Precedence of cases.

3 **“§ 2631. Persons entitled to commence a civil action**

4 “(a) A civil action contesting the denial, in whole or in
5 part, of a protest under section 515 of the Tariff Act of 1930
6 may be commenced in the Court of International Trade by
7 the person who filed the protest pursuant to section 514 of
8 such Act.

9 “(b) A civil action contesting the denial of a petition
10 under section 516 of the Tariff Act of 1930 may be com-
11 menced in the Court of International Trade by the domestic
12 interested party who filed such petition.

13 “(c) A civil action contesting a determination listed in
14 section 516A of the Tariff Act of 1930 may be commenced in
15 the Court of International Trade by any interested party who
16 was a party to the proceeding in connection with which the
17 matter arose.

1 “(d) A civil action to review a final determination made
2 under section 305(b)(1) of the Trade Agreements Act of 1979
3 may be commenced in the Court of International Trade by
4 any person who was a party-at-interest with respect to such
5 determination.

6 “(e) A civil action involving an application for the issu-
7 ance of an order directing the administering authority or the
8 International Trade Commission to make confidential infor-
9 mation available under section 777(c)(2) of the Tariff Act of
10 1930 may be commenced in the Court of International Trade
11 by any interested party who was a party to the investigation.

12 “(f) Any civil action of which the Court of International
13 Trade has jurisdiction, other than an action specified in sub-
14 sections (a) through (e) of this section, may be commenced in
15 the court by any person adversely affected or aggrieved by
16 agency action within the meaning of section 702 of title 5.

17 “(g) Except in civil actions described in section 1581(a)
18 or 1581(b) of this title, any person who would be adversely
19 affected or aggrieved by a decision in a civil action pending in
20 the Court of International Trade may, by leave of court, in-
21 tervene in such action. In exercising its discretion, the court
22 shall consider whether the intervention will unduly delay or
23 prejudice the adjudication of the rights of the original parties.

24 “(h) Any person who was a party to the investigation
25 and who would be adversely affected or aggrieved by the

1 issuance of an order under section 777(c)(2) of the Tariff Act
2 of 1930 may, by leave of court, intervene with respect to the
3 issuance of such order.

4 “(i) In this section—

5 “(1) ‘interested party’ means—

6 “(A) a foreign manufacturer, producer, or ex-
7 porter, or the United States importer, of merchan-
8 dise which is the subject of an investigation under
9 title VII of the Tariff Act of 1930, or a trade or
10 business association a majority of the members of
11 which are importers of such merchandise;

12 “(B) the government of a country in which
13 such merchandise is produced or manufactured;

14 “(C) a manufacturer, producer, or wholesaler
15 in the United States of a like product;

16 “(D) a certified union or recognized union or
17 group of workers which is representative of an in-
18 dustry engaged in the manufacture, production, or
19 wholesale in the United States of a like product;
20 and

21 “(E) a trade or business association a major-
22 ity of whose members manufacture, produce, or
23 wholesale a like product in the United States;

1 “(2) ‘domestic interested party’ means an inter-
2 ested party as defined in subparagraphs (C), (D), and
3 (E) of paragraph (1) of this subsection;

4 “(3) ‘party-at-interest’ means—

5 “(A) a foreign manufacturer, producer, or ex-
6 porter, or a United States importer, of merchan-
7 dise which is the subject of a final determination
8 under section 305(b)(1) of the Trade Agreements
9 Act of 1979;

10 “(B) a manufacturer, producer, or wholesaler
11 in the United States of a like product;

12 “(C) United States members of a labor orga-
13 nization or other association of workers whose
14 members are employed in the manufacture, pro-
15 duction, or wholesale in the United States of a
16 like product; and

17 “(D) a trade or business association a major-
18 ity of whose members manufacture, produce, or
19 wholesale a like product in the United States; and

20 “(4) ‘like product’ means a product which is like,
21 or in the absence of like, most similar in characteristics
22 and uses with, the article subject to an investigation
23 under title VII of the Tariff Act of 1930 or a final de-
24 termination under section 305(b)(1) of the Trade
25 Agreements Act of 1979, as the case may be.

1 **“§ 2632. Commencement of a civil action**

2 “(a) Except for civil actions specified in subsections (b)
3 and (c) of this section, each civil action in the Court of Inter-
4 national Trade shall be commenced by filing concurrently
5 with the clerk of the court a summons and complaint, with
6 the content and in the form, manner, and style prescribed by
7 the rules of the court.

8 “(b) Each civil action in the Court of International
9 Trade under section 515 or section 516 of the Tariff Act of
10 1930 shall be commenced by filing with the clerk of the court
11 a summons, with the content and in the form, manner, and
12 style prescribed by the rules of the court.

13 “(c) Each civil action in the Court of International
14 Trade under section 516A of the Tariff Act of 1930 shall be
15 commenced by filing with the clerk of the court a summons
16 and a complaint, as prescribed in such section, with the con-
17 tent and in the form, manner, and style prescribed by the
18 rules of the court.

19 “(d) The Court of International Trade may prescribe by
20 rule that any summons, pleading, or other paper mailed by
21 registered or certified mail properly addressed to the clerk of
22 the court with the proper postage affixed and return receipt
23 requested shall be deemed filed as of the date of mailing.

1 **“§ 2633. Procedure and fees**

2 “(a) A filing fee shall be payable to the clerk of the
3 Court of International Trade upon the commencement of a
4 civil action in such court. The amount of the fee shall be
5 prescribed by the rules of the court, but shall be not less than
6 \$5 nor more than the filing fee for commencing a civil action
7 in a district court of the United States. The court may fix all
8 other fees to be charged by the clerk of the court.

9 “(b) The Court of International Trade shall prescribe
10 rules governing the summons, pleadings, and other papers,
11 for their amendment, service, and filing, for consolidations,
12 severances, suspensions of cases, and for other procedural
13 matters.

14 “(c) All summons, pleadings, and other papers filed in
15 the Court of International Trade shall be served on all par-
16 ties in accordance with rules prescribed by the court. When
17 the United States, its agencies, or its officers are adverse
18 parties, service of the summons shall be made upon the At-
19 torney General and the head of the Government agency
20 whose actions are complained of. When injunctive relief is
21 sought, the summons, pleadings, and other papers shall also
22 be served upon the named officials sought to be enjoined.

23 **“§ 2634. Notice**

24 “Reasonable notice of the time and place of trial or
25 hearing before the Court of International Trade shall be

1 given to all parties to any civil action, as prescribed by the
2 rules of the court.

3 **“§ 2635. Filing of official documents**

4 “(a)(1) Upon service of the summons on the Secretary of
5 the Treasury in any civil action contesting the denial of a
6 protest under section 515 of the Tariff Act of 1930 or the
7 denial of a petition under section 516 of such Act, the appro-
8 priate customs officer shall forthwith transmit to the clerk of
9 the Court of International Trade, as prescribed by its rules,
10 and as a part of the official record—

11 “(A) the consumption or other entry and the entry
12 summary;

13 “(B) the commercial invoice;

14 “(C) the special customs invoice;

15 “(D) a copy of the protest or petition;

16 “(E) a copy of the denial, in whole or in part, of
17 the protest or petition;

18 “(F) the importer’s exhibits;

19 “(G) the official and other representative samples;

20 “(H) any official laboratory reports; and

21 “(I) a copy of any bond relating to the entry.

22 “(2) If any of the items listed in paragraph (1) of this
23 subsection do not exist in a particular civil action, an affirma-
24 tive statement to that effect shall be transmitted to the clerk
25 of the court.

1 “(b)(1) In any civil action commenced in the Court of
2 International Trade under section 516A of the Tariff Act of
3 1930, within forty days or within such other period of time as
4 the court may specify, after the date of service of a complaint
5 on the Secretary of the Treasury, the administering authority
6 established to administer title VII of the Tariff Act of 1930,
7 or the United States International Trade Commission, the
8 Secretary, the administering authority, or the Commission
9 shall transmit to the clerk of the court the record of such
10 action, as prescribed by the rules of the court. The record
11 shall, unless otherwise stipulated by the parties, consist of—

12 “(A) a copy of all information presented to or ob-
13 tained by the Secretary, the administering authority, or
14 the Commission during the course of the administrative
15 proceedings, including all governmental memoranda
16 pertaining to the case and the record of ex parte meet-
17 ings required to be maintained by section 777(a)(3) of
18 the Tariff Act of 1930; and

19 “(B)(i) a copy of the determination and the facts
20 and conclusions of law upon which such determination
21 was based, (ii) all transcripts or records of conferences
22 or hearings, and (iii) all notices published in the Fed-
23 eral Register.

24 “(2) The Secretary, the administering authority, or the
25 Commission shall identify and transmit under seal to the

1 clerk of the court any document, comment, or information
2 that is accorded confidential or privileged status by the Gov-
3 ernment agency whose action is being contested and that is
4 required to be transmitted to the clerk under paragraph (1) of
5 this subsection. Any such document, comment, or information
6 shall be accompanied by a nonconfidential description of the
7 nature of the material being transmitted. The confidential or
8 privileged status of such material shall be preserved in the
9 civil action, but the court may examine the confidential or
10 privileged material in camera and may make such material
11 available under such terms and conditions as the court may
12 order.

13 “(c) Within fifteen days, or within such other period of
14 time as the Court of International Trade may specify, after
15 service of a summons and complaint in a civil action involv-
16 ing an application for an order directing the administering
17 authority or the International Trade Commission to make
18 confidential information available under section 777(c)(2) of
19 the Tariff Act of 1930, the administering authority or the
20 Commission shall transmit under seal to the clerk of the
21 Court of International Trade, as prescribed by its rules, the
22 confidential information involved, together with pertinent
23 parts of the record.

24 “(d)(1) In any other civil action in the Court of Interna-
25 tional Trade in which judicial review is to proceed upon the

1 basis of the record made before an agency, the agency shall,
2 within forty days or within such other period of time as the
3 court may specify, after the date of service of the summons
4 and complaint upon the agency, transmit to the clerk of the
5 court, as prescribed by its rules—

6 “(A) a copy of the contested determination and
7 the findings or report upon which such determination
8 was based;

9 “(B) a copy of any reported hearings or confer-
10 ences conducted by the agency; and

11 “(C) any documents, comments, or other papers
12 filed by the public, interested parties, or governments
13 with respect to the agency’s action.

14 “(2) The agency shall identify and transmit under seal
15 to the clerk of the court any document, comment, or other
16 information that was obtained on a confidential basis and that
17 is required to be transmitted to the clerk under paragraph (1)
18 of this subsection. Any such document, comment, or informa-
19 tion shall include a nonconfidential description of the nature
20 of the material being transmitted. The confidential or privi-
21 leged status of such material shall be preserved in the civil
22 action, but the court may examine such material in camera
23 and may make such material available under such terms and
24 conditions as the court may order.

1 “(3) The parties may stipulate that fewer documents,
2 comments, or other information than those specified in para-
3 graph (1) of this subsection shall be transmitted to the clerk
4 of the court.

5 **“§ 2636. Time for commencement of action**

6 “(a) A civil action contesting the denial of a protest
7 under section 515 of the Tariff Act of 1930 is barred unless
8 commenced in accordance with the rules of the Court of In-
9 ternational Trade—

10 “(1) within one hundred and eighty days after the
11 date of mailing of notice of denial, in whole or in part,
12 of a protest under section 515(a) of such Act;

13 “(2) if no notice is mailed within the two-year
14 period specified in section 515(a) of such Act, within
15 one hundred and eighty days after the date of the expi-
16 ration of such two-year period; or

17 “(3) within one hundred and eighty days after the
18 date of denial of a protest by operation of law under
19 the provisions of section 515(b) of such Act.

20 “(b) A civil action contesting the denial of a petition
21 under section 516 of the Tariff Act of 1930 is barred unless
22 commenced in accordance with the rules of the Court of In-
23 ternational Trade within thirty days after the date of mailing
24 of a notice pursuant to section 516(c) of such Act.

1 “(c) A civil action contesting a reviewable determination
2 listed in section 516A of the Tariff Act of 1930, other than a
3 determination under section 703(c) or 733(c) of that Act, is
4 barred unless commenced in accordance with the rules of the
5 Court of International Trade within thirty days after the date
6 of the publication of such determination in the Federal
7 Register.

8 “(d) A civil action contesting a determination by the
9 administering authority, under section 703(c) or 733(c) of the
10 Tariff Act of 1930, that a case is extraordinarily complicated
11 is barred unless commenced in accordance with the rules of
12 the Court of International Trade within five days after the
13 date of the publication of such determination in the Federal
14 Register.

15 “(e) A civil action contesting a final determination made
16 under section 305(b)(1) of the Trade Agreements Act of 1979
17 is barred unless commenced in accordance with the rules of
18 the Court of International Trade within thirty days after the
19 date of the publication of such determination in the Federal
20 Register.

21 “(f) A civil action involving an application for the issu-
22 ance of an order making confidential information available
23 under section 777(c)(2) of the Tariff Act of 1930 is barred
24 unless commenced in accordance with the rules of the Court

1 of International Trade within ten days after the date of the
2 denial of the request for such confidential information.

3 “(g) A civil action of which the Court of International
4 Trade has jurisdiction under section 1581 of this title, other
5 than an action specified in subsections (a) through (f) of this
6 section, is barred unless commenced in accordance with the
7 rules of the court within two years after the cause of action
8 first accrues.

9 **“§ 2637. Exhaustion of administrative remedies**

10 “(a) A civil action contesting the denial of a protest
11 under section 515 of the Tariff Act of 1930 may be com-
12 menced only if all liquidated duties, charges, or exactions
13 have been paid at the time the action is commenced, except
14 that a surety’s obligation to pay such liquidated duties,
15 charges, or exactions is limited to the sum of any bond
16 related to each entry included in the denied protest. If a
17 surety commences a civil action in the Court of International
18 Trade, such surety shall recover only the amount of the liqui-
19 dated duties, charges, or exactions paid on the entries includ-
20 ed in the action.

21 “(b) A civil action contesting the denial of a petition
22 under section 516 of the Tariff Act of 1930 may be com-
23 menced only by a person who has first exhausted the proce-
24 dures set forth in that section.

1 “(c) In any civil action not specified in this section, the
2 Court of International Trade shall, where appropriate, re-
3 quire the exhaustion of administrative remedies.

4 **“§ 2638. New grounds in support of a civil action**

5 “In any civil action under section 515 of the Tariff Act
6 of 1930 in which the denial, in whole or in part, of a protest
7 is a precondition to the commencement of a civil action in the
8 Court of International Trade, the court, by rule, may consid-
9 er any new ground in support of the civil action if such new
10 ground—

11 “(1) applies to the same merchandise that was the
12 subject of the protest; and

13 “(2) is related to the same administrative decision
14 listed in section 514 of the Tariff Act of 1930 that was
15 contested in the protest.

16 **“§ 2639. Burden of proof; evidence of value**

17 “(a) In any civil action commenced in the Court of In-
18 ternational Trade under section 515, 516, or 516A of the
19 Tariff Act of 1930, the decision of the Secretary of the
20 Treasury or his delegate is presumed to be correct. The
21 burden of proving otherwise shall rest upon the party chal-
22 lenging such decision.

23 “(b) Where the value of merchandise is in issue in any
24 civil action in the Court of International Trade—

1 “(1) reports or depositions of consuls, customs
2 officers, and other officers of the United States, and
3 depositions and affidavits of other persons whose at-
4 tendance cannot reasonably be had, may be admitted
5 into evidence when served upon the opposing party as
6 prescribed by the rules of the court; and

7 “(2) price lists and catalogs may be admitted in
8 evidence when duly authenticated, relevant, and
9 material.

10 “(c) The provisions of subsection (a) of this section shall
11 not apply to any civil action commenced in the Court of In-
12 ternational Trade under section 1582 of this title.

13 **“§ 2640. Scope and standard of review**

14 “(a) The Court of International Trade shall make its
15 determinations upon the basis of the record made before the
16 court in the following categories of civil actions:

17 “(1) Civil actions contesting the denial of a pro-
18 test under section 515 of the Tariff Act of 1930.

19 “(2) Civil actions commenced under section 516
20 of the Tariff Act of 1930.

21 “(3) Civil actions commenced to review a final de-
22 termination made under section 305(b)(1) of the Trade
23 Agreements Act of 1979.

24 “(4) Civil actions commenced under section
25 777(c)(2) of the Tariff Act of 1930.

1 “(5) Civil actions commenced under section 1582
2 of this title.

3 “(b) In any civil action commenced in the Court of In-
4 ternational Trade under section 516A of the Tariff Act of
5 1930, the court shall review the matter as specified in sub-
6 section (b) of that section.

7 “(c) In any civil action commenced in the Court of In-
8 ternational Trade under subsection (d) or (e) of section 1581
9 of this title, the court shall review the matter as specified in
10 those subsections.

11 “(d) In any civil action commenced in the Court of In-
12 ternational Trade to review any determination of the Secre-
13 tary of Labor or the Secretary of Commerce certifying or
14 refusing to certify workers, communities, or firms as eligible
15 for assistance under the Trade Act of 1974, the court shall
16 review the matter as specified in section 250 of such Act.

17 “(e) In any civil action not specified in this section, the
18 court shall review the matter as provided in section 706 of
19 title 5.

20 “§ 2641. Witnesses; inspection of documents

21 “(a) Except as otherwise provided by law, in any civil
22 action in the Court of International Trade, the parties and
23 their attorneys shall have an opportunity to introduce evi-
24 dence, to hear and cross-examine the witnesses of the other
25 party, and to inspect all samples and papers admitted or of-

1 fered as evidence, as prescribed by the rules of the court.
2 Except as provided in section 2639 of this title, subsection (b)
3 of this section, or the rules of the court, the Federal Rules of
4 Evidence shall apply to all civil actions in the Court of Inter-
5 national Trade.

6 “(b) The Court of International Trade may order that
7 trade secrets and commercial or financial information which
8 is privileged and confidential, or any information provided to
9 the United States by any foreign government or foreign
10 person, may be disclosed to a party, its counsel, or any other
11 person under such terms and conditions as the court may
12 order.

13 **“§ 2642. Analysis of imported merchandise**

14 “The Court of International Trade may order an analy-
15 sis of imported merchandise and reports thereon by laborato-
16 ries or agencies of the United States.

17 **“§ 2643. Relief**

18 “(a) In any civil action commenced under section 1581
19 or 1582 of this title or in any counterclaim asserted under
20 section 1583 of this title, the Court of International Trade
21 may enter a money judgment for or against the United
22 States.

23 “(b) If, in any civil action commenced under section 515
24 or 516 of the Tariff Act of 1930, the Court of International
25 Trade is unable to determine the correct decision on the basis

1 of the evidence presented, the court may order a retrial or
2 rehearing for all purposes, or may order such further admin-
3 istrative or adjudicative procedures as the court deems neces-
4 sary to enable it to reach the correct decision.

5 “(c)(1) Except as provided in paragraph (2) of this sub-
6 section, the Court of International Trade may, in addition to
7 the orders specified in subsections (a) and (b) of this section,
8 order any other form of relief that is appropriate in a civil
9 action, including, but not limited to, declaratory judgments,
10 orders of remand, injunctions, and writs of mandamus and
11 prohibition. A preliminary or permanent injunction may be
12 granted by the court upon the motion of a person who would
13 have the right to commence a civil action after exhausting all
14 appropriate administrative remedies. In ruling on such a
15 motion, the court shall consider whether the person making
16 the request will be irreparably harmed if such injunction is
17 not granted, and the effect of granting such injunction on the
18 public interest.

19 “(2) The Court of International Trade may not grant an
20 injunction or issue a writ of mandamus in any civil action
21 commenced to review any determination of the Secretary of
22 Labor or the Secretary of Commerce certifying or refusing to
23 certify workers, communities, or firms as eligible for adjust-
24 ment assistance under the Trade Act of 1974.

1 **“§ 2644. Decisions**

2 “(a) A final decision of the Court of International Trade
3 in a contested civil action or a decision granting or refusing a
4 preliminary injunction shall be supported by—

5 “(1) a statement of findings of fact and conclu-
6 sions of law; or

7 “(2) an opinion stating the reasons and facts upon
8 which the decision is based.

9 “(b) After the Court of International Trade has rendered
10 a judgment, the court may, upon the motion of a party or
11 upon its own motion, amend its findings or make additional
12 findings and may amend the decision and judgment accord-
13 ingly. A motion of a party or the court shall be made not
14 later than thirty days after the date of entry of the judgment.

15 “(c) A decision of the Court of International Trade is
16 final and conclusive, unless a retrial or rehearing is granted
17 pursuant to section 2645 of this title or an appeal is taken to
18 the Court of Appeals for International Trade, Patents, or
19 Trademarks within the time and in the manner provided in
20 section 2601 of this title.

21 **“§ 2645. Retrial or rehearing**

22 “After the Court of International Trade has rendered a
23 judgment or order, the court may, upon the motion of a party
24 or upon its own motion, grant a retrial or rehearing, as the
25 case may be. A motion of a party or the court shall be made

1 not later than thirty days after the date of entry of the judg-
2 ment or order.

3 **“§ 2646. Precedence of cases**

4 “The following civil actions in the Court of Interna-
5 tional Trade shall be given precedence, in the following
6 order, over other civil actions pending before the court, and
7 shall be assigned for hearing and expedited in every way:

8 “(1) First, a civil action involving the exclusion of
9 perishable merchandise.

10 “(2) Second, a civil action for the review of a de-
11 termination under section 516A(a)(1)(B) or section
12 516A(a)(1)(E) of the Tariff Act of 1930.

13 “(3) Third, a civil action commenced under sec-
14 tion 515 of the Tariff Act of 1930 involving the exclu-
15 sion or redelivery of merchandise.

16 “(4) Fourth, a civil action commenced under sec-
17 tion 516 or 516A of the Tariff Act of 1930, other than
18 a civil action described in paragraph (2) of this
19 section.”.

20 (b) The item relating to chapter 169 in the table of
21 chapters for part V of title 28 of the United States Code is
22 amended by striking out “Court of Claims” and inserting
23 “Court of International Trade” in lieu thereof.

1 TITLE IV—COURT OF APPEALS FOR INTERNA-
2 TIONAL TRADE, PATENTS, AND TRADE-
3 MARKS

4 JURISDICTION OF THE COURT

5 SEC. 401. (a)(1) Section 1541(a) of title 28, United
6 States Code, is amended to read as follows:

7 “(a) The Court of Appeals for International Trade, Pat-
8 ents, and Trademarks shall have exclusive jurisdiction of ap-
9 peals from all final decisions of the Court of International
10 Trade.”.

11 (2) Section 1541 of title 28, United States Code, is
12 amended by adding at the end thereof the following new sub-
13 section:

14 “(c) The Court of Appeals for International Trade, Pat-
15 ents, and Trademarks, shall have exclusive jurisdiction of ap-
16 peals from interlocutory orders of the Court of International
17 Trade granting, continuing, modifying, refusing, or dissolving
18 injunctions, or refusing to dissolve or modify injunctions.”.

19 (b)(1) Section 1543 of title 28, United States Code, is
20 amended to read as follows:

21 **“§ 1543. International Trade Commission determinations**

22 “The Court of Appeals for International Trade, Pat-
23 ents, and Trademarks shall have jurisdiction to review the
24 final determinations of the United States International Trade

1 Commission made under section 337 of the Tariff Act of
2 1930 relating to unfair trade practices in import trade.”.

3 (2) The item relating to section 1543 in the table of
4 sections for chapter 93 of title 28, United States Code, is
5 amended to read as follows:

“1543. International Trade Commission determinations.”.

6 (c)(1). Chapter 93 of title 28, United States Code, is
7 amended by adding at the end thereof the following new
8 section:

9 “§ 1546. **Certain decisions of the Secretary of the Treasury**

10 “The Court of Appeals for International Trade, Pat-
11 ents, and Trademarks shall have exclusive jurisdiction to
12 review—

13 “(1) any decision of the Secretary of the Treasury
14 to deny or revoke a customs broker’s license under
15 section 641(a) of the Tariff Act of 1930; or

16 “(2) any action challenging an order of the Secre-
17 tary of the Treasury to revoke or suspend a license
18 under section 641(b) of the Tariff Act of 1930.”.

19 (2) The table of sections for chapter 93 of title 28,
20 United States Code, is amended by adding at the end thereof
21 the following new item:

“1546. Certain decisions of the Secretary of the Treasury.”.

1 (1) by inserting “or cross appeal” after “appeal”
2 each time it appears; and

3 (2) by striking out “which shall include a concise
4 statement of the errors complained of”.

5 (c) The third sentence of section 2601(b) of title 28,
6 United States Code, is amended by striking out “and the
7 Secretary of the Treasury or their designees” and inserting
8 in lieu thereof “and any named official”.

9 (d) Section 2601(c) of title 28, United States Code, is
10 amended by inserting immediately after the first sentence the
11 following new sentences: “Findings of fact shall not be set
12 aside unless clearly erroneous and due regard shall be given
13 to the opportunity of the Court of International Trade to
14 judge the credibility of the witnesses. A party may raise on
15 appeal the question of whether the findings of fact are clearly
16 erroneous, whether or not the party raising such question
17 made an objection to such findings in the Court of Interna-
18 tional Trade or made a motion to amend such findings.”.

19 (e)(1) Section 2602 of title 28, United States Code, is
20 amended to read as follows:

21 **“§ 2602. Precedence of cases**

22 “The following civil actions in the Court of Appeals for
23 International Trade, Patents, and Trademarks shall be given
24 precedence, in the following order, over other civil actions

1 pending before the court, and shall be assigned for hearing
2 and expedited in every way:

3 “(1) First, a civil action involving the exclusion of
4 perishable merchandise.

5 “(2) Second, a civil action for the review of a de-
6 termination under section 516A(a)(1)(B) or section
7 516A(a)(1)(E) of the Tariff Act of 1930.

8 “(3) Third, a civil action commenced under sec-
9 tion 515 of the Tariff Act of 1930 involving the exclu-
10 sion or redelivery of merchandise.

11 “(4) Fourth, a civil action commenced under sec-
12 tion 516 or 516A of the Tariff Act of 1930, other than
13 a civil action described in paragraph (2) of this section.

14 “(5) Fifth, an appeal from findings of the Secre-
15 tary of Commerce provided for in headnote 6 to sched-
16 ule 8, part 4, of the Tariff Schedules of the United
17 States (19 U.S.C. 1202).”.

18 (2) The item relating to section 2602 in the table of
19 sections for chapter 167 of title 28, United States Code, is
20 amended to read as follows:

“2602. Precedence of cases.”.

21

RULES OF EVIDENCE

22 SEC. 404. (a) Chapter 167 of title 28, United States
23 Code, is amended by adding at the end thereof the following
24 new section:

1 **“§ 2603. Rules of evidence**

2 “Except as provided in section 2639 of this title, sub-
3 section (b) of section 2641 of this title, or the rules prescribed
4 by the court, the Federal Rules of Evidence shall apply in
5 the Court of Appeals for International Trade, Patents, and
6 Trademarks in any appeal from the Court of International
7 Trade.”.

8 (b) The table of sections for chapter 93 of title 28,
9 United States Code, is amended by adding at the end thereof
10 the following new item:

“2603. Rules of evidence.”.

11 **JUDICIAL CONFERENCE**

12 **SEC. 405.** (a) Chapter 167 of title 28, United States
13 Code, as amended by section 404 of this Act, is further
14 amended by adding at the end thereof the following new
15 section:

16 **“§ 2604. Judicial conference**

17 “The chief judge of Court of Appeals for International
18 Trade, Patents, and Trademarks is authorized to summon
19 annually the judges of such court to a judicial conference, at
20 a time and place that such chief judge designates, for the
21 purpose of considering the business of such court and im-
22 provements in the administration of justice in such court.”.

23 (b) The table of contents for chapter 167 of title 28,
24 United States Code, as amended by section 404 of this Act,

1 is further amended by adding at the end thereof the following
2 new item:

“2604. Judicial conference.”.

3 **TITLE V—TECHNICAL AND CONFORMING**
4 **AMENDMENTS TO TITLE 28**

5 **SEC. 501.** (a) The chapter heading for chapter 11 of
6 title 28, United States Code, is amended by striking out
7 “CUSTOMS COURT” and inserting “COURT OF INTER-
8 NATIONAL TRADE” in lieu thereof.

9 (b) The item relating to chapter 11 in the table of chap-
10 ters for part I of title 28, United States Code, is amended by
11 striking out “Customs Court” and inserting “Court of Inter-
12 national Trade” in lieu thereof.

13 **SEC. 502.** Section 252 of title 28, United States Code,
14 is amended by striking out “Judge of the Customs Court”
15 and inserting “Judges of the Court of International Trade”
16 in lieu thereof.

17 **SEC. 503.** Sections 253(a), 254, 255(a), and 257 of title
18 28, United States Code, are each amended by striking out
19 “Customs Court” each place it appears and inserting “Court
20 of International Trade” in lieu thereof.

21 **SEC. 504.** Section 256 of title 28, United States Code,
22 is amended by striking out “Court of Customs and Patent
23 Appeals” and inserting “Court of Appeals for International
24 Trade, Patents, and Trademarks” in lieu thereof.

1 SEC. 505. Section 293(e) of title 28, United States
2 Code, is amended by striking out “Court of Customs and
3 Patent Appeals or the Customs Court” and inserting “Court
4 of Appeals for International Trade, Patents, and Trademarks
5 or the Court of International Trade” in lieu thereof.

6 SEC. 506. Section 751 of title 28, United States Code,
7 is amended by adding at the end thereof the following new
8 subsection:

9 “(f) When the Court of International Trade is sitting in
10 a judicial district, other than the Southern District or Eastern
11 District of New York, the clerk of the district court of such
12 judicial district or an authorized deputy clerk, upon the re-
13 quest of the chief judge of the Court of International Trade
14 and with the approval of such district court, shall act in the
15 district as clerk of the Court of International Trade, as pre-
16 scribed by the rules and orders of the Court of International
17 Trade for all purposes relating to the civil action then pend-
18 ing before such court.”.

19 SEC. 507. Section 1337 of title 28, United States Code,
20 is amended by adding at the end thereof the following new
21 subsection:

22 “(c) The district courts shall not have jurisdiction under
23 this section of any matter within the exclusive jurisdiction of
24 the Court of International Trade under chapter 95 of this
25 title.”.

1 SEC. 508. Section 1340 of title 28, United States Code,
2 is amended by striking out “Customs Court” and inserting
3 “Court of International Trade” in lieu thereof.

4 SEC. 509 Section 1352 of title 28, United States Code,
5 is amended by inserting before the period at the end thereof
6 the following: “, except matters within the jurisdiction of the
7 Court of International Trade under section 1582 of this
8 title”.

9 SEC. 510. Section 1355 of title 28, United States Code,
10 is amended by inserting before the period at the end thereof
11 the following: “, except matters within the jurisdiction of the
12 Court of International Trade under section 1582 of this
13 title”.

14 SEC. 511. Section 1356 of title 28, United States Code,
15 is amended by inserting before the period at the end thereof
16 the following: “, except matters within the jurisdiction of the
17 Court of International Trade under section 1582 of this
18 title”.

19 SEC. 512. The second paragraph of section 1491 of title
20 28, United States Code, is amended by striking out “in
21 suits” and inserting “of any civil action within the exclusive
22 jurisdiction of the Court of International Trade, or of any
23 action” in lieu thereof.

24 SEC. 513. (a) The section heading for section 1541 of
25 title 28, United States Code, is amended by striking out

1 "Customs Court" and inserting "Court of International
2 Trade" in lieu thereof.

3 (b) Section 1541(b) of title 28, United States Code, is
4 amended—

5 (1) by striking out "Customs Court" each place it
6 appears and inserting "Court of International Trade"
7 in lieu thereof; and

8 (2) by striking out "Court of Customs and Patent
9 Appeals" each place it appears and inserting "Court of
10 Appeals for International Trade, Patents, and Trade-
11 marks" in lieu thereof.

12 (c) The table of sections for chapter 93 of title 28,
13 United States Code, is amended—

14 (1) by striking out "COURT OF CUSTOMS
15 AND PATENT APPEALS" and inserting "COURT
16 OF APPEALS FOR INTERNATIONAL TRADE,
17 PATENTS, AND TRADEMARKS" in lieu thereof;
18 and

19 (2) in the item relating to section 1541, by strik-
20 ing out "Customs Court" and inserting "Court of In-
21 ternational Trade" in lieu thereof.

22 SEC. 514. Section 1919 of title 28, United States Code,
23 is amended by inserting "or the Court of International
24 Trade" after "court" the first place it appears.

1 SEC. 515. (a) Chapter 125 of title 28, United States
2 Code, is amended by inserting immediately after section
3 1963 the following new section:

4 **“§ 1963A. Registration of judgments of the Court of Inter-**
5 **national Trade**

6 “(a) A judgment in any civil action for the recovery of
7 money or property entered by the Court of International
8 Trade which has become final by appeal or expiration of time
9 for appeal may be registered in any district by filing a certi-
10 fied copy of such judgment. A judgment so registered shall
11 have the same effect as a judgment of the district court of the
12 district where registered and may be enforced in like manner.

13 “(b) A certified copy of the satisfaction of any judgment
14 in whole or in part may be registered in like manner in any
15 district in which the judgment is a lien.”.

16 (b) The table of sections for chapter 125 of title 28,
17 United States Code, is amended by inserting immediately
18 after the item relating to section 1963 the following:

 “1963A. Registration of judgments of the Court of International Trade.”.

19 SEC. 513. The first paragraph of section 2414 of title
20 28, United States Code, is amended by inserting “or the
21 Court of International Trade” immediately after “court” in
22 the first sentence.

23 SEC. 514. Section 2601 of title 28, United States Code,
24 is amended by striking out “Court of Customs and Patent

1 Appeals” each place it appears and inserting “Court of Ap-
2 peals for International Trade, Patents, and Trademarks” in
3 lieu thereof.

4 TITLE VI—TECHNICAL AND CONFORMING
5 AMENDMENTS TO OTHER ACTS

6 SEC. 601. Section 210 of the Antidumping Act, 1921
7 (19 U.S.C. 169), is amended by striking out “Customs Court,
8 and the Court of Customs and Patent Appeals” and inserting
9 “Court of International Trade, and the Court of Appeals for
10 International Trade, Patents, and Trademarks” in lieu there-
11 of.

12 SEC. 602. Section 337(c) of the Tariff Act of 1930 (19
13 U.S.C. 1337(c)) is amended—

14 (1) by striking out “United States Court of Cus-
15 toms and Patents Appeals” and inserting “United
16 States Court of Appeals for International Trade, Pat-
17 ents, and Trademarks, subject to chapter 7 of title 5,
18 United States Code” in lieu thereof; and

19 (2) by striking out the last sentence and inserting
20 in lieu thereof the following new sentence: “Notwith-
21 standing the foregoing provisions of this subsection,
22 review of Commission determinations under subsections
23 (d), (e), and (f) with respect to its findings on the public
24 health and welfare, competitive conditions in the
25 United States economy, the production of like or di-

1 rectly competitive articles in the United States, and
2 United States consumers, the amount and nature of
3 bond, or the appropriate remedy shall be reviewable
4 only for abuse of administrative discretion.”.

5 SEC. 603. (a) Section 514(a) of the Tariff Act of 1930
6 (19 U.S.C. 1514(a)) is amended—

7 (1) by striking out “Customs Court” each place it
8 appears and inserting “Court of International Trade”
9 in lieu thereof;

10 (2) by striking out “section 2632 of title 28 of the
11 United States Code within the time prescribed by sec-
12 tion 2631” and inserting “chapter 169 of title 28 of
13 the United States Code within the time prescribed by
14 section 2636” in lieu thereof.

15 (b) Section 514(b) of the Tariff Act of 1930 (19 U.S.C.
16 1514(b)) is amended by striking out “Customs Court” and
17 inserting “Court of International Trade” in lieu thereof.

18 SEC. 604. Section 515(b) of the Tariff Act of 1930 (19
19 U.S.C. 1515(b)) is amended by striking out “section 1582”
20 and inserting “section 1581” in lieu thereof.

21 SEC. 605. (a) Section 516A(a) of the Tariff Act of 1930
22 (19 U.S.C. 1516A(a)) is amended by striking out “Customs
23 Court” each place it appears and inserting “Court of Inter-
24 national Trade” in lieu thereof.

1 (b) Section 516A(c) of the Tariff Act of 1930 (19 U.S.C.
2 1516A(c)) is amended—

3 (1) in paragraphs (1) and (2), by striking out
4 “Customs Court” and inserting “Court of International
5 Trade” in lieu thereof;

6 (2) in paragraph (1), by striking out “Court of
7 Customs and Patent Appeals” and inserting “Court of
8 Appeals for International Trade, Patents, and Trade-
9 marks” in lieu thereof; and

10 (3) by amending the second sentence of paragraph
11 (2) to read as follows: “In ruling upon a request for
12 such injunctive relief, the court shall consider the fac-
13 tors set forth in section 2643(d) of title 28, United
14 States Code.”.

15 (c) Section 516A(d) of the Tariff Act of 1930 (19 U.S.C.
16 1516A(d)) is amended—

17 (1) by striking out “Customs Court” and inserting
18 “Court of International Trade” in lieu thereof; and

19 (2) by amending the second sentence to read as
20 follows: “The party filing the action shall notify all
21 such interested parties of the filing of an action under
22 this section, in the form, manner, style, and within the
23 time prescribed by rules of the court”.

24 SEC. 606. Section 592(e) of the Tariff Act of 1930 (19
25 U.S.C. 1592(e)) is amended by striking out “(e) DISTRICT

1 COURT PROCEEDINGS.—” and all that follows through
2 “under this section—” and inserting in lieu thereof the
3 following:

4 “(e) COURT OF INTERNATIONAL TRADE AND DIS-
5 TRICT COURT PROCEEDINGS.—Notwithstanding any other
6 provision of law, in any proceeding commenced by the United
7 States in the Court of International Trade or in a district
8 court of the United States under section 604 of this Act for
9 the recovery of any monetary penalty claimed under this sec-
10 tion, or transferred from the Court of International Trade to
11 a district court under section 1582 of title 28, United States
12 Code—”.

13 SEC. 607. (a) The second sentence of the second para-
14 graph of section 641(b) of the Tariff Act of 1930 (19 U.S.C.
15 1641(b)) is amended by striking out “in the circuit court” and
16 all that follows through “District of Columbia” and inserting
17 “in the Court of Appeals for International Trade, Patents,
18 and Trademarks” in lieu thereof.

19 (b) Section 641(b) of the Tariff Act of 1930 (19 U.S.C.
20 1641(b)) is amended by inserting immediately after the third
21 sentence of the second paragraph the following new sentence:
22 “For purposes of this paragraph, all relevant rules prescribed
23 in accordance with sections 2072 and 2112 of title 28,
24 United States Code, apply to the Court of Appeals for Inter-
25 national Trade, Patents, and Trademarks.”.

1 SEC. 608. (a) Section 250(a) of the Trade Act of 1974
2 (19 U.S.C. 2322(a)) is amended by striking out “court of
3 appeals” and all that follows through “District of Columbia
4 Circuit” and inserting “Court of International Trade” in lieu
5 thereof.

6 (b)(1) Section 250(c) of the Trade Act of 1974 (19
7 U.S.C. 2322(c)) is amended by inserting immediately after
8 the first sentence the following new sentence: “The judgment
9 of the Court of International Trade shall be subject to review
10 by the United States Court of Appeals for International
11 Trade, Patents, and Trademarks as prescribed by the rules of
12 such court.”.

13 (2) Section 250(c) of the Trade Act of 1974 (19 U.S.C.
14 2322(c)) is further amended by striking out “court” the
15 second place it appears and inserting “Court of Customs and
16 Patent Appeals for International Trade, Patents, and Trade-
17 marks” in lieu thereof.

18 SEC. 609. Section 3 of the Act of July 5, 1884 (23 Stat.
19 119), is amended to read as follows:

20 “SEC. 3. The decision of the Commissioner of Customs
21 on all questions of interpretation arising out of the execution
22 of the laws relating to the collection of tonnage tax and to
23 the refund of such tax when collected erroneously or illegally,
24 shall be subject to judicial review in the Court of Interna-
25 tional Trade as provided in title 28, United States Code. In

1 the Court of International Trade, and upon any appeal from
2 such court, the findings of the Commissioner with respect to
3 any fact, if supported by substantial evidence, shall be con-
4 clusive.”.

5 **TITLE VII—EFFECTIVE DATES AND**
6 **MISCELLANEOUS PROVISIONS**

7 **EFFECTIVE DATES**

8 **SEC. 701. (a)** Except as otherwise provided in this sec-
9 tion, this Act and the amendments made by this Act shall
10 become effective on the date on which title VII of the Tariff
11 Act of 1930, as added by title I of the Trade Agreements Act
12 of 1979, took effect.

13 (b) The amendments made by section 405 of this Act
14 shall take effect on October 1, 1980.

15 (c) The provisions of subsections (c), (d), (e), and (f) of
16 section 2631 of title 28, United States Code, as added by
17 section 301 of this Act, apply to entries liquidated on and
18 after the date of enactment of this Act.

19 (d)(1) Except as provided in paragraph (2) of this sub-
20 section, in reviewing any determination made before January
21 1, 1980, under section 303 of the Tariff Act of 1930 or the
22 Antidumping Act, 1921, the Court of International Trade
23 and the Court of Appeals for International Trade, Patents,
24 and Trademarks shall each base its review on the law as it
25 existed on the date of such determination.

1 (2) The scope of review and procedures for the review of
2 any determination described in paragraph (1) of this subsec-
3 tion shall be governed by this Act and the amendments made
4 by this Act.

5 **TREATMENT OF REFERENCES**

6 **SEC. 702.** Any reference in any statute or regulation of
7 the United States to the United States Customs Court, the
8 U.S. Customs Court, or the Customs Court shall be deemed
9 to be a reference to the United States Court of International
10 Trade, and any reference in any such statute or regulation to
11 the United States Court of Customs and Patent Appeals, the
12 U.S. Court of Customs and Patent Appeals, or the Court of
13 Customs and Patent Appeals shall be deemed to be a refer-
14 ence to the United States Court of Appeals for International
15 Trade, Patents, and Trademarks.

16 **EFFECT ON CUSTOMS COURT JUDGES**

17 **SEC. 703.** (a) Except as provided in subsection (b) of
18 this section, the amendments made by title I of this Act shall
19 not affect the status of any individual serving as judge or
20 chief judge of the Customs Court on the date of enactment of
21 this Act.

22 (b) The requirement that a person may not continue to
23 serve as chief judge of the Court of International Trade after
24 having reached the age of seventy years, as set forth in the
25 amendment made by section 101 of this Act, shall apply to

1 any individual serving as chief judge on or after the date of
2 enactment of this Act.

3 **EFFECT ON PENDING CASES**

4 **SEC. 704.** Nothing in this Act shall cause the dismissal
5 of any action commenced prior to the date of enactment of
6 this Act under jurisdictional statutes relating to the Customs
7 Court or the Court of Customs and Patent Appeals in effect
8 before such date of enactment.

○